IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TEXAS WACO DIVISION

In re: Donald Vincent Keith and Jocqualine Susan Keith, Debtors.	Bankruptcy Case No. 21-60559-MMP Chapter 7
KAPITUS SERVICING, INC., AS SERVICING AGENT FOR KAPITUS LLC Plaintiff, vs. DONALD VINCENT KEITH, Defendant.	Adversary No. 22-06003

DEFENDANT DONALD VINCENT KEITH'S REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE MICHAEL M. PARKER, U.S. BANKRUPTCY JUDGE FOR THE WESTERN DISTRICT OF TEXAS, WACO DIVISION:

COMES NOW DONALD VINCENT KEITH, Defendant herein, and pursuant to Federal Rule of Civil Procedure 56, files this Reply in Support of Defendant's Motion for Summary Judgment ("Defendant's Motion").

I. Introduction

On August 4, 2023, Defendant filed his Motion for Summary Judgment ("Defendant's Motion"). Plaintiff filed its Response in Opposition to Defendant's Motion for Summary Judgment on August 25, 2023 ("Plaintiff's Motion"). Defendant files this Reply in Support of Defendant's Motion.

Plaintiff's arguments hinge repeatedly on this contention that credibility determinations are needed. Plaintiff posits to this Court that it should be able to move past summary judgment based on

unsupported conjecture and speculation **when they have not presented any evidence to raise even an inference** of fraud when the agreement of signed. Its argument quite literally is, well Defendant saw a bankruptcy attorney shortly after he signed the agreement and Coyote Design was in arrears on some debt (even though the evidence is that this was information known to Plaintiff at the time the agreement was signed). **Plaintiff's own corporate representative** has repeatedly admitted that Plaintiff had no evidence of intent to defraud, embezzlement, larceny, or any of the myriad baseless claims alleged by Plaintiff at the time the lawsuit was filed. Yet, Plaintiff tells this Court that this Court should just ignore all that because everything turns on credibility assessments?

That simply is not how summary judgment procedure works. Indeed, courts have long held that "[e]ven on summary judgment, district courts are not required to draw every requested inference; they must only draw reasonable ones that are supported by the record."[1] There is nothing reasonable about the speculative, baseless narrative Plaintiff espouses. It simply does not make sense.

It is worth noting that Plaintiff sought permission from this Court for an extension of pages to 26 pages. Then, upon receipt of Plaintiff's Motion, two of Plaintiff's "Exhibits" are revealed to actually be additional arguments. One is Plaintiff's list of "Uncontested Facts,"[2] which is 16 pages, and Plaintiff's "Contested Facts," which is 12 pages. So, essentially, Plaintiff have had a total of 54 pages to make its case (not counting actual real exhibits). Despite this, Plaintiff fails to raise a fact issue on the very basic elements of its claims. It makes sense that Plaintiff is unable to do so – Plaintiff is attempting to recast a breach of contract claim as a fraud claim to avoid discharge in a manner that Congress and the United States Supreme Court have specifically held the statutes in question were meant to prevent.[3]

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[1] *Omnicare, Inc. v. Unitedhealth Group, Inc.*, 629 F.3d 697, 704 (7th Cir. 2011).
[2] Of course, Defendant disagrees that the "Uncontested Facts" are actually all uncontested.
[3] *See Archer, Lamar & Cofrin v. Appling*, 138 S.Ct. 1752, 1764 (2018)("Specifically, as detailed in *Field*, the House Report noted that **consumer finance companies frequently collected information**

II. Defendant is entitled to summary judgment because Plaintiff has failed to discharge its summary judgment burden to raise a genuine issue of material fact in support of Plaintiff's claims.

A. Plaintiff has not raised a fact issue on its 523(a)(2)(A) claim.

Plaintiff seemingly concedes that Section 523(a)(2)(A) involves claims of fraud **other than** a statement respecting Defendant's financial condition.[4] The key phrase is "financial condition" – in other words, as Defendant pointed out in his Motion for Summary Judgment, case law (including United States Supreme Court precedent) makes clear that this section **does not apply** to claims of fraud dealing with the debtor's financial condition. Instead of responding to these cases, Plaintiff takes the position that Plaintiff is not complaining about "statements" involving Defendant's financial condition, but rather acts and omissions – yet any act or omission could only be regarding such "statements." The argument has been rejected by multiple courts. The statute says what it says – and Section 523(a)(2)(A) specifically involves alleged misrepresentations "other than" a statement respecting the debtor's financial condition. As explained by the court in *Haler v. Boyington Capital Grp., L.L.C. (In re Haler)*, "This issue turns on whether his oral statements qualify as 'statement[s] respecting . . . financial condition.' *Id.* § 523(a)(2)(A). If his statements indeed qualify, then they **are outside** the scope of § 523(a)(2)(A) and therefore subject to discharge."[5]

Moreover, Plaintiff's exact argument has already been **rejected** by the Austin Bankruptcy

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from loan applicants in ways designed to permit the companies to later use those statements as the basis for an exception to discharge. Commonly, a loan officer would instruct a loan applicant "'to list only a few or only the most important of his debts'" on a form with too little space to supply a complete list of debts, even though the phrase, "'I have no other debts,'" would be printed at the bottom of the form or the applicant would be "'instructed to write the phrase in his own handwriting.'" **If the debtor later filed for bankruptcy, the creditor would contend that the debtor had made misrepresentations in his loan application and the creditor would threaten litigation over excepting the debt from discharge. That threat was "often enough to induce the debtor to settle for a reduced sum," even where the merits of the nondischargeability claim were weak.**")(citations omitted)(emphasis added).

[4] Plaintiff's Response at 6.

[5] *Haler v. Boyington Capital Grp., L.L.C. (In re Haler)*, 708 Fed. Appx. 836, 839 (5th Cir. 2017).

Court:

> But even assuming the Shurleys were bound by a duty to inform Moody Bank of "adverse events," their silence on the Colonial Funding lien is not actionable under section 523(a)(2)(A). *Mcharo's* conclusion relies heavily on Webster's definition of the word "statement," as "the act or process of stating, reciting, or presenting orally or on paper." But as the *Mcharo* court noted, in both Black's Law Dictionary and in the Federal Rules of Evidence, the word "statement" is defined to include "nonverbal conduct intended as an assertion." Keep in mind that Moody Bank says that the Shurleys' silence about the Colonial lien was conduct intended to mislead Moody Bank.
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> **And a myopic focus on the dictionary definition of one word can overlook the critical context in which the word is used. A fundamental canon of statutory construction is that text should be interpreted within its broader statutory context. Reading sections 523(a)(2)(A) and 523(a)(2)(B) together, it is clear that Congress wanted "statements respecting financial condition," to be in writing in order for a debtor to lose the discharge. There is no reason why Congress would treat oral misrepresentations about financial condition — dischargeable under sections 523(a)(2)(A) — differently from misleading omissions — which under the *Mcharo* interpretation, are non-dischargeable under 523(a)(2)(A)**. Indeed, the oral statement 'there are no other liens' is functionally equivalent to failing to state that there is a lien."[6]

Thus, because Plaintiff cannot point to a statement (or even "omission") that **is not** related to Defendant's financial condition, Section 523(a)(2)(A) does not apply as a matter of law. Even if it did, Plaintiff has wholly failed to raise a fact issue on reliance or intent as outlined in Section II.B. below, which is incorporated by reference.

B. Plaintiff has not raised a fact issue on its 523(a)(2)(B) claim.

Plaintiff claims Defendant intended to deceive Plaintiff, **but provides no evidence whatsoever of Defendant's intent <u>at the time</u> the agreement was signed.** Plaintiff spends pages discussing the facts that it contends show Defendant's alleged misrepresentations, but when it comes to actually presenting evidence of intent **at the time** the agreement was entered into, Plaintiff continues its refrain of, well this involves a credibility determination so we don't even have to set forth

[6] *Moody Nat'l. Bank v. Shurley (In re Shurley)*, No. 19-01091-tmd, 2021 Bankr. LEXIS 3249, at *24-25 (W.D. Tex. Bankr. Nov. 24, 2021)(emphasis added)(citations in original).

a fact issue. **That is not the law.** Even the case Plaintiff relies on states "**Once a creditor establishes that a debtor had actual knowledge of the false statement,** the debtor cannot overcome the inference of the intent to deceive with unsupported assertions of honest intent."[7] Plaintiff has not provided a shred of evidence that Defendant had actual knowledge that the statements he made were false. Indeed, there is not a shred of evidence demonstrating his reasonable explanations for his statements are false. On the contrary, the core event that caused Defendant to default was that Foxworth cut Defendant off only after receiving $50,000. Defendant did not know Foxworth was going to torpedo his business until Foxworth pulled that trigger. Not only is there no evidence of prior knowledge by Defendant, it defies reason that Defendant would have borrowed money from Peter to pay Paul, knowing Paul would still cut him off of building supplies.

Plaintiff harps on the totality of circumstances but ignores the plain fact that none of its allegations are even plausible. For Plaintiff's theory of events to be plausible, the Court would have to believe that (1) Defendant borrowed money **for his business,** (2) used those funds **exclusively to pay off two unsecured amounts to major suppliers so he could continue his business,** (3) kept any remaining funds **to pay Plaintiff** given that Plaintiff took daily draws from the bank account, (4) yet all along intended to file for bankruptcy and shut down his business. **It does not make any sense that someone would borrow money to pay dischargeable debts knowing they would file bankruptcy.** Plaintiff has presented no evidence that Defendant spent this money in any other way (despite making baseless pleadings that the money was spent on a non-business purpose) – nor can they. Defendant has presented unassailable summary judgment evidence demonstrating that the money was spent so he could keep the business going. Otherwise, if he was planning on filing for bankruptcy, why would he pay off the two suppliers necessary to keep the business afloat? Plaintiff

[7] *In re McCracken*, 586 B.R. 247, 259 (Bankr. S.D. Tex. 2018).

has provided no evidence disputing this, or disputing that these were unsecured creditors.

Court after court has held that the nonmovant cannot escape summary judgment by pointing at unreasonable inferences or unsubstantiated speculation. Plaintiff argues that this Court should ignore Defendant's evidence that he did not intend to deceive Plaintiff because it is a credibility determination, but the Fifth Circuit has long-dismissed this type of argument. For instance, in *Pruitt v. Levi Strauss & Co.*,[8] the Fifth Circuit upheld a grant of summary judgment because the nonmovant failed to raise a fact issue of intent in support of his fraudulent inducement claim:

> In this case, the value of Levi Strauss's alleged denial of the deceptive promises is minimal, for two reasons: (1) Pruitt admitted at trial that he did not believe that Levi Strauss deliberately misled him; and (2) Levi Strauss introduced controverting evidence that it did not deliberately or recklessly intend to deceive Pruitt. **In light of these facts and of Pruitt's failure to introduce any specific evidence of Levi Strauss's fraudulent intent, the district court could reasonably conclude that Pruitt failed to raise a fact issue sufficient to avoid summary judgment.** *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986) (**The opponent of a summary judgment motion "must do more than simply show that there is some metaphysical doubt as to the material facts."**). This court is unable to conclude that the district court erroneously granted summary judgment against Pruitt's fraudulent inducement claim.[9]

Despite Plaintiff's repeated refrains that credibility determinations means that it is entitled to proceed to trial no matter what, the law is well settled that:

> "…a court is not precluded from granting summary judgment where elusive concepts such as motive or intent are at issue. The Fifth Circuit has cautioned that "the court must be vigilant to draw *every* reasonable inference from the evidence in the record in a light most flattering to the nonmoving party." **For example, summary judgment may still be appropriate when intent or state of mind is at issue if the non-moving party merely rests on conclusory allegations or unsupported speculation.**"[10]

As held by the Fifth Circuit:

> "…the [nonmoving party] must present affirmative evidence in order to defeat a

[8] *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 462 (5th Cir. 1991).
[9] *Id.* (emphasis added)(citations and parenthetical in original).
[10] *Ross v. Dejarnetti*, No. 18-11277 SECTION: "G"(4), 2021 U.S. Dist. LEXIS 143608, at *23 (E.D. La. Jul. 30, 2021).

> properly supported motion for summary judgment" *Anderson*, 106 S. Ct. at 2514. **The nonmoving party should come forward with evidence, direct or circumstantial, which would allow for the reasonable inference that the moving party acted with a contrary intent or state of mind.** *See Clemente v. Nassau County*, 835 F.2d 1000, 1005 (2d Cir. 1987) (**"Where, as here, the circumstantial evidence is so minimal and the legal standard so daunting, summary judgment is appropriate even when state of mind is at issue"**).[11]

These cases make sense given that courts are clear that "An accusation of fraud should be made cautiously, and only when there is evidence to support it."[12] Here, Plaintiff's own corporate representative testified that **Plaintiff had no evidence to support its fraud claims when it filed its lawsuit and instead based it on speculation and conjecture.**[13] At the summary judgment stage, Plaintiff has still failed to provide even a shred of evidence to support its argument that Defendant had an intent to deceive Plaintiff.[14]

Moreover, Plaintiff has not even provided competent summary judgment evidence on reliance. Plaintiff points to the testimony of its corporate representative where the representative discusses the general things Kapitus does and how it would not approve a loan without the alleged representations it mentions in its response, **but there is no evidence whatsoever regarding Plaintiff's specific**

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[11] *International Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1266 (5th Cir. 1991)(citations and parentheticals in original)(emphasis added).

[12] *United States ex rel. Ruscher v. Omnicare, Inc.,* No. 4:08-cv-3396, 2015 U.S. Dist. LEXIS 117900, at *66 (S.D. Tex. Sept. 3, 2015).

[13] Defendant's Motion for Summary Judgment, Exhibit A at 123:10-16 ("Because as stated before several times, when you look at the circumstances under which this happened it is not unreasonable to infer that he committed all of those acts. So, you can present a whole bunch of new stuff here now that came out discovery, was not available when the lawsuit was started.").

[14] *See also, e.g., Cameron v. Integrated Living Cmtys. of McKinney*, No. 4:03CV252, 2004 U.S. Dist. LEXIS 35418, at *8 (E.D. Tex. Sept. 22, 2004)("If the nonmovant fails to set forth specific facts to support an essential element in that party's claim and on which that party will bear the burden of proof, then summary judgment is appropriate. *Celotex Carp*, 106 S.Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its claim, summary judgment will be appropriate 'unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

reliance on Defendant's statements.[15] Yet, courts have held that **this is not sufficient.** For instance, in *Kapitus Servicing, Inc. v. Polk (In re Polk)*, the court held that Kapitus failed to prove that it reasonably relied on the contractual representations:

> Here, Kapitus' witness was not involved in the investigation leading to these two transactions. Although he testified about Kapitus' normal procedures for investigating and approving these types of transactions, he admitted that he had no personal knowledge as to what actual financial information was provided. (Tr. 101). Further, although he testified that he saw an insolvency analysis of AgForest in the file, he did not review it. (Tr. 150). … **Thus, the evidence does not establish what analysis was actually done by Kapitus.**[16]

This is particularly glaring – **in its own fraud case, Plaintiff has not presented testimony of any witness simply saying "Kapitus relied on these specific representations."** Instead, the only cited testimony Plaintiff relies on speaks to Plaintiff's general practice on not funding contracts without signed agreements.[17]

In *Baer v. Myers (In re Myers)*, the court held that there was no reasonable reliance for purposes of Section 523(a)(2)(B):

> "Even if the Debtor's Quickbooks Statement was materially false, the Court cannot find that Baer met the higher standard of reasonable reliance required under § 523(a)(2)(B). A determination of Baer's reliance is measured by an objective standard. **Baer must not only show actual reliance, but that his reliance was reasonable. "The standard of reasonableness places a measure of responsibility upon a creditor to ensure that there exists some basis for relying upon debtor's representations." "Because a creditor has the responsibility to ensure there is some basis to rely on a debtor's representation, a debtor's representation, by itself, can not be the basis for a creditor's reasonable reliance."**[18]

In the instant case, Plaintiff has not establish **any actual reliance**, let alone reasonable reliance as

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[15] Plaintiff's Response at 11-12.
[16] *Kapitus Servicing, Inc. v. Polk (In re Polk)*, No. 19-03007, 2020 Bankr. LEXIS 398, at *10-11 (M.D. Ga. Bankr. Feb. 13, 2020)(emphasis added).
[17] Plaintiff's Response, Exhibit 13.
[18] *Baer v. Myers (In re Myers)*, No. 19-02054, 2022 Bankr. LEXIS 2350, at *30-31 (Dist. Utah Bankr. Aug. 24, 2022)(emphasis added).

required.

Yet another example is *Kelly v. Merrill (In re Merrill)*,[19] where the court held:

> "…actual reliance is a separate and independent element that a creditor must plead and prove to support its § 523(a)(2)(B) claim. And as this Panel recently opined, **there can be no reasonable reliance unless the creditor first proves actual reliance.** *See Heritage Pac. Fin., LLC v. Montano (In re Montano)*, 501 B.R. 96, 115 (9th Cir. BAP 2013).
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> "Importantly, whereas reasonable reliance is determined under an objective standard and focuses on what a hypothetical prudent person would do under similar circumstances, *see In re Machuca,* 483 B.R. at 736-37, **the actual reliance inquiry necessarily is subjective and focuses on the state of mind of the creditor —what he or she actually considered to be important in deciding to enter into the transaction in which the misrepresentation occurred.** *See AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 246 F.3d 391, 412-13 & n.24 (5th Cir. 2001) (indicating that actual reliance inquiry focuses on whether misrepresentation was a substantial factor in influencing the creditor to act); RESTATEMENT (SECOND) OF TORTS §§ 537, 546 (same)."[20]

C. Plaintiff has not raised a fact issue on its claim that Defendant committed fraud or defalcation while acting in a fiduciary capacity.

Apparently recognizing the baseless nature of their pleaded claims, Plaintiff has stated that it "withdraw[s]" and will "not pursue its claims as to embezzlement and larceny pursuant to 11 U.S.C. 523(4) further or at trial."[21] Thus, Defendant is entitled to summary judgment on Plaintiff's claims of embezzlement and larceny.

Plaintiff's contentions regarding fraud or defalcation while acting in a fiduciary capacity fail – just as they did in numerous other courts. Plaintiff contends that "Defendant had a fiduciary duty to Plaintiff for two, independent reasons: (1) the Agreement created a trust relationship pursuant to which Defendant owed a fiduciary responsibility to Plaintiff (this is a question of law); and (2) CD&B's likely insolvency supports Defendant's fiduciary obligations to Plaintiff as a creditor of CD&B (this is

[19] *Kelly v. Merrill (In re Merrill)*, No. CC-13-1370-KuPaTa, 2014 Bankr. LEXIS 1175, at *19-20 (9th Cir. BAP Mar. 26, 2014).
[20] *Id.* (emphasis added)(citations and parenthetical in original).
[21] Plaintiff's Response at 16.

a mixed question of law and fact precluding summary judgment)."[22]

In *Strategic Funding Source, Inc. v. Donghee Choi (In re Donghee Choi)*, the court rejected this exact argument:

> "The court rejects the claims for fraud and defalcation while acting in a fiduciary capacity because Debtor did not owe Plaintiff a fiduciary duty at the time of the funding or when Debtor diverted funds for his personal use. *In re Scheller*, 265 B.R. 39, 52 (Bankr. S.D.N.Y. 2001) ("`Fiduciary capacity' as used in Section 523(a)(4) applies only to trusts existing prior to the wrongful conduct which created the debt."); *Zohlman v. Zoldan*, 226 B.R. 767, 772 (S.D.N.Y. 1998) ("`The broad, general definition of fiduciary, involving confidence, trust and good faith, is not applicable in dischargeability proceedings under § 523(a)(4)'; rather, for purposes of § 523(a)(4), who is a fiduciary 'is a matter of federal law.'). Although Northfield ultimately became insolvent at some point after the execution of the tax lien, there was insufficient proof, as noted, that Northfield was insolvent at the time Debtor made the transfers of funds to his personal account."[23]

Kapitus was a party in this exact lawsuit.[24] In yet another lawsuit where Plaintiff was a party, the court held that "the general fiduciary duty that state law imposes on a corporate officer when a company is insolvent does not establish the type of technical trust that is necessary to except a debt from discharge based on fraud or defalcation in a fiduciary capacity."[25] In *Dodge*, the court explained why these types of arguments fail – because Section 523(a)(4)'s reference to fiduciary capacity **must be narrowly construed**:

> "In *Follett Higher Education Group, Inc. v. Berman (In re Berman)*, 629 F.3d 761, 767-768 (7th Cir. 2011) (citations omitted), the Seventh Circuit explained why § 523(a)(4)'s reference to fiduciary capacity is narrowly construed:
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> "The Supreme Court taught in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934), **that the non-dischargeability exception's reference to fiduciary capacity was 'strict and narrow.' As Justice Cardozo wrote for the Court, the debtor 'must have been a trustee before the wrong and without reference thereto.' Those facts are not present in a situation such as this, where**

[22] Plaintiff's Response at 16.
[23] *Strategic Funding Source, Inc. v. Donghee Choi (In re Donghee Choi)*, No. 18-50001, 2019 Bankr. LEXIS 3875, at *30-31 (N.Y. Bankr. Dec. 20, 2019)
[24] *Id.* at *1 n.1 ("Strategic Funding Source, Inc. is now doing business as 'Kapitus' although it retains its formal incorporated name.).
[25] *Strategic Funding Source, Inc. v. Dodge (In re Dodge)*, 623 B.R. 663, 668 (N.D. Ga. Bankr. Sept. 30, 2020).

> **the corporation's breach of its contract created the debt. The resulting obligation to the creditor is not 'turned into' one arising from a trust.** Such obligations are 'remote from the conventional trust or fiduciary setting, in which someone ... in whom confidence is reposed is entrusted with another person's money for safekeeping.' At least in the absence of fraud, we decline to stretch the section 523(a)(4) exception so far as to make officers and directors of insolvent corporations personally liable, without the ability to secure discharge in bankruptcy, for a wide range of corporate debts.
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> "This Court concurs with *Berman's* analysis. Imposing a fiduciary relationship between an officer of an insolvent company and a creditor is "remote from the conventional trust or fiduciary setting, in which someone ... in whom confidence is reposed is entrusted with another person's money for safekeeping." *Berman*, 629 F.3d at 767. Duties of loyalty, good faith, and care — to the extent they exist - are too general to establish an express or technical trust as that term is understood for purposes of § 523(a)(4).
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> "Based on the foregoing, the Court concludes that the amended complaint fails to state a claim for fraud or defalcation while acting in a fiduciary capacity under § 523(a)(4)."[26]

The law is clear and unassailable that there is no fiduciary duty involved in this matter. Plaintiff has failed to raise a fact issue and, instead, only regurgitates arguments that have already been rejected by multiple bankruptcy courts. Accordingly, Defendant is entitled to summary judgment.

D. Plaintiff has not raised a fact issue regarding its 523(a)(6) claim.

Plaintiff ignores the crucial inquiry in a 523(a)(6) claim: it must raise a fact issue that Defendant Keith **intended to cause willful and malicious injury** to Plaintiff – **not just** that an act of Defendant caused injury to Plaintiff. Plaintiff argues that when a debtor has acted "in a manner substantially certain to cause financial loss and injury," that is sufficient to establish that the injury was willful and malicious. Plaintiff's "evidence" of willful and malicious injury is that Defendant stopped making payments after a month, hasn't made payments on his guaranty, and Defendant was in arrears at the time the agreement was entered into. It is truly startling that Plaintiff affirmatively represents to this

[26] *Strategic Funding Source, Inc. v. Dodge (In re Dodge)*, 623 B.R. 663, 668-69 (N.D. Ga. Bankr. Sept. 30, 2020).

Court that this is enough to establish willful and malicious injury as contemplated by the statute. **If this sufficed, every singe breach of contract claim would become non-dischargeable.** That is simply not what Congress intended.

As explained by the court in *Kapitus Servicing, Inc. v. Friedlander (In re Friedlander)*,[27] which, incidentally, is another case where Kapitus was a Plaintiff:

> In order to except a debt from discharge under § 523(a)(6), the creditor has the burden of proving by a preponderance of the evidence that the debtor's conduct was willful and malicious. *See Grogan*, 498 U.S. at 291. The injury must be both willful and malicious. *See In re Markowitz*, 190 F.3d 455, 463 (6th Cir. 1999); *In re Trantham*, 304 B.R. 298, 306 (B.A.P. 6th Cir. 2004). A willful and malicious injury must be "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998).
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> In *Kawaauhau*, the Supreme Court compared the "willful and malicious" standard of § 523(a)(6) to the legal standards for intentional torts, noting that "[i]ntentional torts generally require that the actor intend 'the *consequences* of an act,' not simply 'the act itself.'" 523 U.S. at 62 (citing Restatement (Second) of Torts § 8A, comment *a*, p. 15 (1964)) (emphasis in original). Thus, the Sixth Circuit has stated that "only acts done with the intent to cause injury—and not merely acts done intentionally—can cause willful and malicious injury." *Markowitz*, 190 F.3d at 464. "Unless 'the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it' . . . he has not committed a 'willful and malicious injury' as defined under § 523(a)(6)." *Id.* (citing Restatement (Second) of Torts § 8A, comment *a*, p. 15 (1964)).
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> Kapitus alleges that BJRP's discontinuation of weekly ACH payments constitutes willful and malicious conduct by the debtor to divert proceeds of the funding and purchased receivables from Kapitus. As both parties stipulated, from May 21, 2018 through October 1, 2018, Kapitus deducted $7,418.00 weekly payments per the Agreement, except that during the period July 30, 2018 through August 20, 2018, the agreed weekly deductions were reduced to $3,000.00. *See* Pl. Ex. No. 10. The last payment made was in the amount of $7,418.00 on October 1, 2018, which was reversed on October 3, 2018, because BJRP filed a Chapter 11 bankruptcy case on September 28, 2018. *See In re BJRP, LLC*, Case No. 18-15839, Bankr. N.D. Ohio (Chapter 11 petition filed on September 28, 2018). Here, the payments stopped because BJRP filed a bankruptcy case, and there is no evidence that the debtor sought to divert funds from Kapitus for the purpose of causing harm. Because a willful and malicious injury must be "a deliberate or intentional *injury*, not merely a deliberate

[27] *Kapitus Servicing, Inc. v. Friedlander (In re Friedlander)*, No. 19-1070, 2021 Bankr. LEXIS 2360, at *35-37 (N.D. Ohio Bankr. Aug. 27, 2021).

> or intentional *act* that leads to injury[,]" Kapitus has failed to reach its burden under § 523(a)(6). (*Kawaauhau*, 523 U.S. at 61 (emphasis in original)).
>
> Accordingly, Kapitus has failed to prove by a preponderance of the evidence that the debt owed by the debtor to Kapitus is nondischargeable under § 523(a)(6).[28]

Similarly, in *Kapitus Servicing, Inc. v. Polk (In re Polk)*,[29] yet another court rejected Kapitus' contentions:

> "First, as explained above, Kapitus did not 'own' the receivables. It merely had a security interest in the receivables. As for stopping the ACH payments, Debtor testified that he did this after AgForest lost a major contract and could no longer pay the required payments. (Tr. 153-54). There was no evidence that he stopped the payments for the purpose of causing injury to Kapitus.
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> The evidence was that the new company was opened after AgForest failed and Debtor filed bankruptcy. (Tr. 153-54, Exhibit 30). There was no evidence that he did this to hide anything from Kapitus.
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> As for diverting receivables to another bank account, the testimony was that when Debtor began receiving money on a particular contract, he no longer had a bank account into which he could deposit checks. Accordingly, he opened a new account to handle those funds. (Tr. 157-60). There was no evidence that he opened the account to divert receivables.
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> Finally, as for using the receivables for his own personal benefit, as explained above, some of the payments for Debtor's personal expenses and the expenses of his assistant were in lieu of salary. Further, because the payments came from a co-mingled account, the payments cannot be traced to Kapitus' collateral. Finally, there was no evidence that the payment of personal expenses was done for the purpose of harming Kapitus.
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> A final response to Kapitus' § 523(a)(6) claim is that the debt which Kapitus sought to have declared nondischargeable did not arise from an injury by Debtor to Kapitus' property. Rather, this debt was created when the two contracts were signed and Kapitus advanced funds pursuant thereto for which AgForest and Debtor became obligated to repay. Thus, Kapitus has no claim under § 523(a)(6).[30]

There is not a single shred of evidence of a subjective motive to cause harm or objective substantial certainty of harm.[31] Defendant is entitled to summary judgment on this ground.

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[28] *Id.*

[29] *Kapitus Servicing, Inc. v. Polk (In re Polk)*, No. 19-03007, 2020 Bankr. LEXIS 398, at *27-28 (M.D. Ga. Bankr. Feb. 13, 2020).

[30] *Id.*

[31] *See, e.g., Moody Nat'l. Bank v. Shurley (In re Shurley)*, No. 19-01091-tmd, 2021 Bankr. LEXIS 3249, at *27 (W.D. Tex. Bankr. Nov. 24, 2021)(finding that 523(a)(6) did not apply: "The Court has seen no

E. Plaintiff's attempt to manufacture a fact issue based on COVID-19 must be rejected.

Plaintiff spends three pages arguing that there is a fact question based on something that Defendant did not even premise his motion on. Whether or not COVID actually impacted Plaintiff's business has never been an issue in anything in this case. Rather it is just some monster red herring Plaintiff is tossing up to proclaim a "fact question." Defendant's motion focuses on Plaintiff's failure to prove Plaintiff's pleaded causes of action. That COVID did or did not impact Defendant's need for working capital is irrelevant – everyone agrees Defendant needed working capital.

III. Conclusion and Prayer

The exceptions to dischargeability must be "narrowly construed" and "the reasons for denying a discharge must be real and substantial, not merely technical and conjectural."[32] That Plaintiff wants to get money repaid does not give it license to manufacture a fraud, embezzlement, or larceny claim out of a situation that is nothing more than a simple breach of contract. If Plaintiff's allegations

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evidence that there was an objective substantial certainty of harm or that the Shurleys operated with a subjective intent to cause harm. . . . Moody Bank also failed to show a subjective motive to cause harm."). Plaintiff's cited cases doesn't change this result. Plaintiff cites *In re Sligh*, No. 21-03052-sgj, 2022 Bankr. LEXIS 1017, at *6 (Bankr. N.D. Tex. Apr. 12, 2022) and *In re Hartman*, No. 21-3013, 2021 Bankr. LEXIS 3154, at *4 (Bankr. N.D. Tex. Nov. 16, 2021). Plaintiff's reliance on these cases underscores the non-existent nature of its contentions. In *In re Slight*, there was evidence that the defendant blackmailed, extorted, and threatened the plaintiff. *Sligh*, 2022 Bankr. LEXIS 1017 at *17. In *In re Hartman*, the court found that Plaintiff had failed to proof its case despite there being facts that the defendant created a business in order to compete with plaintiff in violation of a contractual agreement. *Hartman*, 2021 Bankr. LEXIS 3154, at *10.

[32] *Strategic Funding Source, Inc. v. Veale (In re Veale),* No. 21-1751-RGA, 2022 U.S. Dist. LEXIS 193940, at *8 (Dist. Del. Oct. 25, 2022)(further holding that "While the Opinion highlights that none of the alleged written misrepresentations concerned the Debtor's individual financial condition, and thus did not support a plausible claim for nondischargeability of the guarantee debt under § 523(a)(2)(B), the Bankruptcy Court also found that the specific Alleged Misrepresentations concerning Retro contained in **'the pre-printed loan agreement' appeared to be" 'technical and conjectural' rather than substantial reasons for asserting nondischargeability because the Complaint lacks factual allegations showing that any of the statements were made with an 'intent to deceive**."")(emphasis added).

sufficed, the exceptions to discharge would swallow the rule. **Plaintiff** was the one that instituted this lawsuit. **Plaintiff** is the one that brought claims its own corporate representative admitted lacked an actual foundation when filed. **And Plaintiff** is the one who had an opportunity to produce summary judgment evidence in support of its claims and has failed at every turn. In the end, Defendant's only mistake was paying Foxworth the $50,000 he borrowed from Plaintiff, not knowing Foxworth would turn around and entirely cut him off without warning. No one foresaw that. Defendant is entitled to summary judgment.

Defendant prays that this Court grant them summary judgment on Kapitus' claims for the reasons set forth above. Defendant further prays for any and all such other relief to which they may be entitled whether at law or in equity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing (including attachments) has been served on all counsel of record in compliance with Texas Rule of Civil Procedure 21a on this 1st day of September, 2023, properly addressed as follows:

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