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

IN RE:	§	CASE NO. 21-60559-mmp
	§	
DONALD VINCENT KEITH AND	§	
JOCQUALINE SUSAN KEITH	§	
	§	
DEBTORS	§	CHAPTER 7

KAPITUS SERVICING, INC., AS	§	
SERVICING AGENT FOR	§	
KAPITUS, LLC	§	
Plaintiff,	§	
	§	
v.	§	ADV. PROC. NO. 22-06003-mmp
	§	
DONALD VINCENT KEITH	§	
Defendant.	§	

PLAINTIFF KAPITUS SERVICING, INC.,
AS SERVICING AGENT FOR KAPITUS, LLC'S
RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

TO THE HON. MICHAEL M. PARKER, UNITED STATES BANKRUPTCY JUDGE:

Kapitus Servicing, Inc., as Servicing Agent for Kapitus, LLC ("Plaintiff" or "Kapitus") files its *Response in Opposition* ("Response") to Donald Vincent Keith's ("Defendant") *Motion for Summary Judgment* ("Motion"), and respectfully states as follows:

I. PLAINTIFF'S EVIDENCE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In support of its *Response*, Plaintiff offers and incorporates the following Exhibits in addition to the pleadings and papers on file:

- Ex. 1: Plaintiff's Summary of Uncontested Facts;
- Ex. 2: Plaintiff's Summary of Contested Facts;

- Ex. 3: Excerpts from Keith Depo.;[1]
- Ex. 4: Agreement;
- Ex. 5: Representations and Acknowledgements;
- Ex. 6: DocuSign Trail;
- Ex. 7: Contract Funding (Redacted);
- Ex. 8: Merchant Statement of Activity (Redacted);
- Ex. 9: Coyote Design and Build, LLC, Petition, Case No. 21-60560;
- Ex. 10: Foxworth-Galbraith Lumber Co., State Court Complaint;
- Ex. 11: Foxworth-Galbraith Lumber Co., Proof of Claim;
- Ex. 12: Dahlseid State Court Complaint;
- Ex. 13: Excerpts from Wolfson Depo.;
- Ex. 14: G Suite Tools, IP Location Search, dated 08.09.2023;
- Ex. 15: Excerpts from Podhorzer Depo.;[2]
- Ex. 16: Excerpts of Oral Ruling by Hon. Judge William T. Thurman, United States Bankruptcy Court for the District of Utah;
- Ex. 17: Texas COVD-19 Disaster Proclamation Dated March 13, 2020;
- Ex. 18: EO-GA-08 Dated March 19, 2020;
- Ex. 19: EO-GA-34 Dated March 2, 2021;
- Ex. 20: ProPublica PPP Loan Search Dated August 18, 2023;
- Defendant's Response to Complaint [ECF # 11];
- Defendant's Ex. B: Declaration of Donald Vincent Keith [ECF # 50-2]; and
- Defendant's Ex. C: Documents Produced by Plaintiff [ECF # 50-3].

II. VENUE AND JURISDICTION

The Court has jurisdiction under 28 U.S.C. §§ 1334 and 157(a) and the Order of Reference entered on August 13, 1984. Determinations of dischargeability are core proceedings under 28 U.S.C. § 157(b)(2)(I). Venue is proper in this district pursuant to 28 U.S.C. § 1409.

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[1] Plaintiff's Exhibits are numbered, whereas Defendant's Exhibits are lettered.

[2] The Deposition Transcript of Mr. Podhorzer has been marked as "Confidential" pursuant to the Protective Order in this case. Plaintiff agrees to waive the "Confidential" designation only as to the specific and extremely limited testimony of Mr. Podhorzer cited herein, and without waiver of any right to object to the publication of any confidential/proprietary information in the future and/or any of Plaintiff's other rights and remedies included under the Protective Order in this case. Should Defendant request to cite Deposition testimony of Mr. Podhorzer in any Reply the Defendant might file in support of his Motion, counsel for Kapitus will consider a request to waive the designation of additional testimony based on specific citations to the same from counsel for Defendant to avoid requiring counsel to prepare and file a motion pursuant to Local Rule 9018.

III. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c), incorporated by Federal Rules of Bankruptcy Procedure 9014 and 7056 and Local Rule 7056, provides a court shall render 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." FED. R. CIV. P. 56(a). The party moving for summary judgment bears the burden of showing: (i) an absence of evidence to support the non-moving party's claims, or (ii) the absence of a genuine issue of material fact. *In re Long*, 2007 WL 4355324, at *2 (Bankr. S.D. Tex. Dec. 10, 2007) (*citing Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Material facts are those that could affect the outcome of the action or could allow a reasonable fact finder to find in favor of the non-moving party." *In re Long*, 2007 WL 4355324, at *2 (*citing DIRECTV, Inc. v. Budden*, 420 F.3d 521, 529 (5th Cir. 2005)).

Once the moving party meets that burden, the nonmoving party must identify specific facts supported by affidavits, or by depositions, answers to interrogatories, and admissions on file that show there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986). The non-moving party has a duty to respond with specific evidence demonstrating a triable issue of fact (*see Celotex Corp.*, 477 U.S. 317, 324; *Wheeler v. BL Dev. Cor*p.,415 F.3d 399, 402 (5th Cir. 2005)), and articulate how that evidence supports its position (*Johnson v. Deep E. Texas Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004).[3] In determining the existence or nonexistence of a material fact, "a court views the facts in the light most favorable to the non-moving party." *In re Long*, 2007 WL 4355324, at *2 (*citing Rodriguez v. ConAgra Grocery Products, Co*., 436 F.3d 468, 473 (5th Cir. 2006)).

[3] Ex. 1, *Plaintiff's Summary of Uncontested Facts*; Ex. 2, *Plaintiff's Summary of Contested Facts*.

IV. LEGAL ARGUMENT IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Summary of Plaintiff's Argument in Opposition to Summary Judgment.

The contested facts set forth in Plaintiff's Exhibit 2, both by themselves and when taken in conjunction with the uncontested facts set forth set forth in Plaintiff's Exhibit 1, preclude a finding of summary judgment when viewed in the light most favorable to the nonmovant, Plaintiff.

The totality of the facts, as plead and supported by deposition testimony as well as the other Exhibits attached and incorporated herein, show that Plaintiff's claims that Defendant obtained money from Plaintiff either: (a) via false pretenses, false representation, or actual fraud other than a statement respecting Defendant's financial condition (§523(a)(2)(A)); or (b) via the use of a statement in writing that was materially false respecting Defendant/debtor's or an insider's financial condition (§523(a)(2)(B)) are supported by more than a mere "improbable inference." Further, the contested facts raise material, factual questions, at a minimum, as to Defendant's credibility. These issues of fact are not negated merely by Defendant's Declaration [ECF # 50-2]. The totality of the circumstances inquiry is fact specific and hinges on the credibility of witnesses, which must be assessed by the trier of fact. *In re Alvarado*, 608 B.R. 877, 885 (Bankr. W.D. Okla. 2021) (*quoting In re Graham*, 600 B.R. 90 (Bankr. D. Kan. 2019)).[4] "The intent to deceive is largely an assessment of the credibility and demeanor of the debtor." *In re Miller*, 39 F.3d 301, 305 (11th Cir. 1994).

As to fraud or defalcation under §523(a)(4), pursuant to the law of Virginia, Defendant

[4] Whether Plaintiff's reliance on Defendant's statements was justifiable (§523(a)(2)(A)) or reasonable (§523(a)(2)(B)) similarly requires the Court to judge, to some extent, the credibility of the Plaintiff. Therefore, issues of fact as to Plaintiff's reliance on Defendant's statements preclude summary judgment as to the Plaintiff's claim just as much as they preclude summary judgment in favor of Defendant. "The reasonableness of a creditor's reliance (under 11 U.S.C. § 523(a)(2)(B)) is a factual determination that "should be judged in light of the totality of the circumstances." *In re McCracken*, 586 B.R. 247, 257 (Bankr. S.D. Tex. 2018), *quoting Matter of Coston*, 991 F.2d 257, 261 (5th Cir. 1993).

owed a fiduciary responsibility to Plaintiff. Additionally, there is a mixed question of fact and law regarding whether Coyote Design and Build, LLC ("CD&B" or "Merchant") was insolvent on August 9, 2021—if so, Defendant owed an additional fiduciary obligation to Plaintiff outside of the Agreement[5]—which precludes summary judgment as to Plaintiff's claims under §523(a)(4). Furthermore, numerous uncontested facts when taken in conjunction with contested facts raise material, factual questions as to whether Defendant breached his fiduciary obligations to Plaintiff via fraud or defalcation, which questions also preclude summary judgment as to Plaintiff's claims under §523(a)(4).

As a matter of law, actions undertaken to cause financial loss can be willful and malicious within the meaning of §523(a)(6). Defendant and CD&B breached the Agreement almost immediately after entering it on August 9, 2021. CD&B made no payments to Plaintiff pursuant to the Agreement after August 2021, and Defendant, via his personal guaranty, has never made a payment to Plaintiff. For all intents and purposes, CD&B ceased operations on or before August 24, 2021, indicating the representations Defendant made about his and CD&B's financial condition only a few weeks earlier were palpably false when made. Further, both CD&B and Defendant, personally, were significantly in arrears to Foxworth-Galbraith Lumber Co. ("FGLC") at the time the Agreement was entered into and continued to be so afterwards despite Defendant's affirmative obligations to inform Plaintiff as to these arrearages. Accordingly, material factual questions exist as to whether Defendant's actions, from a reasonable person's standpoint, were

[5] On August 9, 2021, Defendant and Kapitus entered into a Forward Purchase Agreement (Fixed ACH Delivery) as well as a related Security Agreement, and Guaranty, all of which were expressly incorporated by reference into the Forward Purchase Agreement (collectively the "Agreement"). [Ex. 4, *Agreement*; Ex. 6, *DocuSign Trail*] . The Agreement as filed at ECF # 1-1 is also filed as Ex. 4 to Plaintiff's *Response.* For ease of reference and to avoid confusion, the page numbers cited refer to the file marked pages 1 – 21 as shown at the top of the Agreement as filed at ECF # 1-1.

substantially certain to result in harm to Plaintiff such that the Court ought to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the Plaintiff.

Finally, while not discussed in Defendant's Motion [ECF 50] or Declaration [ECF 50-2], Defendant testified CD&B's economic problems were driven by COVID-19 related factors within the construction industry. If so, given the public record as to the State of Texas's response to the COVID-19 pandemic and timing of the same when compared to the timing of the Agreement (August 9, 2021), material questions of fact exist that further preclude the granting of summary judgment in Defendant's favor as to Plaintiff's claims under Section 523(a)(2)(A), 523(a)(2)(B), 523(a)(4), and 523(a)(6).

Consequently, the Court should deny the Defendant's Motion.

B. Material questions of fact remain as to whether Defendant obtained money from Plaintiff via false pretenses, false representation, or actual fraud <u>other than a statement</u> respecting the Defendant's financial condition (11 U.S.C. § 523(a)(2)(A)).

Section 523(a)(2)(A) of the Bankruptcy Code bars a discharge of debts obtained by false pretenses, false representations, <u>or</u> actual fraud other than via a statement respecting a debtor or insider's financial condition. 11 U.S.C. §523(a)(2)(A). For a debtor's representation to be a false representation or false pretense, it must have been: (1) a knowing and fraudulent falsehood; (2) describing past or current facts; (3) that was relied upon by the other party. *In re Burg*, 641 B.R. 120, 134 (Bankr. S.D. Tex. 2022) (internal citation omitted); *see also In re Long*, 2007 WL 4355324, at *11-12 (*citing In re Allison*, 960 F.2d 481, 483 (5th Cir. 1992). "The operative terms in §523(a)(2)(A) ... 'false pretenses, a false representation, or actual fraud,' carry the acquired meaning of terms of art ... [and] are common-law terms." *In re Mercer*, 246 F.3d 391, 402 (5th Cir. 2001) (*quoting Field v. Mans*, 516 U.S. 59, 69, 116 S.Ct. 437 (1995)).

"[F]alse representation involves an express statement, while a claim of false pretenses may

be premised on misleading conduct without an explicit statement." *In re Hanna*, 603 B.R. 571, 585 (Bankr. S.D. Tex. 2019). "For purposes of interpreting Section 523(a)(2)(A) of the Bankruptcy Code, courts have generally defined 'false pretenses' as written or oral misrepresentations, or conduct which creates or fosters in the proposed lender or creditor a 'false impression' and can include 'conduct and material omissions.'" *In re Clem*, 583 B.R. 329, 383–84 (Bankr. N.D. Tex. 2017). False pretenses, therefore, can be "implied misrepresentation or conduct intended to create and foster a false impression," *In re Hanna*, 603 B.R. 571, 592. Unlike false representations, false pretenses may be premised on misleading conduct without an explicit statement. *Id. See also In re Young*, 91 F.3d 1367, 1374-75 (10th Cir. 1996) (Failure to disclose may constitute a false representation or false pretenses).

Silence or omissions, when they create a false impression, can constitute misrepresentations under Section 523(a)(2)(A). "[F]alse pretenses can be defined as any series of events, when considered collectively, that create a contrived and misleading understanding of the transaction, in which a creditor is wrongfully induced to extend money or property to the debtor." *In re Alvarado,* 608 B.R. 877, 883 (*quoting In re Call*, 560 B.R. 814, 821 (Bankr. D. Utah 2016). *See also In re Chong*, 523 B.R. 236, 245 (Bankr. D. Colo. 2014) ("Intent to deceive under § 523(a)(2)(A) may be inferred from the totality of the circumstances and includes reckless disregard of the truth. Moreover, the scienter requirement may be established by material omissions").

The Supreme Court has defined a "statement" as: "[T]he act or process of stating, reciting, or presenting orally or on paper; something stated as a report or narrative; a single declaration or remark." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759, 201 L. Ed. 2d 102 (2018) (*quoting* Webster's Third New International Dictionary (1976)). "Omissions by definitions cannot be statements…. therefore, a false pretense that omits information about [Defendant's] financial

condition could be actionable under 523(a)(2)(A)." [Ex. 16, *Oral of Ruling by Hon. Judge William T. Thurman*, at 12:24-25, 13:1-25, 14:1-6 *(noting Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752)].

The Agreement and the legal Representation and Acknowledgements ("R&As") both imposed upon Defendant an affirmative duty to speak/to disclose information to Plaintiff, which information Defendant admits he did not disclose. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 4, *Agreement*, ¶ 2.1, p. 7 of 21; Ex. 5, *R&As*, ¶9; ***but cf.***, Ex. 3, *Excerpts from Keith Depo.*at 104:6-16; 105:11-15; 139:9-25, 140:1-12; 141:3-22]. "When one has a duty to speak, both concealment and silence can constitute fraudulent misrepresentation; an overt act is not required." *In re Whittington*, 530 B.R. 360, 379 (Bankr. W.D. Tex. 2014) (*quoting In re Mercer*, 246 F.3d 391, 404). *See also In re Weinstein*, 31 B.R. 804, 810 (Bankr. E.D.N.Y. 1983) ("Case law has additionally gone so far as to extend an affirmative duty to a party in a business transaction to disclose all the facts the concealment of which would mislead the other side").

Although false pretenses, false representation, and actual fraud represent different concepts, the element of scienter is common to all. However, because a defendant or debtor will rarely admit to intentional deception, courts uniformly recognize intent may be established by circumstantial evidence or by inferences drawn from a course of conduct or from the totality of the circumstances. "Thus, when assessing a debtor's intent to deceive under §523(a)(2)(A) '[t]he Court is required to consider whether the circumstances in the aggregate present a picture of deceptive conduct on the part of the debtor, which betrays an intent on the part of the debtor to deceive his creditors." *In re Sigler*, 2023 WL 4610749, at *7 (Bankr. W.D. Tex. July 17, 2023) (*quoting In re Whittington*, 530 B.R. 360, 383). *See also Whitcomb v. Smith*, 572 B.R. 1, 16 (1st Cir. BAP 2017) (Addressing intent under §523(a)(2)(A) and stating "[b]ecause the intent to

defraud is rarely proven by direct evidence, courts assess this element using a totality of the circumstances approach to discern the debtor's subjective intent"); *In re Lemke,* 423 B.R. 917, 922 (10th Cir. BAP 2010) (Intent to deceive §523(a)(2)(A) may be inferred from the totality of the circumstances); *In re Bocchino,* 794 F.3d 376, 382 (3d Cir. 2015) (*citing Palmacci v. Umpierrez,* 121 F.3d 781, 786 (1st Cir. 1997)) "A debtor will rarely admit to intentional deception, thus intent is most often inferred from the totality of the circumstances").

The "totality of the circumstances inquiry is fact specific and hinges on the credibility of witnesses." *In re Alvarado,* 608 B.R. 877, 885 (internal citation omitted). *See also In re Preece*, 125 B.R. 474, 477 (Bankr. W.D. Tex. 1991) ("The issue remains as to whether such implied representation was made with the requisite fraudulent intent required under § 523(a)(2)(A)…This is a fact-intensive inquiry and in large part depends upon this Court's assessment of the credibility of the testimony of the Debtor"); *In re Miller*, 39 F.3d 301, 305 ("The intent to deceive is largely an assessment of the credibility and demeanor of the debtor").

The uncontested facts show Defendant knew CD&B was likely insolvent at the time of both the Application for Funding (August 3, 2021) (the "Application") and when he entered into the Agreement and signed the R&As (August 9, 2021). Specifically, CD&B was in arrears to FGLC, one of its largest suppliers, as of August 3rd and August 9th, 2021, [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 10, *FGLC State Court Complaint*; Ex. 11, *FGLC POC*; Ex. 8, *CD&B Petition*, Schedule E/F, line 3.9, p. 17 of 42; Ex. 3, *Excerpts from Keith Depo.* at 99:10-23; 100:1-25; 101:1-7] – so far in arrears that FGLC noted its intention to lien CD&B's bank account (August 24, 2024), and Defendant consulted a bankruptcy attorney (at least as of September 9, 2021). [Ex. 1, *Plaintiff's Uncontested Facts*; *Ex. B*, p. 3-4 of 8 [ECF #50-2]; Ex. 3, *Excerpts from Keith Depo.*at 134:15-25; 135:1-23]. By way of his personal guaranty of CD&B's debt to FGLC, Defendant's

financial situation was similarly precarious and Defendant, personally, was likely insolvent as of August 3rd and August 9th, 2021. [*Keith Petition*, Schedule E/F, line 4.17, p. 35 of 88 [ECF #1]; Ex. 10, *FGLC State Court Complaint*; Ex. 11, *FGLC, POC*, p. 8 of 39; Ex. 3, *Excerpts from Keith Depo.*at 85:16-25, 86:1-14; 87-3-7].

Defendant's silence and non-disclosure of the facts concerning CD&B's and his own personal financial situation to Kapitus at the time of both the Application (August 3, 2021) and when entering into the Agreement, signing the R&As, and receiving funding (August 9, 2021) create genuine issues of material fact as to whether Defendant obtained money from Plaintiff via misrepresentations/false pretenses (silence or omissions) and preclude granting summary judgment as to Plaintiff's claims under §523(a)(2)(A). These issues of fact hinge on Defendant's intent, which, in turn, requires the Court, as trier of fact, to assess the credibility and demeanor of the Defendant, and, therefore, are not negated merely by statements contained within the Defendant's Declaration as to his intent. [ECF # 50-2].

C. Material questions of fact remain as to whether Defendant obtained money from Plaintiff via the use of a statement in writing that was materially false respecting the Defendant's financial condition (11 U.S.C. § 523(a)(2)(B)).

Section 523(a)(2)(B) of the Bankruptcy Code excepts from discharge any debt obtained by use of a statement in writing that is materially false respecting the debtor's or an insider's financial condition on which the creditor to whom the debt is owed reasonably relied, and that the debtor caused to be made or published with intent to deceive. 11 U.S.C. §523(a)(2)(B). Defendant caused many statements in writing to be to be published to the Plaintiff respecting not just the financial condition of CD&B but also his own financial condition via the Agreement and the R&As. [*See generally*, Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 4, *Agreement*, ¶ 2.1, p. 7 of 21; Ex. 5, *R&As*].

"[T]o fall within § 523(a)(2)(B), the writing must have been written, signed, or adopted and

used by the debtor." *In re McCracken*, 586 B.R. 247, 255 (Bankr. S.D. Tex. 2018) (*citing* 4 COLLIER ON BANKRUPTCY, ¶ 523.08[2][a] (16th ed)). Defendant acknowledges signing the Agreement both in his personal capacity as guarantor and on behalf of CD&B. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 4, *Agreement*, pp. 3, 8, 15, 17 of 21; Ex. 3, *Excerpts from Keith Depo.*at 47:10-24; 50:4-25;51:1-25;52:1-23]. Defendant also acknowledges signing the R&As. [Ex. 1, *Plaintiff's Uncontested Facts*; *Defendant's Response to Complaint*, ¶ 29 [ECF # 11]; Ex. 3, *Excerpts from Keith Depo.*at 75: 20-25, 76:1-7].

"A materially false statement is one that 'paints a substantially untruthful picture of a financial condition by misrepresenting information of the type which would normally affect the decision to grant credit.'" *In re McCracken*, 586 B.R. 247, 256 (Bankr. S.D. Tex. 2018) (*quoting In re Nance*, 70 B.R. 318, 321 (Bankr. N.D. Tex. 1987)). "[I]n determining whether a false statement is material, a relevant although not dispositive inquiry is whether the lender would have made the loan had he known the debtor's true situation." *In re McCracken*, 586 B.R. 247, 256 (internal citations committed).

On August 9, 2021, in reliance on the representations and warranties made by Defendant, Kapitus agreed to purchase Merchant's Receipts and funded to Merchant the Purchase Price as called for in the Agreement with the Merchant. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 7, *Contract Funding*; Ex. 3, *Excerpts from Keith Depo.*at 58:7-10; Ex. 13, *Excerpts from Wolfson Depo.* at 144, 10-25; 145: 1-5; 145:24-25; 146:1-8; *Complain*t, ¶ 28, p. 5 of 29 [ECF 1]]. Funding is the last step in the process. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 13, *Excerpts from Wolfson Depo.* at 137:20-24; *Complain*t, ¶ 28, p. 5 of 29 [ECF #1]]. Kapitus would not have funded the Agreement absent Defendant's signature on the R&As both for the Merchant and personally. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 13, *Excerpts from Wolfson Depo.* at 144, 10-25; 145: 1-5].

Kapitus would not have funded the Agreement absent Defendant's signature on the Agreement both for the Merchant and personally. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 13, *Excerpts from Wolfson Depo.* at 145: 1-5; 145:24-25; 146:1-8].

"A document qualifies as materially false if it contains information causing it to be substantially inaccurate or omits relevant information." *In re McCracken*, 586 B.R. 247, 256 (internal citations committed). (Emphasis added). Defendant, personally, represented and warranted to Plaintiff that CD&B was currently in compliance with all loans, financing agreements, promissory notes, and/or other obligations of indebtedness, except as disclosed to Purchaser/Kapitus. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 4, *Agreement*, ¶ 2.1, p. 7 of 21]. The uncontested facts show this statement was not true at the time it was made to Plaintiff on August 9, 2021. Unbeknownst (and undisclosed) to Plaintiff, at the time Defendant entered into the Agreement and signed the R&As, CD&B was significantly in arrears to FGLC. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 10, *FGLC State Court Complaint*; Ex. 11, *FGLC POC*; *Keith Petition*, Case No. 21-60559, Schedule E/F, line 4.17, p. 35 of 88; Ex. 8, *CD&B Petition* Schedule E/F, line 3.9, p. 17 of 42; Ex. 3, *Excerpts from Keith Depo.*at 99:10-23; 100:1-25; 101:1-7]. Defendant represented and warranted to Plaintiff that he, personally, was currently in compliance with all loans, financing agreements, promissory notes, and/or other obligations of indebtedness, except as disclosed Purchaser/Kapitus. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 4, *Agreement*, ¶ 2.1, p. 7 of 21]. The uncontested facts show this statement was also not true at the time it was made to Plaintiff on August 9, 2021. Unbeknownst (and undisclosed) to Plaintiff, Defendant was a personal guarantor of CD&B's debt to FGLC. [Ex. 1, *Plaintiff's Uncontested Facts*; *Keith Petition*, Case No. 21-60559, Schedule E/F, line 4.17, p. 35 of 88; Ex. 11, *FGLC POC*, Ex. A-1; Ex. 3, *Excerpts from Keith Depo.*at 85:16-25;86:1-14;87-3-7]. On August 9, 2023, when Defendant entered into the Agreement with Kapitus and signed the

R&As, Defendant, by way of his personal guaranty, was in arrears to FGLC. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 11, *FGLC POC*, p. 8 of 39; Ex. 10, *FGLC State Court Complaint*, pp.4-5; Ex. 3, *Excerpts from Keith Depo.*at 99:10-23; 100:1-25; 101:1-7].

In executing the Agreement, on August 9, 2021, Defendant, personally, represented and warranted to Plaintiff that CD&B was not insolvent and was not contemplating bankruptcy. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 4, *Agreement*, ¶ 2.9, p. 7 of 21; Ex. 3, *Excerpts from Keith Depo.*at 150:7-19]. Pursuant to the R&As, Defendant, personally, also represented and warranted to Plaintiff on August 9, 2021:

- He did not anticipate closing his business for any reason over the next 12 months [Ex. 5, *R&As*, ¶5 ***but cf.,*** Ex. 3, *Excerpts from Keith Depo.*at 18:25; 19:1-2; 76:16-19; Ex. 8, *CD&B Petition*];
- Neither he nor his business planned to file bankruptcy within the next 12 months [Ex. 5, *R&As*, ¶ 7; ***but cf.,*** Ex. 1, *Keith Petition*, Case No. 21-60559; Ex. 8, *CD&B Petition*; Ex. 3, *Excerpts from Keith Depo.*at 18:25; 19:1-2; 76:16-19;]; and
- Neither he nor his business were in arrears on any business or personal loans or other financial obligations, except as previously disclosed to Kapitus in writing" [Ex. 5, *R&As*, at ¶ 9 ***but cf.,*** Ex. 11, *FGLC State Court Complaint*; Ex. 11, *FGLC POC; Keith Petition*, Case No. 21-60559, Schedule E/F, line 4.17, p. 35 of 88 [ECF #1]; Ex. 8, *CD&B Petition*, Schedule E/F, line 3.9, p. 17 of 42; Ex. 3, *Excerpts from Keith Depo.*at 99:10-23; 100:1-25; 101:1-7].

Regardless of these statements, as well as others, made in writing, respecting both CD&B and Defendant's personal financial condition, and upon which Plaintiff asserts it reasonably relied in funding the Agreement, as well as the many facts and documents supporting the questionability (if

not outright falsehood) of these statements at the time they were made (August 9, 2021), Defendant insists no genuine issues of material fact remain and offers, in support of this, his personal Declaration. [*Ex. B* [ECF # 50-2]].

Furthermore, the uncontested facts show, the IP address "24.243.229.113" on the Application for Funding relates to Copperas Cove, Texas. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 15, *Excerpts from Podhorzer Depo.* at 57:4-21; Ex. 14, *G Suite Tools, IP Location Search, dated 08.09.2023*]. Given the unique IP address on the Application for Funding is registered to Copperas Cove, Texas, where Defendant lived at the time of the Application (August 3, 2021), there are genuine issues of material fact as to whether Defendant: (1) filled out the Application; (2) saw the Application prior to the adversary proceeding; (3) signed or provided his electronic signature on the Application; (4) provided the average monthly sales for CD&B of $170,369.49 in the Application and, accordingly, as to whether Defendant made or published statements to Plaintiff with the intent to deceive. [*Defendant's Ex. B [ECF #50-2]*, ***but cf.***, Ex. 15, *Excerpts from Podhorzer Depo.* at 57:4-21; Ex. 14, *G Suite Tools, IP Location Search, dated 08.09.2023*].

These facts (both contested and uncontested) raise questions of material fact as to whether Defendant obtained funds from Plaintiff by use of a statement in writing that was materially false respecting the debtor's or an insider's financial condition on which the creditor to whom the debt is owed reasonably relied, and that the debtor/ defendant caused to be made or published with intent to deceive.

These issues of material fact are not settled merely by Defendant's Declaration [ECF # 50-2]; nor would they be settled by an affidavit offered by Plaintiff stating Plaintiff's reliance was, in fact, reasonable. Section 523(a)(2)(B)(iv) requires that the written statement used to obtain a debt be made by the debtor with an intent to deceive the creditor. 11 U.S.C. § 523(a)(2)(B)(iv). "Unless

a debtor admits to having an intent to deceive a creditor, a court looks at the totality of the circumstances to infer whether the statement was knowingly false or made with a "[r]eckless disregard for the truth or falsity of [the] statement combined with the sheer magnitude of the resultant misrepresentation ...." *In re McCracken*, 586 B.R. 247, 259 (Bankr. S.D. Tex. 2018) (*quoting In re Morrison*, 555 F.3d 473, 482 (5th Cir. 2009) and *In re Miller*, 39 F.3d 301, 305)). "The reasonableness of a creditor's reliance (under 11 USC § 523(a)(2)(B)) is (also) a factual determination that "should be judged in light of the totality of the circumstances." *Id.*, at 257 (*quoting Matter of Coston*, 991 F.2d 257, 261 (5th Cir. 1993)).

Additionally, question of Defendant's intent under §523(a)(2)(B) "hinges on the credibility of witnesses," which must be assessed by the trier of fact. *In re Alvarado*, 608 B.R. 877, 885 (internal citation omitted). "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." *In re McCracken*, 586 B.R. 247, 259 (internal citation omitted). Instead, "where a debtor testifies as to [his] subjective intent, the bankruptcy court must make a credibility determination, considering the debtor's testimony, along with other objective circumstantial evidence of the debtor's subjective intent." *Id*. (*quoting In re Mercer*, 246 F.3d 391, 409).

Accordingly, as outlined above, genuine issues of material fact preclude granting summary judgment in favor of Defendant as to Plaintiff's claims under Section 523(a)(2)(B).

D. Questions of material fact remain as to whether Defendant committed fraud or defalcation while acting in a fiduciary capacity pursuant to 11 U.S.C. § 523(a)(4).

Under Section 523(a)(4) of the Bankruptcy Code, a debtor cannot receive a discharge "from any debt ... for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or

larceny." 11 U.S.C. § 523(a)(4).[6] " According to the Fifth Circuit, "[t]his bar to discharge reaches 'debts incurred through abuses of fiduciary positions ... [and] involv[ing] debts arising from the debtor's acquisition or use of property that is not the debtor's.'" *In re Whittington*, 530 B.R. 360, 387–88 (*quoting In re Harwood*, 637 F.3d 615, 620 (5th Cir. 2011)). "The term 'fiduciary' in this context is limited to 'technical trusts' and to traditional fiduciary relationships involving 'trust-type' obligations imposed by statute or common law." *Id.* However, "state law is important in determining whether or not a trust obligation exists." *In re Whittington*, 530 B.R. 360, 387–88 (*quoting In re Bennett*, 989 F.2d 779, 784 (5th Cir. 1993)). (Emphasis added).

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 a mixed question of law and fact precluding summary judgment).

First, the Agreement is governed by Virginia law. [*Agreement*, ¶ 4.5, p. 10 of 21]. Under Virginia law, an express trust can be "manifested either in writing or through the parties' actions" *In re Bilter*, 413 B.R. 290, 304–05 (Bankr. E.D. Va. 2009) (*quoting In re Strack*, 524 F.3d 493, 498 (4th Cir. 2008) ("In order to constitute an express trust there must be either explicit language

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[6] Defendant would ask the Court to believe, in essence, Plaintiff's claims under Section 523(a)(4) are, at best, toss away arguments, and, at worst, a violation of Federal Rule of Civil Procedure 11 as incorporated by Federal Rule of Bankruptcy Procedure 9011. [*Defendant's Motion*, p. 14 of 22]. However, Plaintiff's Complaint alleges fraud or defalcation while acting in a fiduciary capacity under Section 523(a)(4) incorporating 67 specifically factual allegations against Defendant as well as setting forth particular, salient facts as to the relevant cause of action, including, but not limited to CD&B's likely insolvency at the time Defendant entered into the Agreement with Plaintiff and signed the R&As, Defendant's fiduciary duties to CD&B's creditors due to CD&B's likely insolvency, the Agreement calling for the application of Virginia law, and the application of Virginia law to the facts relevant to Plaintiff's Section 523(a)(4) claim. [*Complaint* ¶¶ 97-126, pp. 21-25 of 29 [ECF 1].

Plaintiff agrees, however, post-discovery to withdraw and not to pursue its claims as to embezzlement and larceny pursuant to 11 U.S.C. 523(4) further or at trial.

to that effect or circumstances which show with reasonable certainty that a trust was intended to be created")). The parties' use of the word "trust" is to be given weight, but it is not determinative. *Id. See also Broaddus v. Gresham*, 26 S.E.2d at 36 (Va. 1943) (recognizing that an express trust can be established without use of any "technical words")). "All that is necessary is the 'unequivocal intent' 'that the legal estate [be] vested in one person, to be held in some manner or for some purpose on behalf of another.'" *In re Bilter*, 413 B.R. 290, 305, (*quoting In re Strack*, 524 F.3d 493, 498). "At bottom, '[i]f the intention is that the money shall be kept or used as a separate fund for the benefit of the payor or a third person, a trust is created." *Id.*

Under Virginia law, the Agreement created an express trust by showing with reasonable certainty that a trust was intended to be created under the terms of the Agreement. Specifically, Plaintiff purchased CD&B/Merchant's Receipts, and, therefore, Plaintiff was the owner of CD&B's future Receipts. [Ex. 4, *Agreement,* p. 1 of 21; Ex. 7, *Contract Funding*]. Plaintiff then placed Defendant in a position of trust to ensure continued performance of the Agreement and the remittance of the Receipts Plaintiff purchased to Plaintiff. Specifically, the Agreement required CD&B to use only a single, specified deposit account to deposit all Receipts collected by CD&B (the "Account"), which Account was designated by the parties in the Agreement. [Ex. 4, *Agreement,* ¶¶ 7-8, §§ 1.3, 2.6, pp. 1, 2, 5, and 7 p. 21; *Ex. B*, p. 4 of 8 [ECF #50-2]]. Defendant, as the managing member/sole owner of CD&B, had a fiduciary duty to Plaintiff to hold Plaintiff's purchased Receipts (the res) in trust on Plaintiff's behalf via the use of the Account and to make sure those Receipts were remitted to Plaintiff. [Ex. 4, *Agreement,* ¶¶ 7-8, §§ 1.3, 2.6, pp. 1, 2, 5, and 7 p.21; *Complaint*, ¶¶ 117-121, pp.24-25 of 29 [ECF #1]; *Ex. B*, p. 4 of 8 [ECF #50-2]].

Second, setting aside Defendant's fiduciary duties to Plaintiff via the Agreement, given the uncontested (and undisclosed) facts concerning CD&B's financial situation as of August 9, 2021,

mixed issues of law and fact persist as to whether CD&B was insolvent at the time of the Agreement. For all intents and purposes, CD&B ceased operations on or before August 24, 2021, when Defendant states he was made aware of FGLC's intent to lien CD&B's business account(s). [Ex. 3, *Excerpts from Keith Depo.*at 18:25; 19:1-2; 76:16-19; Ex. 8, *CD&B Petition*; ***but cf.***, *Ex. B*, p. 3 of 8 [ECF # 50-2]]; Ex. 3, *Excerpts from Keith Depo.*at 135:2-23].[7] As noted by the Hon. Judge Isgur, "when the officers and directors of a corporation become aware that their corporation is insolvent or within the 'zone of insolvency,' fiduciary duties expand to creditors of the corporation." *In re Rajabali*, 365 B.R. 702, 708 (Bankr. S.D. Tex. 2007), *citing Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 534, n. 24 (5th Cir. 2004). If, as Plaintiff believes, CD&B was insolvent at the time Defendant entered into the Agreement with Plaintiff then Defendant, personally, owed fiduciary duties to CD&B's creditors, including Plaintiff. *In re Kahn*, 533 B.R. 576, 586 (Bankr. W.D. Tex. 2015) ("Fiduciary duties can be extended to corporate officers …if the transaction is made while the corporation is insolvent"). This mixed question of law and fact CD&B insolvency, and, therefore, whether Defendant owed a fiduciary obligation to Plaintiff also precludes summary judgment should the Court not enforce the choice of law provision in the Agreement, or, alternatively, find the Agreement did not create a trust under Virginia law.

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[7] Within the analysis of a claim to deny discharge for fraud pursuant to Section 523(a), courts have found that a debtor's insolvency at a particular time may be established through the process of retrojection by "showing that the debtor was insolvent a reasonable time after the transfer and that the debtor's financial condition did not materially change during the intervening period." *In re Cowin*, No. 13-30984, 2014 WL 1168714, at *28 (Bankr. S.D. Tex. Mar. 21, 2014), *quoting Weaver v. Kellogg*, 216 B.R. 563, 576 (S.D.Tex.1997); *In re Pace*, 456 B.R. 253, 273 (Bankr.W.D. Tex 2011).

Employing this method here, the funds from Plaintiff were received by CD&B on August 9, 2021. [Ex. 7, *Contract Funding*]. The evidence shows CD&B was significantly in arrears to FGLC as of August 9, 2021, and this financial liability did not materially improve after August 9, 2021. [Ex. 10, *FGLC State Court Complaint*; Ex. 11, *FGLC POC; Keith Petition*, Schedule E/F, line 4.17, p. 35 of 88; Ex. 8, *CD&B Petition*, Schedule E/F, line 3.9, p. 17 of 42; Ex. 3, Excerpts from Keith Depo. at 99:10-23; 100:1-25; 101:1-7]. Further, Defendant's own declaration establishes that from August 9, 2021, to August 24, 2021, when he learned of FGLC's intent to lien, CD&B's financial situation never materially changed or improved. [Ex. 7. *Contract Funding; Defendant's Ex. B*, p. 2 of 8 [ECF #50-2]]. Accordingly, CD&B was likely insolvent as of at least August 9, 2021.

The second element of § 523(a)(4) is that the debtor-fiduciary must have committed fraud or defalcation while acting in his or her fiduciary capacity. Fraud in a fiduciary capacity under § 523(a)(4) requires "positive fraud, or fraud in fact…." *In re Amberson*, 2021 WL 1845328, at *13 (Bankr. W.D. Tex. May 7, 2021), *aff'd sub nom. Amberson v. McAllen*, No. AP 20-05060-CAG, 2022 WL 3581185 (W.D. Tex. Aug. 19, 2022), *aff'd sub nom. Matter of Amberson*, 73 F.4th 348 (5th Cir. 2023). "In other words, it requires a showing of 'wrongful intent.'" *In re Amberson* 2021 WL 1845328, at *13 (*citing quoting Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 274). "Fraud also requires 'a false statement or omission.'" *Id.*

As set forth above as well as in Plaintiff's Exhibits 1 and 2, numerous uncontested facts taken in conjunction with contested facts, raise material factual questions as to whether Defendant committed fraud either via silence/omission (§523(a)(2)(A)) or via his written statements (§523(a)(2)(B)) to Plaintiff, and, therefore, also preclude granting summary judgment as to whether or not Defendant committed fraud with respect to his fiduciary obligations to Kapitus established under the Agreement and via the application of Virginia law.

Defalcation "may be used to refer to nonfraudulent breaches of fiduciary duty." *In re Amberson*, 2021 WL 1845328, at *13 (*quoting Bullock*, 569 U.S. 267, 276). (Emphasis added). As such, defalcation "includes a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior." *Id*. *Bullock* further stated, however, that where actual knowledge of wrongdoing is absent, conduct rises to the level of recklessness if the fiduciary consciously disregards (or is willfully blind to) a substantial and unjustifiable risk that his conduct will turn out to violate a fiduciary duty. *Bullock*, 569 U.S. at 274. (Emphasis added). Defendant ceased performing his mandated duties under the Agreement almost immediately. CD&B made no payments to Plaintiff pursuant to the Agreement after August 2021.

[Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 8, *Merchant Statement of Activity*]. Defendant, personally, by way of his guaranty, has never made a payment to Plaintiff. [Ex. 3, *Excerpts from Keith Depo.*at 154:14-19]. For all intents and purposes, CD&B ceased operations on or before August 24, 2021. [Ex. 3, *Excerpts from Keith Depo.*at 18:25; 19:1-2; 76:16-19; Ex. 8, *CD&B Petition*; ***but cf***., *Defendant's Ex. B*, p. 3 of 8 [ECF #50-2]]; Ex. 3, *Excerpts from Keith Depo.*at 135:2-23]. Further, both CD&B and Defendant, personally, were significantly in arrears to FGLC at the time the Agreement was entered into (August 9, 2021) and continued to be so afterwards; Defendant had positive obligations under the Agreement (as well as the R&As) to inform Plaintiff at the time of the Agreement as well as afterwards as to these arrearages. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 10, *FGLC State Court Complaint*; Ex. 11, *FGLC POC*; Ex. 1; *Keith Petition*, Schedule E/F, line 4.17, p. 35 of 88 [ECF #1]; Ex. 8, *CD&B Petition*, Schedule E/F, line 3.9, p. 17 of 42; Ex. 4, *Agreemen*t; Ex. 5, *R&As*, ¶ 9; Ex. 3, *Excerpts from Keith Depo.*at 99:10-23; 100:1-25; 101:1-7].

Defendant's silence as to the same at the time of the Agreement as well as afterwards demonstrates material factual questions exist as to whether Defendant consciously disregarded (or was willfully blind to) a substantial and unjustifiable risk that his conduct would violate his fiduciary duties to Plaintiff. Defendant's Declaration supports this factual inquiry, stating, in part, he "…did not consider [himself] in arrears in any debt at the time that [he] signed the agreement" with Plaintiff, which included the R&As. [*Ex. B*, pp. 2-3 of 8 [ECF # 50-2]].

Accordingly, numerous uncontested facts, taken in conjunction with contested facts, raise issues of material fact as to whether Defendant consciously disregarded (or was willfully blind to) a substantial and unjustifiable risk his conduct would violate his fiduciary duties owed to Plaintiff and, therefore, committed defalcation while acting in a fiduciary capacity under §523(a)(4).

E. Material questions of fact remain as to whether Defendant's injury to Plaintiff was willful and malicious under 11 U.S.C. § 523(a)(6).

Section 523(a)(6)) of the Bankruptcy Code bars a discharge of debts obtained by willful and malicious injury by the debtor to another entity or to the property of another entity. 11 U.S.C. § 523(a)(6). For the act to be willful and malicious "a debtor must have acted with 'objective substantial certainty or subjective motive' to inflict injury." *In re Kahn*, 533 B.R. 576, 588 (Bankr. W.D. Tex. 2015) (*quoting In re Williams*, 337 F.3d 504, 508–09 (5th Cir. 2003)). (Emphasis added). Whether the acts were substantially certain to cause injury (the "objective test") is based on "whether the [d]efendant's actions, which from a reasonable person's standpoint were substantially certain to result in harm, are such that the court ought to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the Plaintiff." *In re Kahn*, 533 B.R. 576, 588 (*quoting In re Powers*, 421 B.R. 326, 335 (Bankr. W.D.Tex. 2009)). A subjective motive to cause harm (the "subjective test") exists when a tortfeasor acts "deliberately and intentionally, in knowing disregard of the rights of another." *In re Kahn*, 533 B.R. 576, 588 (*quoting Miller*, 156 F.3d at 605–06).

The Supreme Court has determined that the word "willful" under Section 523(a)(6) modifies the word "injury," indicating a finding of nondischargeability requires a deliberate or intentional injury, not merely a deliberate act that results in injury. *In re Kahn*, 533 B.R. 576, 588, *citing Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974 (1998). In defining the term "malicious" under Section 523(a)(6), the Fifth Circuit holds it means "implied malice," as opposed to "special malice." *In re Kahn*, 533 B.R. 576, 588 (*quoting Miller*, 156 F.3d at 605). "Implied malice" means "acts done with the actual intent to cause injury," whereas "special malice" requires a showing of a motive to harm. *Id*. The Fifth Circuit, in recognizing that the definition of implied malice is the same standard used by the Supreme Court for "willful injury," held that a finding of

implied malice can render a debt non-dischargeable under Section 523(a)(6). *Id*.

Bankruptcy courts in Texas have found actions undertaken to cause financial loss can be willful and malicious within under §523(a)(6). "It is well-established under the law of the Fifth Circuit that where a debtor has acted in a manner substantially certain to cause financial loss and injury to the [creditor], [he] therefore inflicted a willful and malicious injury upon [the creditor]." *In re Sligh*, 2022 WL 1101537, at *6 (Bankr. N.D. Tex. Apr. 12, 2022) (*citing In re Kahn*, 533 B.R. 576 and *In re Gamble-Ledbetter*, 419 B.R. 682, 699 (Bankr. E.D. Tex. 2009). *See also In re Hartman*, 2021 WL 5343923, at *4 (Bankr. N.D. Tex. Nov. 16, 2021) ("This injury (under Section 523(a)(6)) may include physical harm or financial harm").

Defendant and CD&B breached the Agreement almost immediately after entering it. CD&B made no payments to Plaintiff pursuant to the Agreement after August 2021. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 8, *Merchant Statement of Activity*]. Defendant, personally, via his guaranty, has never made a payment to Plaintiff. [Ex. 3, *Excerpts from Keith Depo.*at 154:14-19]. For all intents and purposes, CD&B ceased operations on or before August 24, 2021. [Ex. 3, *Excerpts from Keith Depo.*at 18:25; 19:1-2; 76:16-19; Ex. 8, *CD&B Petition*, Case No. 21-60560; ***but cf.***, *Ex. B*, p. 3 of 8 [ECF #50-2]]; Ex. 3, *Excerpts from Keith Depo.*at 135:2-23]. Further, both CD&B and Defendant, personally, were significantly in arrears to FGLC at the time the Agreement was entered into (August 9, 2021) and continued to be so afterwards despite Defendant's affirmative obligation to inform Plaintiff at the time of the Agreement as well as afterwards as to these arrearages. [Ex. 1, *Plaintiff's Uncontested Facts*; Ex. 10, *FGLC State Court Complaint*; Ex. 11, *FGLC, POC, Keith Petition*, Schedule E/F, line 4.17, p. 35 of 88 [ECF #1]; Ex. 8, *CD&B Petition*,, Schedule E/F, line 3.9, p. 17 of 42; Ex. 4, *Agreement*, ¶ 2.1, p. 7 of 21; Ex. 5, *R&As*, ¶ 9; Ex. 3, *Excerpts from Keith Depo.*at 99:10-23; 100:1-25; 101:1-7].

Accordingly, the uncontested facts when taken in conjunction with the contested facts raise factual questions under the objective test as to whether Defendant's actions, from a reasonable person's standpoint, were substantially certain to result in harm to Plaintiff such that the Court ought to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the Plaintiff. *In re Kahn*, 533 B.R. 576; *In re Powers*, 421 B.R. 326.

F. Material questions of fact remain as to Defendant's claims CD&B's economic problems were driven by COVID-19 related factors.

Defendant testified CD&B's economic problems were driven by COVID-19 related factors within the construction industry. [Ex. 3, *Excerpts from Keith Depo*.at 163:6-16]. This is not brought up in Defendant's Declaration [ECF 50-2] or within Defendant's Motion [ECF 50].

No evidence has been produced by Defendant regarding the effects of COVID-19 upon CD&B or upon himself, personally. For example, no Paycheck Protection Program ("PPP") loans are included in CD&B's Petition, Schedules and SOFA or Amended SOFA. [Ex. 8, *CD&B Petition*]. A search of ProPublica's Tracking PPP Web site for the encompassing phrase "Coyote Design" reveals no such loans to CD&B. [Ex. 20, *ProPublica PPP Loan Search Dated August 18, 2023*]. Defendant also provides no evidence as to whether state or local shutdown orders affected businesses such as CD&B's. A search for information at the Web site for the City of Copperas Cove related to the City's resolutions dealing with COVID-19 for 2020 and 2021 found no city-wide orders related to COVID or the shutdown of any business operations in the city. *See generally* https://www.copperascovetx.gov/city_secretary/resolutions/. Regarding the State of Texas, on March 13, 2020, Governor Abbott officially declared a state of disaster for all counties in Texas, which Proclamation did not shut down any businesses. [Ex. 17, *Texas COVD-19 Disaster Proclamation Dated March 13, 2020*].[8] Governor Abbott's COVD-19 Disaster Proclamation was

[8] Federal Rule of Evidence 201(b) permits a court to take judicial notice of an adjudicative fact that

thereafter continued each month with the last continuance being dated March 6, 2021. *See* https://gov.texas.gov/coronavirus-executive-orders. On March 19, 2020, Governor Abbott issued Executive Order GA-08 establishing, on a statewide basis, certain orders from 11:59 pm on March 20, 2020, until 11:59 pm on April 3, 2020, none of these orders specifically affected or limited the construction industry and only shut down operations at schools. [Ex. 18, *EO-GA-08 Dated March 19, 2020*]. Importantly, on March 2, 2021 (nearly five months prior to the Agreement), Governor Abbott issued EO-GA-34, which states, in part, effective March 10, 2021, at 12:01 a.m.:

1. In all counties not in an area with high hospitalizations as defined below:
   a. there are no COVID-19-related operating limits for any business or other establishment; and

2. In any county located in an area with high hospitalizations as defined above:
   a. there are no state-imposed COVID-19-related operating limits for any business or other establishment;
   b. there is no state-imposed requirement to wear a face covering; and
   c. the county judge may use COVID-19-related mitigation strategies; *provided, however, that*:
      i. business and other establishments may not be required to operate at less than 50 percent of total occupancy, with no operating limits allowed to be imposed for religious services (including those conducted in churches, congregations, and houses of worship), public and private schools and institutions of higher education, and child-care services;
      ii. no jurisdiction may impose confinement in jail as a penalty for violating any order issued in response to COVID-19; and
      iii. no jurisdiction may impose a penalty of any kind for failure to wear a face covering or failure to mandate that customers or employees wear face coverings, except that a legally authorized official may act to enforce trespassing laws and remove violators at the request of a business establishment or other property owner.

[Ex. 19, *EO-GA-34 dated March 2, 2021*].

is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. FED. R. EVID. 201(b). A court may also take judicial notice, whether requested or not, at any stage in the proceeding. FED. R. EVID. 201(c) & (f); *In re James*, 300 B.R. 890, 894 (Bankr. W.D. Tex. 2003).

In light of Defendant's testimony that CD&B's financial situation was negatively affected by COVID-19, recognized as a "disaster" in Texas from March 13, 2020 until ~ March 6, 2021 (all of which was well before Defendant signed the Agreement and R&As) and Texas declaring itself open for business on as of 12:01 a.m on March 10, 2021 (nearly five months prior to August 9, 2021), questions of fact exist as to: (1) If, when, or how the COVID-19 pandemic affected CD&B's business and/or its financial condition; and (2) If, when, or how the COVID-19 pandemic affected Defendant's personal, financial condition. If, in fact, COVID-19 effected CD&B's or Defendant's personal financial situation, was Defendant aware of these effects by August 3, 2021, or by August 9, 2021?

Defendant's deposition testimony taken in conjunction with the uncontested and contested facts set forth in Plaintiff's Exhibits 1 and 2 and public information cited herein, raises material questions of fact as to whether Defendant: (1) obtained money from Plaintiff via false pretenses to §523(a)(2)(A); (2) made or published statements to Plaintiff with the intent to deceive as to his and CD&B's financial situation under the Agreement and the R&A's pursuant to §523(a)(2)(B); (3) consciously disregarded (or was willfully blind to) a substantial and unjustifiable risk that his conduct would violate his fiduciary duties owed to Plaintiff, and, therefore, committed fraud or defalcation while acting in a fiduciary capacity under §523(a)(4); and (4) whether (under the objective test) Defendant's actions, from a reasonable person's standpoint, were substantially certain to result in harm to Plaintiff such that the Court ought to infer that the debtor's subjective intent was to inflict a willful and malicious injury on the Plaintiff under §523(a)(6).

VII. CONCLUSION AND PRAYER

For the reasons set forth above, Plaintiff prays this Court deny Defendant's Motion in its entirety, and for any and all other relief this Court deems proper in law or equity.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on August 25, 2023, a true and correct copy of the foregoing document was served via electronic mail upon the following counsel of record below.

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