IT IS SO ORDERED.

Dated: August 8, 2013
08:49:44 AM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
MICHAEL J. MERCURE,	*	**CASE NUMBER 11-40258**
Debtor.	*	
* * * * * * * * * * * * * * * *	*	
ALLY FINANCIAL INC.,	*	**ADVERSARY NUMBER 11-4145**
Plaintiff,	*	
v.	*	
MICHAEL J. MERCURE,	*	**HONORABLE KAY WOODS**
Defendant.	*	

****

MEMORANDUM OPINION REGARDING
ALLY'S MOTION FOR SUMMARY JUDGMENT

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Before the Court is Motion for Summary Judgment (Doc. # 62) filed by Plaintiff Ally Financial Inc. ("Ally") on May 17, 2013. Together with the Motion for Summary Judgment, Ally filed

(i) Motion for Leave to File Motion for Summary Judgment ("Motion for Leave");[1] and (ii) Notice of Filing Deposition Transcript and Exhibit of FBI Special Agent Wallace Sines ("Sines Deposition"). Defendant/Debtor Michael J. Mercure ("Mercure") filed Response to Plaintiff's Motion for Summary Judgment ("Response") (Doc. # 69) on June 3, 2013 and, in support of the Response, Supplemental Affidavit of Albert Palombaro, Esq. ("Palombaro Affidavit") (Doc. # 70) on June 7, 2013. Ally filed Reply Brief in Support of Motion for Summary Judgment ("Reply") (Doc. # 71) on June 10, 2013.

Having reviewed all of the pleadings and documents referenced above, the Court finds that no genuine issue of material fact exists and Ally is entitled to judgment as a matter of law, as set forth below. As a consequence, the Court will grant the Motion for Summary Judgment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (Gen. Order Nos. 84 and 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

[1]On May 20, 2013, the Court granted the Motion for Leave. (*See* Doc. # 63.)

I. FACTUAL & PROCEDURAL BACKGROUND

A. Ally's Complaint

Mercure filed a voluntary petition pursuant to chapter 7 of Title 11, United States Code, on February 1, 2011. On May 27, 2011, Ally filed Complaint (Doc. # 1), which commenced the instant adversary proceeding. The Complaint includes the following allegations:

1. Mercure served as President and Owner of the now-defunct auto dealership Midway Motor Sales, Inc. ("Midway"). (Compl. ¶ 1.)
2. On January 17, 1991, Mercure's parents executed a guaranty in which they guaranteed all indebtedness of Midway to Ally. (*Id.* ¶¶ 32-33; Ans. ¶ 10.)
3. On September 30, 1993, Mercure executed a guaranty in which he guaranteed all indebtedness of Midway to Ally ("Guaranty"). (Compl. ¶¶ 32-33; Ans. ¶ 10.)
4. Midway, by and through Mercure, engaged in odometer tampering and misrepresented the odometer readings of vehicles that were subsequently sold by Ally at auction. (Compl. ¶¶ 14-15.)
5. Upon discovering the odometer tampering in early 2004, Ally compensated the purchasers of the vehicles with altered odometers, thereby incurring losses and expenses. (*Id.* ¶ 20.)

6. On August 3, 2004, Ally initiated a lawsuit in the Cuyahoga County, Ohio, Court of Common Pleas ("Cuyahoga Court") against Mercure and his parents seeking recovery pursuant to the guaranty agreements, which proceeding was denominated Case No. CV 04 542097 ("State Court Action"). (*Id.* ¶ 34; Ans. ¶ 10.)

7. On December 23, 2005, the Cuyahoga Court entered partial summary judgment with respect to liability in favor of Ally. (Compl. ¶ 35; Ans. ¶ 11.)

8. On October 5, 2006, the Cuyahoga Court awarded Ally damages in the amount of $1,743,176.18 plus six percent interest ("Judgment"), specifically finding that the Judgment included "$1,055,397.50 as and for damages related to Midway Motor Sales' Odometer Tampering."[2] (Compl. ¶ 36, Compl., Ex. D.)

9. Mercure and his parents are jointly and severally liable for the Judgment. (Compl. ¶ 38; Ans. ¶ 13.)

10. The Judgment was affirmed by the Eighth Appellate District Court of Appeals of Ohio ("Appellate Court"),[3] and the Supreme Court of Ohio declined to hear the appeal of Mercure and his parents. (Compl. ¶ 39; Ans. ¶ 13.)

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[2]The judgment is attached to the Complaint as Exhibit D.
[3]The judgment of the Appellate Court ("Appellate Judgment") is attached to the Complaint as Exhibit F.

11. The Judgment has not been paid in full, but a portion of the Judgment has been paid by or on behalf of Mercure's parents. (Compl. ¶ 40; Ans. ¶ 13.)

12. In 2005, the State of Ohio filed a lawsuit against Midway and Ally in the Franklin County, Ohio, Court of Common Pleas ("Franklin Court") for violations of the Odometer Rollback and Disclosure Act and the Consumer Sales Practices Act. (Compl. ¶¶ 25-26, 30.)

13. On June 6, 2006, Magistrate Lippe of the Franklin Court entered default judgment against Midway and found that Midway "adjusted, altered, tampered with, advanced or set back the odometers."[4] (*Id.* ¶¶ 26-27.)

14. On September 7, 2007, the Franklin Court adopted the judgment of Magistrate Lippe in all respects.[5] (*Id.* ¶ 29.)

15. The State of Ohio ultimately dismissed its lawsuit against Ally. (*Id.* ¶ 31.)

Ally alleges that the Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4) and (6) based upon Mercure's alleged fraud, embezzlement and willful and malicious conduct in connection with the odometer tampering by Midway.

[4]The judgment of Magistrate Lippe is attached to the Complaint as Exhibit A.
[5]The judgment of the Franklin Court is attached to the Complaint as Exhibit B.

B. Mercure's Answer

Mercure filed Answer (Doc. # 16) on August 22, 2011. Mercure asserts eighteen affirmative defenses, including that Ally's claims are barred due to its own fraud and the Judgment has been paid in full. (Ans. ¶¶ 22, 33.) However, Mercure admits that the Judgment "has not been paid in full . . . and the majority of the Judgment [] remains unpaid." (Compl. ¶ 40; Ans. ¶ 13.)

C. Denial of Mercure's Motion for Summary Judgment

On March 19, 2012, Mercure moved for summary judgment (Doc. # 29). Mercure argued that the Judgment is dischargeable because it is based solely on his breach of the Guaranty and Ally did not allege fraud in the State Court Action. On April 9, 2012, Ally filed a memorandum in opposition to summary judgment ("Memorandum in Opposition") (Doc. # 30).[6] On that same date, Ally filed Notice of Filing State Court Trial Transcript ("Trial Transcript") (Doc. # 31), which contains the transcript of the trial held by the Cuyahoga Court on September 29, 2006 in the State Court Action ("Trial").

On June 7, 2012, the Court denied Mercure's motion for summary judgment. (*See* Docs. ## 34-35.) In denying summary judgment, the Court held that the State Court Action was not

[6]Ally's requests for admission submitted to Mercure in the State Court Action are attached to the Memorandum in Opposition as Exhibit A. In response to request for admission no. 1, Mercure admitted the authenticity of the Guaranty, which is attached to the requests for admission at page 13.

determinative of this proceeding (Summ. J. Op. at 8-10) and "genuine issues of material fact remain[ed] regarding Mercure's alleged participation in odometer tampering or other fraudulent activity." (Summ. J. Order ¶ 3.)

D. FBI Discovery

1. Granting of Ally's Motion for Court Order

Ally took a videotaped deposition of Mercure on November 15, 2012.[7] During the deposition, Mercure invoked his Fifth Amendment privilege in response to questions regarding the odometer tampering that occurred at Midway. (*See, e.g.*, Mercure Dep. 7:22-8:1, 11:11-24, 21:5-11.) Mercure further declined to sign a Certification of Identity, which would have waived the protections of the Privacy Act of 1974 and authorized the FBI to release its investigative files related to odometer tampering by Mercure and Midway.

On November 30, 2012, Ally filed Motion for Order of Court Pursuant to 5 U.S.C. § 552a(b)(11) ("Motion for Court Order") (Doc. # 47). Because Mercure's involvement in the odometer tampering is at the heart of this proceeding, Ally requested the Court to authorize the FBI's disclosure of investigative materials and testimony regarding the odometer tampering. In the alternative, Ally requested an adverse inference that Mercure's deposition testimony with respect to the odometer

[7]On November 30, 2012, Ally filed Notice of Filing Deposition of Michael J. Mercure ("Mercure Deposition") (Doc. # 46).

tampering would have been unfavorable to him. On December 17, 2012, Mercure filed a response in opposition to the Motion for Court Order (Doc. # 50).

On January 11, 2013, the Court granted the Motion for Court Order. (*See* Docs. ## 51-52.) The Court found that Ally was entitled either to (i) disclosure by the FBI of all materials related to its investigation of odometer tampering by Mercure and Midway; or (ii) an adverse inference regarding Mercure's personal involvement in the odometer tampering. The FBI materials were disclosed to the parties on February 4, 2013 and Special Agent Sines was deposed on April 11, 2013. (Mot. for Leave at 3.)

2. Sines Deposition

Ally filed the Sines Deposition with its Motion for Summary Judgment. Attached to the Sines Deposition as Exhibit 1 are five reports documenting interviews Special Agent Sines conducted with Mercure[8] in furtherance of the FBI's investigation of odometer tampering by Midway ("Interview Reports").[9] (Sines Dep. 6:18—7:15, 12:5-9.) The interviews were conducted on March 30, 2004, April 4, 2004,[10] April 20, 2004, September 27,

[8]Agent Sines testified that Mercure is the person identified in the Interview Reports as "SOURCE." (Sines Dep. at 37:15-38:5.) Henceforth, the Court will refer to SOURCE as Mercure.
[9]Each Interview Report is identified by a serial number that the Court will use for identification purposes.
[10]At the request of Mercure, the Court redacted a portion of the April 4, 2004 Interview Report — *i.e.*, Interview Report No. 19. (*See* Doc. # 77.)

2004 and October 14, 2004.[11] (*Id.* 11–14:25.) Special Agent Sines testified that he took notes contemporaneous with the interviews, from which the Interview Reports were generated shortly thereafter. (*Id.* 7:18-23.) Special Agent Sines further testified that he was obligated to create the reports in the regular course of FBI business. (*Id.* 13:9-17.)

II. ALLY'S MOTION FOR SUMMARY JUDGMENT

A. Motion for Summary Judgment

Based upon the resolution of Mercure's motion for summary judgment, Ally states that the only remaining issue of material fact is "'whether Mercure engaged in odometer tampering or other fraudulent activity that may except the Judgment from discharge.'" (Mot. for Summ. J. at 3 (quoting Summ. J. Op. at 14).) Ally argues that the Sines Deposition, together with the Interview Reports, "indisputably establish[es] Mercure's personal involvement in the odometer tampering. As such, the undisputed facts establish by a preponderance of the evidence that the Judgment debt is nondischargeable under 11 USC §§ 523(a)(2), (a)(4), and/or (a)(6)." (*Id.*)

Attached to the Motion for Summary Judgment as Exhibit B is Affidavit of Angela Paul Whitfield ("Whitfield Affidavit"), which sets forth the amount of the Judgment debt as of May 16,

[11]Each interview took place on the date listed in the Interview Report as the "Approval Date." (Sines Dep. 19:8-23.)

2013 – ***i.e.***, the day prior to the filing of the Motion for Summary Judgment. Ms. Whitfield attests to the following:

1. Ms. Whitfield serves as outside counsel for Ally in this proceeding and served as outside counsel for Ally in the State Court Action. As a result, Ms. Whitfield is knowledgeable about the Judgment and the amounts paid in partial satisfaction of the Judgment. (Whitfield Aff. ¶¶ 2-3.)
2. On March 19, 2010, a final settlement agreement was reached among Ally and Mercure's parents ("Parents' Settlement"). (***Id.*** ¶ 4.)
3. In June 2010, Ally received $593,187.23 in satisfaction of the Parents' Settlement. (***Id.*** ¶ 5.)
4. As of June 1, 2010, the Judgment debt had increased to $2,124,860.13 due to interest. Following the Parents' Settlement payment, the outstanding Judgment debt was $1,531,672.90. (***See id.*** ¶¶ 5-6.)
5. Mercure "has never made a single payment towards the satisfaction of the Judgment." (***Id.*** ¶ 6.)
6. As of May 16, 2013, the total Judgment debt was $1,803,345.51.[12] (***Id.*** ¶¶ 7-8.)

[12]A spreadsheet demonstrating the calculations in the Whitfield Affidavit is attached to the Whitfield Affidavit as Exhibit 4.

Ally contends that the amount of the Judgment debt cannot be disputed and any attempts to re-litigate the amount of the Judgment are barred by collateral estoppel.

B. Response

In his Response, Mercure sets forth four reasons why the Motion for Summary Judgment should be denied: (i) the amount of the Judgment debt is in dispute; (ii) Ally has not properly supported its case with materials in the record; (iii) the doctrine of unclean hands precludes Ally from recovering damages because Ally was aware of and attempted to conceal the odometer tampering; and (iv) Mercure is not liable for the attorney fees sought by Ally, which are unreasonable and uncorroborated. Mercure filed the Palombaro Affidavit in support of his assertion that Ally had knowledge of the odometer tampering. Specifically, Mr. Palombaro describes a meeting in March or April 2004 at which agents of Ally discussed the odometer tampering with Mercure and Mr. Palombaro, as counsel for Mercure and Midway.

C. Reply

In its Reply, Ally argues that Mercure does not dispute the relevant facts, but instead attempts to re-litigate the Judgment. Ally states:

> Significantly, Mercure does not dispute that he participated in and directed the fraudulent odometer tampering that resulted in the Judgment debt of

> $1,743,176.18 entered against him and in favor of [Ally]. Mercure also does not dispute that his fraudulent actions satisfy each and every element for establishing that the Judgment debt is nondischargeable under 11 USC §§ 523(a)(2), (a)(4), and (a)(6). As such, there is no genuine issue of material fact as to the nondischargeability of the Judgment debt, and [Ally] is entitled to judgment as a matter of law.

(Reply at 2.)

Ally further contends that Mercure is collaterally estopped from disputing both the amount of the Judgment debt and the defense of unclean hands. Similarly, Ally states that the reasonableness of the attorney fees included in the Judgment was litigated in the State Court Action and review of those fees is barred by estoppel.

III. STANDARD OF REVIEW

FED. R. CIV. P. 56, made applicable to this proceeding by FED. R. BANKR. P. 7056, states, in pertinent part:

> (a) Motion for Summary Judgment or Partial Summary Judgment. . . . The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. . . .
>
> * * *
>
> (c) Procedures.
>
> (1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or

> declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
>
> * * *

FED. R. CIV. P. 56 (West 2013). A fact is material if it could affect the determination of the underlying action. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986); ***Tenn. Dep't of Mental Health & Mental Retardation v. Paul B.***, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational trier of fact could find in favor of either party on the issue. ***Anderson***, 477 U.S. at 248-49; ***SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)***, 224 B.R. 27, 30 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Anderson***, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden of establishing the absence of a genuine issue of material fact. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. ***Pucci v. Nineteenth Dist. Court***, 628 F.3d 752, 759-60 (6th Cir. 2010) (citing ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475

U.S. 574, 587 (1986)). "[T]he court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Banks v. Wolfe County Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003) (citing *Matsushita*, 475 U.S. at 587).

IV. LAW & ANALYSIS

A. Collateral Estoppel

1. Standard

The doctrine of collateral estoppel, also known as issue preclusion, "'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.'" *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 461 (6th Cir. 1999) (quoting *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992)). "[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which that judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

In Ohio, the following four elements must be established to assert collateral estoppel:

> "(1) The party against whom estoppel is sought was a party or in privity with a party to the prior action;

> (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue;
>
> (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and
>
> (4) The issue must have been identical to the issue involved in the prior suit."

Cashelmara Villas Ltd. P'Ship v. DiBenedetto, 623 N.E.2d 213, 215-16 (Ohio Ct. App. 1993) (quoting *Monahan v. Eagle Picher Indus., Inc.*, 486 N.E.2d 1165, 1168 (Ohio Ct. App. 1984)).

2. Analysis

Ally argues that "the amount of damages was fully litigated and decided" in the State Court Action and, thus, collateral estoppel precludes re-litigation of the amount of the Judgment. (Mot. for Summ. J. at 18.) In the Reply, Ally further contends that Mercure is estopped from disputing the attorney fees included in the Judgment or asserting the defense of unclean hands because each of those issues was decided in the State Court Action. Mercure wholly fails to address the issue of collateral estoppel.

For the reasons set forth below, the Court finds that Mercure is estopped from (i) disputing the amount of the Judgment, including attorney fees; and (ii) asserting the defense of unclean hands.

i. Identity of the Parties

Because Ally and Mercure were parties to the State Court Action, the first element – *i.e.*, identity of parties – is satisfied without the need for argument or analysis.

ii. Final Judgment Fully & Fairly Litigated

Ally must establish that Mercure was granted a full and fair opportunity to litigate the Judgment, which is final and on the merits. Mercure admits that the Judgment was affirmed by the Appellate Court and the Supreme Court of Ohio declined to hear any further appeal of the Judgment. (Compl. ¶ 39; Ans. ¶ 13.) Thus, there is no dispute that the Judgment is final.

Mercure further admits that the Cuyahoga Court entered summary judgment against him with respect to liability. (Compl. ¶ 35; Ans. ¶ 11.) Thereafter, the Cuyahoga Court held the Trial to determine damages. (Trial Tr. 6:21-7:2.) At the Trial, Mercure was represented by counsel (*id.* 6:7-9), and the Cuyahoga Court heard argument and received evidence. (Judgment at 1.) Following the Trial, the Cuyahoga Court entered the Judgment against Mercure. The Appellate Court affirmed both the entry of summary judgment and the Judgment, including the award of damages. (App. J. at 1, 19.) Accordingly, the record establishes that the Judgment is based on the merits and Mercure

was provided a full and fair opportunity to litigate the Judgment.

iii. Issues Necessary to Judgment Tried & Decided

Next, Ally must demonstrate that the issues Mercure allegedly seeks to re-litigate in this Court – *i.e.*, the amount of damages, including attorney fees, and the defense of unclean hands – were necessary to the Judgment and actually tried and decided in the State Court Action.

The Cuyahoga Court expressly considered Mercure's defense of unclean hands and granted Ally's motion to exclude the defense: "And the motion of plaintiff [Ally] to preclude the defendant's [sic], quote, anticipated attempts to raise the unplead [sic] and irrelevant defense of unclean hands is granted as well." (Trial Tr. 8:13-17.) Thus, the defense was actually tried and decided. Moreover, because the defense of unclean hands is an affirmative defense, the Cuyahoga Court necessarily considered the defense prior to entering judgment in favor of Ally.

At the Trial, the Cuyahoga Court heard testimony and received evidence regarding damages, including attorney fees. For example, Ms. Whitfield examined Anita Bhama, in-house counsel for Ally (*id.* 167:15-168:4), as follows:

> Q. Just to recap, what is the total amount of fees and expenses constituting indebtedness of Midway that [Ally] is asking to recover from this Court?

A. $555,541.06.

Q. And you testified that those fees and expenses have either been already paid by [Ally] or have been approved for payment?

A. Correct.

Q. Now, are the fees and expenses just one component of the entire indebtedness Midway owes to [Ally]?

A. Yes.

Q. What is the total indebtedness Midway owes to [Ally]?

A. $1,743,176.18.

(*Id.* 185:18-186:6.) Thus, the determination of damages, which was the basis for the Judgment, was actually tried and decided.

As a consequence, both the amount of damages and the defense of unclean hands were actually tried and decided by the Cuyahoga Court and were necessary to the Judgment.

iv. Identical Issues

Finally, the issues Mercure attempts to re-litigate in this Court – *i.e.*, the amount of damages and the defense of unclean hands – are the identical issues decided in the State Court Action. The fourth and final element of the collateral estoppel doctrine is satisfied.

Because Ally has satisfied each element of the collateral estoppel doctrine with respect to the defense of unclean hands and the amount of the Judgment, Mercure's attempts to assert the defense of unclean hands in this proceeding and dispute the

amount of the Judgment or the attorney fees included therein are unavailing and must fail.

B. Undisputed Facts

Mercure does not refute any of the allegations in the Motion for Summary Judgment concerning his involvement in the odometer tampering. Nor does Mercure present evidence tending to disprove his involvement in the odometer tampering. As set forth below, even when the evidence is viewed in the light most favorable to Mercure, there is no dispute that Mercure personally participated in and directed the odometer tampering by Midway.

Summarizing the odometer tampering, the Appellate Court quoted a ruling by the Franklin Court:

> [Midway] bought vehicles from General Motors to sell at its dealership in Youngstown, Ohio. Midway then leased numerous vehicles to Modern Builders Supply, Inc. The leases as well as the vehicles were then assigned to [Ally], with the vehicles being titled in its name. After the leases expired, Midway obtained possession of the vehicles and altered and/or rolled back the odometers on 85 - 93 of the vehicles without [Ally]'s knowledge or consent * * * [Ally] owned the vehicles at the time of the 'rollbacks' though the vehicles were never physically possessed by [Ally]. These vehicles were then sold at auctions to automobile dealers.
>
> At the time of their sale, [Ally] completed odometer statements. However, these were inaccurate. These statements were completed before [Ally] learned of Midway's alteration and/or rolling back of the odometers. The vehicles were ultimately sold to retail purchasers.

> It bears emphasizing that Midway, not [Ally], was responsible for the tampering and that [Ally] had no knowledge of Midway's actions. In fact, [Ally] uncovered Midway's fraud and reported it to [the State of Ohio]. [Ally] formulated a remediation plan which [the State of Ohio] encouraged. These remediation efforts included the payment of $1.2 million to the current owners of the affected vehicles. [Ally] negotiated with each owner and either bought back the vehicles or paid a monetary adjustment for which [Ally] received releases from the owners.

(App. J. at 2-3 (quotation marks and citation omitted).) The Appellate Court further stated, "Despite the fact that Midway, and not [Ally], was responsible for the odometer tampering, [Ally] was found strictly liable for violating Ohio's Odometer Rollback and Disclosure Act . . . ." (*Id.* at 3.)

The Sines Deposition and the Interview Reports[13] establish that Mercure personally participated in and directed the odometer fraud scheme. During his interviews with Special Agent Sines, Mercure admitted his personal involvement in the odometer tampering by Midway, as set forth below.

To induce Modern Builders Supply, Inc. ("Modern Builders") to lease vehicles from Midway, "MERCURE came up with a plan where he provided contracts to [Modern Builders] allowing high mileage and unlimited mileage. However, MERCURE obtained [Ally] lease contracts that were two years 30,000 miles or three years

[13]Mercure does not challenge the admissibility of the Sines Deposition or the Interview Reports. However, the Court finds that the Sines Deposition is not hearsay pursuant to the public records exception in FED. R. EVID. 803(8) and the Interview Reports are not hearsay pursuant to the party admission exclusion in FED. R. EVID. 801(d)(2)(A).

45,000 [miles]." (Interview Report No. 18 at 2.) "MERCURE did this even though he knew that [Modern Builders] needed high mileage leases." (Interview Report No. 20 at 1.) "MERCURE felt that he could make a profit on this deal by averaging the mileage. MERCURE did not feel that all of the [Modern Builders] vehicles would go over mileage. However, as time went on MERCURE found out that almost all [Modern Builders] vehicles were used for high mileage." (Interview Report No. 18 at 2.)

Mercure operated in conjunction with Doe 1, an officer and manager at Modern Builders,[14] to conceal from other officers and managers at Modern Builders the fact that the Ally leases allowed only 15,000 miles per year. (*Id.* at 1-2.) "In return for [Doe 1's] help in obtaining the above referenced business, and [Doe 1's] assistance with other matters, MERCURE paid [Doe 1] thousands of dollars . . . [and] provided other items to [Doe 1] such as loaning him vehicles." (*Id.* at 1.) Doe 1 was not aware of the odometer tampering. (Interview Report No. 19 at 3.)

"[Modern Builders] was provided with documents, by MERCURE and [Doe 1], that reflected [Modern Builders] . . . was allowed to put high mileage and unlimited mileage on the vehicles." (Interview Report No. 18 at 2.) "[Modern Builders] would email

[14]The Interview Reports discuss third parties who are not identified in this Memorandum Opinion because those persons are not before the Court.

order forms for new vehicles to [Doe 2].[15] [Doe 2] would then create the [Ally] documents for the leases. The [Ally] documents would have the standard mileage amounts and lease terms on them." (Interview Report No. 85 at 1.) Doe 1 signed the Ally leases on behalf of Modern Builders and later provided Mercure with a power of attorney and a rubber stamp with Doe 1's signature. (Interview Report No. 18 at 2.) "After the first approximately forty leases between [Midway] and [Modern Builders], [Mercure] and [Doe 2] routinely signed [Doe 1's] name on the [Ally] contracts." (Interview Report No. 85 at 1.) "Two different sets of paperwork were completed by [Doe 2]. One set of paperwork provided to [Modern Builders] specifying unlimited mileage, and one set of paperwork provided to [Ally] specifying a limit of . . . miles." (*Id.* at 2.)

Initially, when Modern Builders returned vehicles exceeding the mileage limits in the Ally leases, Mercure and Midway paid the penalties for the excessive mileage. (Interview Report No. 19 at 1.) Eventually, "MERCURE realized that he had a problem and needed to do something. MERCURE first began replacing odometers by obtaining odometers with lower mileage amounts on them from auto wrecking yards." (Interview Report No. 18 at 2.) Mercure later "paid approximately $2,200 to obtain a software package and hardware to be used to roll

[15]Doe 2's relationship to Midway is not disclosed in the Interview Reports.

back/clock odometers." (*Id.*) "[Doe 3] helped MERCURE pull out the old instrument clusters and insert the replacement ones from auto wrecking yards. [Doe 3] was also involved in using the software . . . to roll back/clock odometers." (*Id.*) Mercure also paid Doe 4 $300 per odometer "to roll back/clock odometers . . . taken out of the [Modern Builders] lease vehicles. MECURE would provide the odometers to [Doe 4] who would then roll back/clock the odometers and return them to MERCURE." (Interview Report No. 19 at 2.) Mercure also obtained the assistance of [Doe 5], who Midway had previously employed to service computers, "to set up the software [on a computer at Midway] and successfully roll back/clock odometers." (*Id.*) [Doe 5] then showed [Doe 3] how to use the software to roll back/clock odometers. (*Id.*) "[Doe 3], [Doe 5] and [Doe 4] rolled back/clocked odometers and replaced odometers at MERCURE's direction." (*Id.* at 3 (emphasis added).)

Regarding the leased vehicles that were returned to Midway by Modern Builders:

> Vehicle condition reports that were completed when leased vehicles were turned in by [Modern Builders] to [Midway] were done by [Doe 2]. The majority of the time, the vehicles had their odometers rolled. [Mercure] recalls many times when [Doe 2] would come to [Mercure] and advise [Mercure] that they needed to take care of a car, because of the mileage. After that point, either [Doe 3], [Mercure] or [Mercure]'s father would tell [Doe 2] when the car had been taken care of. "Taking care of a vehicle," meant to roll back the mileage on the odometer.

(Interview Report No. 85 at 2.)

In late 2003 or early 2004, Ally audited the Modern Builders account and "during these audits the mileage issues began to surface." (Interview Report No. 18 at 3.) In March 2004, "[Ally] recognized that odometers had been tampered with on vehicles leased by [Modern Builders] from [Midway]." (*Id.*) "MERCURE did not tell [Doe 1] about rolling back the odometers until after [Ally] began their audits and the issue of the leases between [Midway] and [Modern Builders] blew up." (Interview Report No. 19 at 3.)

During his deposition, Ms. Whitfield twice asked Special Agent Sines whether Mercure admitted to odometer tampering. Both times, Special Agent Sines testified that Mercure admitted his participation:

> Q Does that refresh your memory as to whether Mr. Mercure admitted to you in this interview that odometer tampering had occurred at Midway Motor Sales?
>
> A Yes, [Interview Report No. 19] is a report that reflects just that.
>
> Q Okay. And Mr. Mercure admitted to you that he was personally involved in that odometer tampering?
>
> A Yes.
>
> * * *
>
> Q And if you look at page 3 of that report, the first full paragraph there, it says, and I quote,

"[Doe 3], [Doe 5] and [Doe 4] rolled back/clocked odometers and replaced odometers at Mercure's direction."

Did I read that correctly?

A Yes.

Q And that was based, information or factual finding that made in this report based on your investigation and interview of Michael Mercure?

A Right, on the interview of Michael Mercure.

(Sines Dep. at 9:23-10:23.) Special Agent Sines again answered:

Q Your interviews with Mr. Mercure reflect the facts that he admitted to you that he was involved in either rolling back or replacing the odometers of certain vehicles; correct?

* * *

A Yes.

(*Id.* at 57:5-12.)

Based upon the foregoing, there is no dispute that Mercure personally participated in and directed the odometer tampering by Midway.

C. Section 523(a)

Section 523(a), which excepts various categories of debt from discharge, states, in pertinent part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> * * *
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
>
> * * *
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

11 U.S.C. § 523(a) (West 2013). "Together, [§ 523(a)(2), (4) and (6)] codify a long-standing bankruptcy policy that any debt which is shown to have arisen from a dishonest or otherwise wrongful act committed by a debtor is not entitled to the benefits of a bankruptcy discharge." *Hoffman v. Anstead (In re Anstead)*, 436 B.R. 497, 500 (Bankr. N.D. Ohio 2010) (citing *Cohen v. De La Cruz*, 523 U.S. 213 (1998)). The creditor bears the burden of proving by a preponderance of the evidence that a debt is excepted from discharge pursuant to § 523(a). *Meyers v. I.R.S. (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999) (citing *Grogan v. Garner*, 498 U.S. 279, 290-91 (1991)).

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

i. Standard

To except a debt from discharge pursuant to § 523(a)(2)(A), the creditor must prove actual fraud or establish:

> (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to 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 v. AT&T Universal Card Servs., Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998) (n.2 omitted) (citing *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993)). Actual fraud, as that term is used in § 523(a)(2)(A), "'has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud.'" *Ash v. Hahn (In re Hahn)*, Adv. No. 11-3146, 2012 Bankr. LEXIS 651, *6-7 (Bankr. N.D. Ohio Feb. 6, 2012) (quoting *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001)).

ii. Analysis

The undisputed facts set forth in Section IV(B), *supra*, establish that the Judgment is a debt for actual fraud and false representation and, thus, is nondischargeable pursuant to § 523(a)(2)(A). Midway, by and through Mercure, fraudulently presented Ally with leases that contained lower mileage limits than the leases to which Modern Builders had agreed. Mercure intended to personally profit from this dual-lease scheme. To

avoid paying Ally the mileage penalties resulting from Modern Builders exceeding the mileage limits in the Ally leases, Mercure caused the odometers to be rolled back/clocked or replaced. When returning the vehicles to Ally, Midway, by and through Mercure, provided Ally with vehicle condition reports that falsely listed the lower mileage figures. Ally justifiably relied upon the leases and the vehicle condition reports because it "had no knowledge of Midway's actions." (App. J. at 3 (quotation marks and citation omitted).) Because this conduct serves as the basis for the Judgment, the Judgment is a nondischargeable debt for actual fraud and false representation pursuant to § 523(a)(2)(A).

2. Section 523(a)(4)

i. Standard

Section 523(a)(4) excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4) (West 2013). Embezzlement is defined 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) (citing *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr. M.D. Tenn. 1982)). The elements necessary to prove embezzlement are: (i) property of another was entrusted to the debtor;

(ii) the debtor appropriated the property for a use other than that for which it was entrusted; and (iii) the circumstances indicate fraud. *Beneficial Mortg. Co. v. Craig (In re Craig)*, 140 B.R. 454, 457 (Bankr. N.D. Ohio 1992) (citations omitted).

ii. Analysis

The Court finds that the Judgment is a nondischargeable debt for embezzlement because Mercure (i) permitted Modern Builders to exceed the mileage limits on vehicles owned by Ally; and (ii) directed Doe 3, Doe 4 and Doe 5 to roll back/clock or replace the odometers in approximately 90 of Ally's vehicles. Ally owned the vehicles leased to Modern Builders and contracted with Midway to safely store and deliver the vehicles. (*See* App. J. at 11-12.) Mercure appropriated the vehicles when he permitted Modern Builders to put high mileage or unlimited mileage on the vehicles without penalty and when he caused the vehicles' odometers to be altered. Moreover, as explained *supra* at 27-28, Mercure intentionally defrauded Ally when he appropriated the vehicles. As a consequence, the Judgment debt is nondischargeable pursuant to § 523(a)(4).

3. Section 523(a)(6)

i. Standard

Section 523(a)(6) precludes from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The

plain language of § 523(a)(6) requires the creditor to establish that the injury is both willful and malicious. ***Markowitz v. Campbell (In re Markowitz)***, 190 F.3d 455, 463 (6th Cir. 1999). The Supreme Court has held that the inclusion of the term "willful" in § 523(a)(6) requires "deliberate or intentional ***injury***, not merely a deliberate or intentional ***act*** that leads to injury." ***Kawaauhau v. Geiger***, 523 U.S. 57, 61 (1998). The Sixth Circuit Court of Appeals expanded the definition of willfulness to include the debtor's belief that injury is "'substantially certain to result'" from the debtor's actions. ***Markowitz***, 190 F.3d at 464 (quoting Restatement (Second) of Torts § 8A, at 15 (1964)). The element of "malicious injury" in § 523(a)(6) requires action "taken in conscious disregard of the debtor's duties or without just cause or excuse." ***Superior Metal Prods. v. Martin (In re Martin)***, 321 B.R. 437, 441-42 (Bankr. N.D. Ohio 2004) (citing ***Wheeler v. Laudani***, 783 F.2d 610, 615 (6th Cir. 1986)).

To prevail in a § 523(a)(6) action, the creditor must establish by a preponderance of the evidence: (i) the debtor caused injury to the creditor or the creditor's property; (ii) the debtor intended to cause such injury or the debtor's actions were substantially certain to cause such injury; and (iii) the debtor acted in conscious disregard of the debtor's

duties or without just cause or excuse. *Palik v. Sexton (In re Sexton)*, 342 B.R. 522, 530 (Bankr. N.D. Ohio 2006).

ii. Analysis

Mercure willfully and intentionally caused injury to Ally when he directed Doe 3, Doe 4 and Doe 5 to tamper with the odometers in vehicles owned by Ally. Moreover, the injury was malicious because Mercure directed the odometer tampering solely to avoid paying Ally mileage penalties to which it was contractually entitled. Mercure acted in conscious disregard of Midway's duties to Ally to safely store and deliver the vehicles. Ally suffered damages as a result of Mercure's actions in the form of the remediation costs Ally paid to the affected purchasers and its costs of recovery. As a consequence, the Court finds that the Judgment debt is nondischargeable pursuant to § 523(a)(6).

D. Mercure's Opposition to Summary Judgment

Mercure advances four arguments why the Motion for Summary Judgment should be denied: (i) the amount of the Judgment debt is in dispute; (ii) Ally has not properly supported its case with materials in the record; (iii) the doctrine of unclean hands precludes Ally from recovering damages because Ally was aware of and attempted to conceal the odometer tampering; and (iv) Mercure is not liable for the attorney fees sought by Ally,

which are unreasonable and uncorroborated. Each of these arguments will be addressed in succession.

1. The Judgment Debt Is Not in Dispute

Mercure argues that the amount of the Judgment debt is in dispute, but he fails to provide any evidence thereof. Instead, Mercure summarily states, "Ally either refuses to acknowledge, ignores, or simply misapplies, [sic] prior payments towards its claimed debt." (Resp. at 4.) Mercure identifies three payments that Ally allegedly failed to credit against the Judgment debt: (i) $325,000.00 paid by Midway Pontiac Buick Oldsmobile Cadillac GMC, Inc. ("Midway Pontiac") on August 9, 2004; (ii) $508,000.00 paid by Midway prior to the State Court Action; and (iii) $593,187.23 paid by the Mercure family pursuant to the Parents' Settlement.

Ally does not dispute that the Midway Pontiac and Midway payments were made, but instead argues that the Cuyahoga Court expressly considered these payments when it determined damages. Thus, Ally maintains that Mercure is estopped from attempting to apply those payments against the Judgment debt in this proceeding. With respect to the payment pursuant to the Parents' Settlement, Ally states that this payment was fully credited in arriving at the current balance owed on the Judgment.

As stated *supra* in Part IV(A), Mercure cannot re-litigate the amount of the Judgment in this proceeding. According to Mercure, the payment from Midway was made prior to the State Court Action and the payment from Midway Pontiac was made on August 9, 2004 – *i.e.*, six days after the State Court Action was filed. Because these payments occurred prior to and shortly after the filing of the State Court Action, Mercure had ample opportunity to present evidence of these payments to the Cuyahoga Court.[16] Accordingly, Mercure is collaterally estopped from deducting these payments from the amount of the Judgment debt in this proceeding.

Mercure is correct that any post-Judgment payments, such as the payment pursuant to the Parents' Settlement, must be applied against the Judgment debt. However, the Whitfield Affidavit establishes that Ally received and credited the Parents' Settlement payment in the amount of $593,187.23 on June 1, 2010. (Whitfield Aff. ¶¶ 5-6.) Moreover, Exhibit 4 to the Whitfield Affidavit shows that the Parents' Settlement payment was offset against the Judgment debt. (*Id.*, Ex. 4.) Mercure offers no evidence that belies Ally's application of the Parents'

[16]In fact, the Trial Transcript demonstrates that the Cuyahoga Court was presented evidence regarding payments made by Midway Pontiac and Midway. (*See* Trial Tr. at 127:7-128:11 (testimony that all recoveries Ally received from Midway Pontiac were offset against Ally's losses and expenses related to odometer tampering); *id.* at 165:18-166:2 (testimony that all recoveries Ally received from any source were offset against the total indebtedness owed to Ally by Midway).)

Settlement payment to the Judgment debt. He merely states, "If [Ally] has received payments for the [] debt, then those payments must be applied to the instant case. They have not." (Resp. at 3.) As a consequence, there is no genuine dispute that the Parents' Settlement payment was credited.

Ally has offered supporting evidence, in the form of the Whitfield Affidavit and the exhibits thereto, that the Judgment debt was $1,803,345.51 as of May 16, 2013. Because Ally has presented evidence of the amount of the Judgment debt, the burden has shifted to Mercure to present conflicting evidence establishing a genuine dispute. *See Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 759-60 (6th Cir. 2010) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Mercure has presented no evidence that the outstanding Judgment debt is less than the amount alleged. As a result, the Court finds that the amount of the Judgment debt is not in dispute.

2. Ally Has Supported Its Case with Materials in the Record

Mercure contends that summary judgment is improper because Ally has failed to properly support its position with materials in the record in violation of FED. R. CIV. P. 56(c). Mercure argues that Ally has failed to attach verified documents establishing "the debt itself, as well as its total claimed amount." (Resp. at 5.) In particular, Mercure states, "Ally

claims that the debt owed to it stems from a guaranty signed by Mercure—and never attaches the document in question." (*Id.*) Mercure also asserts that the Court should disregard the Whitfield Affidavit because it is a self-serving affidavit of counsel "that goes to the heart of this case: it attempts to establish the total amount of the debt/damages that Ally has incurred." (*Id.* at 2.) Finally, Mercure argues that Ms. Whitfield was not identified as a potential witness in this proceeding and, thus, he was not provided an opportunity to cross-examine Ms. Whitfield.

In its Reply, Ally states, "Despite Mercure's unsupported grandstanding as to the impropriety and unfairness of the Whitfield Affidavit . . . , in the end he does not dispute a single relevant fact established by the affidavit." (Reply at 10.)

The existence of the Judgment is not in dispute. Thus, for Mercure to argue that Ally has failed to verify "the debt itself" is disingenuous. The amount of the Judgment debt is evidenced in the Whitfield Affidavit, which simply states that the Parents' Settlement payment was credited against the Judgment debt in June 2010 and the accrual of interest caused the Judgment Debt to increase to $1,803,345.51 as of May 16, 2013. These calculations are further demonstrated in Exhibit 4 to the Whitfield Affidavit. Having served as counsel for Ally

in the State Court Action and in this proceeding, as well as having negotiated the Parents' Settlement, Ms. Whitfield has personal knowledge of the information set forth in her Affidavit – ***i.e.***, the amount of the Judgment, payments received against the Judgment and the compounding of interest on the Judgment. As a result, Ms. Whitfield may properly attest to such information. Furthermore, Mercure does not actually dispute any information contained in the Whitfield Affidavit.

Mercure's argument that Ms. Whitfield was not identified as a potential witness is also disingenuous. Ally stated the following in response to an interrogatory of Mercure:[17]

> INTERROGATORY NO. 8: Please identify each and every witness who will testify for you in this matter, and describe the subject of his or her testimony.
>
> ANSWER: Objection. This interrogatory, as presently drafted, is improper and premature. [Ally] has not decided which witnesses it will call at trial. However, [Ally] will identify the witnesses whom it expects to call at trial when required by applicable rule, court order, or agreement of the parties.

(Resp., Ex. 1 at 1-2.) Mercure has not identified any applicable rule, court order or agreement of the parties that would prevent Ally from calling Ms. Whitfield as a witness. Accordingly, Mercure's objection to Ally's use of the Whitfield Affidavit is overruled.

[17]Ally's supplemental answers to Mercure's interrogatory nos. 8 and 10 are attached to the Response as Exhibit 1.

Finally, Mercure contends that summary judgment is improper because the Judgment is based upon the Guaranty, which is not part of the record. This is false. As stated *supra* at footnote 6, a previously authenticated copy of the Guaranty, which is signed by Mercure and dated September 30, 1993, is attached to Ally's Memorandum in Opposition at page 13 of Exhibit A. Moreover, Mercure admits that he executed the Guaranty on September 30, 1993. (Compl. ¶¶ 32-33; Ans. ¶ 10.)

For the reasons set forth above, the Court finds that the Motion for Summary Judgment is properly supported by materials in the record pursuant to FED. R. CIV. P. 56.

3. Mercure is Collaterally Estopped from Asserting the Defense of Unclean Hands

In response to Mercure's position that summary judgment is inappropriate due to the defense of unclean hands, Ally contends that Mercure is estopped from asserting that defense. As stated *supra* in Part IV(A), this Court agrees.

In an apparent attempt to dispute his liability for the Judgment, Mercure states that there is "some evidence in this case that [Ally] knew about the odometer rollbacks, and (unsuccessfully) attempted to cover them up. But now [Ally] is attempting to recover damages from Mercure for something that it knew about all along. That is an act of unclean hands." (Resp. at 7-8.) Mercure states that both the Palombaro Affidavit and

the Sines Deposition create an issue of fact whether Ally was aware of the odometer tampering and, thus, cannot recover from Mercure. However, there is no evidence that Ally knew about the odometer tampering when it occurred or when the vehicles with altered odometers were sold. Nothing in Mercure's bald allegations suggests that Ally was involved with the odometer tampering or had contemporaneous knowledge of Mercure's conduct. The Palombaro Affidavit and the Sines Deposition establish only that Ally was aware of the odometer tampering in 2004[18] – ***i.e.***, one year before the Cuyahoga Court entered summary judgment with respect to liability against Mercure. Thus, Mercure was provided a full and fair opportunity to present this defense in the State Court Action and is collaterally estopped from doing so in this proceeding.

4. Calculation of Fees Related to this Proceeding Is Not Presently Before the Court

Finally, Mercure challenges the reasonableness of the attorney fees requested by Ally and states that such fees have not been authenticated or documented. In addition, Mercure disputes his liability for attorney fees incurred by Ally in

[18]In his Affidavit, Mr. Palombaro attests that agents of Ally had a meeting with Mercure in March or April 2004, at which Mr. Palombaro was present and the odometer tampering was discussed. (Palombaro Aff. ¶¶ 2-5.) Likewise, the testimony of Special Agent Sines was limited to the content of the Interview Reports, which were based on interviews that occurred from March through October 2004.

other proceedings, including proceedings to which he was not a party.

As this Court held in Part IV(A), to the extent Mercure disputes the amount or reasonableness of any attorney fees contained in the Judgment, Mercure is collaterally estopped from disputing those fees.

With respect to attorney fees not contained in the Judgment, Ally clarifies that it "currently does not request any attorneys' fees incurred in any other litigation, or suggest that such other fees are included in the amount of the nondischargeable judgment debt. The debt [Ally] alleges is nondischargeable consists only of the state court Judgment, plus accrued interest." (Reply at 7.) In addition to those fees already included in the Judgment, Ally asks the Court to "consider awarding [Ally] its attorneys fees and costs incurred in pursuing this adversary action given Mercure's express contractual guaranty to reimburse [Ally] for all attorneys fees and costs. Should this Court decide to award these fees and costs, [Ally] will submit all itemized bills for those expenses." (*Id.*)

As clarified in the Reply and demonstrated in the Whitfield Affidavit and exhibits thereto, the outstanding Judgment debt of $1,803,345.51 does not include attorney fees other than those contained within the Judgment. Therefore, Mercure's concerns

regarding payment of fees for which he is not liable or fees that have not been authenticated is without merit.

Having addressed and rejected each of Mercure's reasons why summary judgment is improper, the Court will next address whether summary judgment is, in fact, appropriate.

E. Summary Judgment

Ally is entitled to summary judgment if it can establish that no genuine issue of material fact exists and it is entitled to judgment as a matter of law. Viewing the evidence in the light most favorable to Mercure, the Court has already determined that Mercure personally participated in and directed the odometer tampering by Midway, which conduct serves as the basis for the Judgment. In addition, the Court has determined that Mercure is collaterally estopped from disputing the Judgment. Finally, the Court has found that the Judgment is a debt for (i) actual fraud and false representation; (ii) embezzlement; and (iii) willful and malicious injury. Accordingly, there is no genuine issue of material fact and Ally is entitled to judgment as a matter of law. The Court will grant the Motion for Summary Judgment.

V. CONCLUSION

The Judgment issued by the Cuyahoga Court and affirmed by the Appellate Court is a final judgment decided on the merits, which Mercure was provided a full and fair opportunity to

litigate. Furthermore, the identical issues Mercure seeks to re-litigate in this proceeding – ***i.e.***, the amount of damages, including attorney fees, and the defense of unclean hands – were actually tried and decided in the State Court Action and were necessary to the Judgment. Thus, Mercure is collaterally estopped from challenging the Judgment in this Court.

No material facts in this proceeding, including Mercure's personal involvement in the odometer tampering by Midway, are genuinely disputed. In fact, in his Response, Mercure never disputes that he personally participated in and directed the odometer tampering. The undisputed facts establish that the Judgment is a debt for (i) actual fraud and false representation; (ii) embezzlement; and (iii) willful and malicious injury. Accordingly, Ally is entitled to judgment as a matter of law pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6). The Court will grant the Motion for Summary Judgment.

An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: August 8, 2013
08:49:45 AM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
MICHAEL J. MERCURE,	*	**CASE NUMBER 11-40258**
Debtor.	*	
* * * * * * * * * * * * * * * *	*	
ALLY FINANCIAL INC.,	*	**ADVERSARY NUMBER 11-4145**
Plaintiff,	*	
v.	*	
MICHAEL J. MERCURE,	*	**HONORABLE KAY WOODS**
Defendant.	*	

****

ORDER GRANTING ALLY'S MOTION FOR SUMMARY JUDGMENT

****

Before the Court is Motion for Summary Judgment (Doc. # 62) filed by Plaintiff Ally Financial Inc. ("Ally") on May 17, 2013. Together with the Motion for Summary Judgment, Ally filed Notice

of Filing Deposition Transcript and Exhibit of FBI Special Agent Wallace Sines. Defendant/Debtor Michael J. Mercure ("Mercure") filed Response to Plaintiff's Motion for Summary Judgment ("Response") (Doc. # 69) on June 3, 2013, and, in support of the Response, Supplemental Affidavit of Albert Palombaro, Esq. (Doc. # 70) on June 7, 2013. Ally filed Reply Brief in Support of Motion for Summary Judgment (Doc. # 71) on June 10, 2013.

For the reasons set forth in this Court's Memorandum Opinion Regarding Ally's Motion for Summary Judgment entered on this date, the Court hereby:

1. Finds that Mercure is collaterally estopped from re-litigating (i) the amount of the Judgment, including attorney fees; and (ii) the defense of unclean hands;
2. Finds that there is no dispute that Mercure personally participated in and directed the odometer tampering by Midway;
3. Finds that the Judgment is a debt for actual fraud and false representation;
4. Finds that the Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A);
5. Finds that the Judgment is a debt for embezzlement;
6. Finds that the Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(4);

7. Finds that the Judgment is a debt for willful and malicious injury;

8. Finds that the Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(6);

9. Finds that, as of May 16, 2013, the amount of the Judgment debt was $1,803,345.51;

10. Finds that no genuine issue of material fact exists;

11. Finds that Ally is entitled to judgment as a matter of law; and

12. Grants Ally’s Motion for Summary Judgment.

# # #