

UNITED STATES BANKRUPTCY COURT  
 NORTHERN DISTRICT OF INDIANA  
 HAMMOND DIVISION

IN RE:	)	
	)	
SHARON ALICIA RANSOM,	)	CASE NO. 10-25767 JPK
	)	Chapter 7
Debtor.	)	
*****	)	
CENTIER BANK,	)	
	)	
Plaintiff,	)	
v.	)	ADVERSARY NO. 11-2047
	)	
SHARON ALICIA RANSOM,	)	
	)	
Defendant.	)	

AMENDED ORDER ON DEFENDANT’S MOTION TO DISMISS

This adversary proceeding was commenced by a complaint filed on March 25, 2011 by the plaintiff Centier Bank (“Centier”) against the debtor Sharon Alicia Ransom (“Ransom”). The complaint seeks to except from discharge certain debts alleged by Centier to be owed it by Ransom pursuant to provisions of 11 U.S.C. § 523(a)(2), 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(6). On May 16, 2011, Ransom filed a motion to dismiss, along with a brief in support thereof, based exclusively on Fed.R.Bankr.P. 7012(b)/Fed.R.Civ.P. 12(b)(6). Centier has not filed a response to the that motion. The court has jurisdiction of this adversary proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and (b), and N.D.Ind.L.R. 200.1. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

The motion to dismiss filed by Ransom is based solely on the face of the complaint; no matters outside of the pleadings have been presented to the court. Federal Rule of Civil Procedure 12(b)(6), made applicable to adversary proceedings by Fed.R.Bankr.P. 7012(b), provides for the defense of “failure to state a claim upon which relief can be granted”. As this court stated in the case of *Weichman v. Lazzaro, et al.*, 422 B.R. 143, 156 (Bankr. N.D. Ind. 2010):

Fed.R.Civ.P. 12(b)(6), incorporated into contested matters by operation of Fed.R.Bankr.P. 7012(b), provides that "(e)very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted." Rather than state the Rule 12(b)(6) defense which it has raised in a responsive pleading (i.e., an answer), the defendant has exercised the option provided to it by Rule 12(b) to assert that defense in a separate motion which raises the ground of "failure to state a claim upon which relief can be granted" as a defense to the plaintiff's action. Properly understood, this defense asserts that based upon the allegations/averments of the plaintiff's complaint, the complaint does not state any cognizable legal basis upon which any relief requested by the complaint can be granted in relation to the defendant.

Under Fed.R.Bankr.P. 7008(a)/Fed.R.Civ.P. 8(a), a complaint must contain a short and plain statement of the grounds for the court's jurisdiction, a short and plain statement of the claim demonstrating that the pleader is entitled to relief, and a demand for the relief sought. In addition, when a claim in the complaint is based on fraud, Fed.R.Bankr.P. 7009(b)/Fed.R.Civ.P. 9(b) provides that a party must particularly state the circumstances constituting the fraud.<sup>1</sup> This court in *In re Weichman*, 422 B.R. 143, 146-47 (Bkrptcy. N.D. Ind, 2010) extensively reviewed the criteria against which the sufficiency of a complaint is to be judged generally and in circumstances when fraud is pled, stating the following:

The decision of the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), now provides the definitive standard for allegations which must be provided in a complaint pursuant to Fed.R.Civ.P. 8(a) and the standards by which a complaint is measured under that rule in the face of a Rule 12(b)(6) motion. *Bell Atlantic Corp.* eschewed the long-standing formulation of *Conley v. Gibson*, 78 S.Ct. 99 (1957) – that a complaint does not state a claim only if "no set of facts" could be postulated which would provide a ground for relief. The new standard is stated as follows:

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<sup>1</sup> Note that according to this rule, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests,” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (C.A.7 1994), a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed.2004) (hereinafter *Wright & Miller*) (“[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”), on the ASSUMPTION THAT ALL THE allegations in the complaint are true (even if doubtful in fact), see, e.g., *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (“Rule 12(b)(6) does not countenance ... dismissals based on a judge’s disbelief of a complaint’s factual allegations”); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely”). (footnote omitted)

127 S.Ct. 1995, 1964-1965.

As the court stated in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007):

To survive a motion to dismiss, a complaint must

contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” [citation omitted] A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. [citation omitted] The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. [citation omitted] Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” [citation omitted]

...

[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. [citation omitted] . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. [citation omitted] Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. [citation omitted] But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – “that the pleader is entitled to relief.” [citation omitted]

The foregoing are the basic standards by which the sufficiency of a complaint is judged against a challenge pursuant to Rule 12(b)(6). In addition, when allegation are fraud are made, or are necessary to be made to sustain a claim, Fed.R.Civ.P. 9(b) [made applicable to adversary proceedings by Fed.R.Bankr.P. 7009] comes into play. The rule states:

**(b) Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.

Application of the requirements of Rule 9(b) is also straightforward. The manner in which compliance is to be had with the rule has been well-defined by the United States Court of Appeals for the Seventh Circuit. In *Graue Mill Development Corp. v. Colonial Bank & Trust Company of Chicago*, 927 F.2d 988, 992-93 (7<sup>th</sup> Cir. 1991), the following was stated:

Graue Mill's second argument on appeal is that the district court erred in dismissing the RICO counts in its complaint for failure to allege predicate acts of fraud with sufficient specificity. The starting point for pleading fraud claims under RICO is Rule 9(b) of the Federal Rules of Civil Procedure. That rule states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with *particularity*." (emphasis added). Rule 9(b) effectively carves out an exception to the otherwise generally liberal pleading requirements under the Federal Rules. We read 9(b) to mean that RICO plaintiffs, like all other parties pleading fraud in federal court, must "state the time, place and content" of the alleged communications perpetrating the fraud. *U.S. Textiles Inc. v. Anheuser Busch Cos.*, 911 F.2d 1261, 1268 n. 6 (7<sup>th</sup> Cir.1990) (quoting *New England Data Servs. Inc. v. Becher*, 829 F.2d 286, 291 (1<sup>st</sup> Cir.1987)); see also *Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9<sup>th</sup> Cir.1989). Most importantly, complaints charging fraud must sufficiently allege the defendant's fraudulent intent. See *Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 403 (7<sup>th</sup> Cir.1984), *aff'd on other grounds*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). "Cryptic statements" suggesting fraud are not enough; "[m]ere allegations of fraud ..., averments to conditions of mind, or references to plans and schemes are too conclusional to satisfy the particularity requirements." *Flynn v. Merrick*, 881 F.2d 446, 449 (7<sup>th</sup> Cir.1989) (quoting *Hayduk v. Lanna*, 775 F.2d 441, 444 (1<sup>st</sup> Cir.1985)). Rather, pleadings must state the "specific content of the false representations as well as the identities of the parties to the misrepresentation." *Moore*, 885 F.2d at 540; see also *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7<sup>th</sup> Cir.1987) (complaint which "[did] not identify a single [fraudulent] statement ... or specify why that statement [was] fraudulent" failed to satisfy the requirements of Rule 9(b)).

To similar effect is the following statement in *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777 (7<sup>th</sup> Cir. 1994):

Rule 9(b) states that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” The rule is said to serve three main purposes: (1) protecting a defendant's reputation from harm; (2) minimizing “strike suits” and “fishing expeditions”; and (3) providing notice of the claim to the adverse party. See *Uni\*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 924 (7<sup>th</sup> Cir.1992); *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir.1987). Although some have questioned Rule 9(b)'s effectiveness in serving these purposes, the caselaw and commentary agree that the reference to “circumstances” in the rule requires “the plaintiff to state ‘the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.’ ” *Uni\*quality*, 974 F.2d at 923 (quoting *Bankers Trust Co. v. Old World Republic Ins. Co.*, 959 F.2d 677, 683 (7<sup>th</sup> Cir.1992)); see also *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1020 (7<sup>th</sup> Cir.1992) (stating that in a RICO action “the complaint must, at a minimum, describe the predicate acts with some specificity and ‘state the time, place, and content of the alleged communications perpetrating the fraud’ ”) (quoting *Graue Mill Dev. Corp. v. Colonial Bank & Trust Co.*, 927 F.2d 988, 992 (7<sup>th</sup> Cir.1991)); *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7<sup>th</sup> Cir.) (stating that Rule 9(b) “particularity” means “the who, what, when, where, and how: the first paragraph of any newspaper story”), *cert. denied*, 498 U.S. 941, 111 S.Ct. 347, 112 L.Ed.2d 312 (1990); 5 Wright & Miller, *supra*, § 1297, at 590. (footnote omitted)

This interpretation of Rule 9(b) has been consistently applied by the United States Court of Appeals for the Seventh Circuit, and continues to be so applied. As stated in *Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Services, Inc.*, 536 F.3d 663, 669 (7<sup>th</sup> Cir. 2008):

Despite its use of inartful terminology, the district court properly dismissed the plaintiffs' fraud claims for failure to state with particularity “who made the

fraudulent statement, when the fraudulent statement was made, and how the fraudulent statement was made.” *Id.* at \*3. The district court did not require the complaint to provide actual evidence of the claims; it merely required that the claims be pleaded with the requisite particularity. *See id.* Moreover, the district court correctly determined that the complaint failed to plead with particularity the who, when and how of the alleged frauds, all of which are required by Rule 9(b) for allegations of fraud. *See Gen. Elec. Capital*, 128 F.3d at 1078; *DiLeo*, 901 F.2d at 627. The district court therefore properly dismissed the fraud counts for failure to comply with Rule 9(b). (footnote omitted)

*Weichman*, 422 B.R. at 146-47.

To apply the foregoing criteria, it is necessary to determine the elements of the causes of action sought to be asserted by the complaint, and to compare those elements with the allegations of the complaint. If the court determines that the motion to dismiss should be granted as to one or more claims, then the next step is to decide whether those claims should be dismissed with or without prejudice. In this case, the complaint seeks to except from discharge certain claims alleged against the defendant pursuant to 11 U.S.C. § 523(a)(2), 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(6). However, in the complaint Centier does not specify under *which* section of § 523(a)(2) it is proceeding – § 523(a)(2)(A) or § 523(a)(2)(B)– so the court will examine both.

First, under § 523(a)(2)(A), certain categories of debt are excepted from discharge to the extent obtained by false pretenses, a false representation or actual fraud. In the case of *In re Hostetter*, 320 B.R. 674 (Bankr. N.D.Ind. 2005), this court set forth the elements of a cause of action which it will apply to actions under 11 U.S.C. § 523(a)(2)(A). While these elements were primarily developed with respect to actions under that statute premised upon “a false representation”, the elements also have applicability to an action under that section based upon “false pretenses” and to a lesser extent “actual fraud”. In *Hostetter*, this court articulated the

base elements necessary for an action under 11 U.S.C. § 523(a)(2)(A):

Although the precise formulation and specification of the number of elements varies from decision to decision, in order to sustain a *prima facie* case of fraud under § 523(a)(2)(A), courts have traditionally required a creditor to establish that: (1) the debtor made a representation to the creditor; (2) at the time of the representation, the debtor knew it to be false or the representation was made with such reckless disregard for the truth as to constitute willful misrepresentation; (3) the debtor made the representation with the intent and purpose of deceiving the creditor; (4) the creditor relied on the representation resulting in a loss to the creditor; and (5) the creditor's reliance was justifiable;<sup>FN5</sup> *In re Sheridan*, 57 F.3d 627, 635 (7<sup>th</sup> Cir.1995); *Mayer v. Spanel Int'l, Ltd. (In re Mayer)*, 51 F.3d 670, 673, 676 (7<sup>th</sup> Cir.), *cert. denied*, 516 U.S. 1008, 116 S.Ct. 563, 133 L.Ed.2d 488 (1995); *In re Maurice*, 21 F.3d 767, 774 (7<sup>th</sup> Cir.1994). The creditor must prove each element by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991); *In re Bero*, 110 F.3d 462, 465 (7<sup>th</sup> Cir.1997). Finally, "exceptions to discharge are to be construed strictly against a creditor and in favor of the debtor." *In re Scarlata*, 979 F.2d 521, 524 (7<sup>th</sup> Cir.1992), *reh. en banc den.*1993; *In re Zarzynski*, 771 F.2d 304, 306 (7<sup>th</sup> Cir.1985).

FN5. In *Field v. Mans*, 516 U.S. 59, 70, 116 S.Ct. 437, 446, 133 L.Ed.2d 351 (1995), the Supreme Court held that a creditor's reliance need only be justifiable, not reasonable.

*Hostetter*, 320 B.R. at 681.

The court further delineated the nature of the representation necessary for sustaining a § 523(a)(2)(A) action, as follows:

The bottom line is that the defendant must have made the representation of the promise to pay with the intent and purpose of deceiving the creditor; i.e., intentional/actual fraud. As eloquently stated by the Honorable Kent Lindquist:

This finding of fact as to intention will obviously have to be determined by circumstantial evidence in most cases as direct evidence of the Defendant's state of mind at the time of purchase is seldom expressly indicated. Although this is certainly a difficult task, it is no greater a task than any other cause of action that includes intent or state of mind as a necessary element. And the existence of fraud may be inferred if the totality of the circumstances present

a picture of deceptive conduct by the Debtor which indicates he intended to deceive or cheat the creditor. *In re Fenninger*, 49 B.R. 307, 310, *supra*; *In re Taylor*, 49 B.R. 849, 851, *supra*. The Court may logically infer this intent not to pay from the relevant facts surrounding each particular case. See, *In re Kimzey*, 761 F.2d 421, 424, *supra*. And a person's intent, his state of mind, has been long recognized as capable of ascertainment and a statement of present intention is deemed a statement of a material existing fact sufficient to support a fraud action. *In re Pannell*, 27 B.R. 298, 302 (Bankr.E.D.N.Y.1983). *In re Faulk*, 69 B.R. 743, 755 (Bankr.N.D.Ind.1986).

*Hostetter*, 320 B.R. at 684-685.

Lastly as the court pointed out in *Weichman*:

For the purposes of Rule 9(b) with respect to actions premised upon "false pretenses" or "actual fraud", the elements do not differ much from the foregoing. In the court's view, an action for "false pretenses" under § 523(a)(2)(A) differs from an action based upon "false representation" only in the nature of the predicate conduct giving rise to the fraud, i.e., the creation of an appearance of circumstances as contrasted to an actual statement regarding circumstances. The concept of "actual fraud" is a bit more difficult to delineate, but again, that action is premised upon fraudulent conduct, undertaken with the intent and purpose of deceiving another, upon which a creditor justifiably relied, resulting in a loss to the creditor.

*Weichman*, 422 B.R. at 151.

Next, § 523(a)(2)(B) provides in pertinent part as follows:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt

....

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

....

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or insider's financial condition;

(iii) on which the creditor to whom the debt- or is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; ...

Therefore, when bringing an action pursuant to § 523(a)(2)(B) a creditor must establish that the debtor made a materially false written statement about his/her financial condition with an intent to deceive, and that the creditor reasonably relied on the statement; *In re Cohen*, 507 F.3d 610, 613 (7<sup>th</sup> Cir. 2007). A claim brought pursuant to this section must be pled with the specificity required under Rule 9(b); See, *In re Young*, 428 B.R. 804, 819-820 (Bankr. N.D. Ind. 2010).

Under 11 U.S.C. §523(a)(2)(B), a recurring issue is the meaning of the language “statement respecting ... financial condition”. In the case of *Consumers Cooperative Credit Union v. Munson, et al. (In re Munson)*, 2010 W.L. 3768017 (Bankr. N.D. Ill. 2010), the debtors financed the purchase of an automobile through Consumers Cooperative Credit Union. As part of the transaction the debtors executed a security agreement in which they agreed to take certain steps to ensure that the credit union’s lien on the vehicle was properly perfected. Also, the proceeds check issued by the lender and endorsed by one of the debtors contained a restrictive endorsement wherein the dealer or the debtors were supposed to perfect the creditor’s lien on the vehicle. Subsequently, for reasons unknown, the car dealership delivered the certificate of title, without the credit union’s lien noted thereon, to the debtors. The debtors then failed/refused to turn over the title or provide an executed title application to the credit union so that it could take the necessary steps to perfect its lien. Ultimately, the debtors filed bankruptcy and the creditor filed a dischargeability action arguing that the promise in the security agreement and the restrictive endorsement on the proceeds check were both actionable written statements under § 523(a)(2)(B). The plaintiffs in turn filed a motion to dismiss. In deciding the motion the court stated as follows:

Section 523(a)(2)(B) renders nondischargeable any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by — ... (B) use of a

statement in writing — (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor ... reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive." The Credit Union contends that Debtors made two actionable written statements, i.e., the promise in the Security Agreement to perfect the Credit Union's lien and the restrictive endorsement on the proceeds check, again promising to perfect the lien. Debtors, however, contend that these statements are not statements "respecting ... financial condition" within the purview of the statute.

Collier notes that "[n]either the phrase 'respecting the debtor's... financial condition' nor the term 'financial condition' is defined" in the Bankruptcy Code and that "[c]ourts are sharply divided on the proper scope of the term." 4 Collier on Bankruptcy ¶ 523.08[2][c] (16th ed. 2010). In *In re Brzakala*, Judge Goldgar opined that in order for a statement to qualify as a statement "respecting financial condition,"

the statement must do more than just prompt speculation about the debtor's finances. It must be "sufficient to determine financial responsibility." *In re Price*, 123 B.R. 42, 45 (Bankr.N.D.Ill. 1991). In the case of an individual, for example, "statements of income and expenses or schedules of assets and liabilities" will qualify. *Id.* Transactional documents that merely imply a certain financial status, on the other hand, will not. See, e.g., *In re Segal*, 195 B.R. 325, 332 (Bankr.E.D.Pa.1996) (finding lease and promissory note insufficient); *City Fed. Sav. Bank v. Seaborne (In re Seaborne)*, 106 B.R. 711, 714 (Bankr.M.D.Fla.1989) (finding loan closing documents insufficient).

*In re Brzakala*, 305 B.R. 705, 709 -710 (Bankr. N.D.Ill. 2004). In *Brzakala*, the creditor sought to state a claim under § 523(a)(2)(B) based on two uncollectible checks given by the debtor and certain promises the debtor made in a settlement agreement. The court rejected the claim, explaining:

The [Plaintiffs] here appear to allege that the two uncollectible checks and the settlement agreement are statements "respecting the debtor's financial condition." They are not. A bad check is not a statement of any kind, much less a false statement about someone's financial condition. ... As for the settlement agreement, it never mentions [Debtor's] financial condition. It simply contains promises on [Debtor's] part to pay a sum of money and to grant a mortgage in return for the dismissal of a civil action. Inferences that might be drawn about [Debtor's] financial condition from those promises are not enough to bring the settlement agreement under section 523(a)(2)(B).

*Brzakala*, 305 B.R. at 710.

Likewise, in this case, the Security Agreement and proceeds check simply contain promises by Debtor to have the Credit Union's security interest shown on the certificate of title. They shed no light on Debtors' financial condition and do not give rise to any meaningful inferences about it.

The Credit Union nonetheless asserts that this case is similar to *Engler v. Van Steinburg (In re Van Steinburg)*, 744 F.2d 1060 (4th Cir. 1984), where an individual loaned the debtor \$5,500 and obtained in exchange a security interest in the debtor's livestock and farm implements. The debtor assured the creditor orally throughout the loan negotiations that he would have a first priority security interest in the debtor's livestock and farm implements, even though the debtor knew that other creditors already had superior liens. *Id.* at 1060. The bankruptcy court held that the debtor's oral misrepresentations that the property was free and clear constituted statements relating to his financial condition within the purview of §523(a)(2)(B). On appeal, the Fourth Circuit affirmed, espousing the broader view of the scope of that provision and rejecting the contention that statements "respecting financial condition" are limited to formal financial statements. *Id.*

Even if this court were bound by the Fourth Circuit's holding in *Van Steinburg* - - which it is not - - that case is easily and materially distinguishable. There, the debtor was making a representation about the unencumbered status of assets that he already owned, i.e., information that is often material to a lending decision. Here, on the other hand, the Credit Union was financing the purchase of a new asset, on which it would have a first priority purchase money security interest. Debtor, in making the promise to perfect that lien, was in no way providing information concerning the unencumbered status of any assets that he already owned - - or indeed, any information concerning the value or extent of his assets and liabilities.

Finally, the court notes that the Credit Union has not only failed to adequately plead a statement respecting Debtors' financial condition, but it also has failed to adequately plead intent to deceive, as required by § 523(a)(2)(B)(iv). In this regard, the Credit Union has the same problems discussed above concerning its allegation of intent to deceive under § 523(a)(2)(A). Under the circumstances, the Credit Union has failed to state a plausible claim for relief under §523(a)(2)(B).

*Munson*, at 2010 WL 3768017 at \*6 - \*7.

Under § 523(a)(2)(B), the creditor must have reasonably relied on the written representations made by the debtor. Additionally, the statement in question must be materially false, as discussed by the court in *In re Carlson*, 2011 WL 666307, \*5 (Bankr. N.D. Ill. 2011):

To satisfy the reliance element of § 523(a)(2)(A), the creditor must show that the debtor made a material misrepresentation that was the cause-in-fact of the debt that the creditor wants excepted from discharge. *Rose v. Gelhaar* (*In re Gelhaar*), No. 09-A-00504, 2010 Bankr. LEXIS 3899, 2010 WL 4780314, at \*8 (Bankr. N.D. Ill. Nov. 16, 2010) (Squires, J.) (citing *Mayer v. Spanel Int'l Ltd.* (*In re Mayer*), 51 F.3d 670, 676 (7th Cir. 1995) ("Reliance means the conjunction of a material misrepresentation with causation in fact.")). In the context of § 523(a)(2)(B) complaints, numerous cases have used a "but for" test to determine whether a statement is "materially" false under Section 523(a)(2)(B)(I), see, e.g., *Webster Bank, N.A. v. Contos* (*In re Contos*), 417 B.R. 557, 564 (Bankr. N.D. Ill. 2009) (Squires, J.), though other courts have applied a "substantial untruth" test, whereby a statement is materially false if it "paints a substantially untruthful picture of a financial condition by misrepresenting information of the type which would normally affect the decision to grant credit." *Id.* The Seventh Circuit Court of Appeals has noted that the "but for" test is a "recurring guidepost" for determining material falsity, but has not decided whether satisfaction of the "but for" test is an essential part of a claim under Section 523(a)(2)(B). *Selfreliance Fed. Credit Union v. Harasymiw* (*In re Harasymiw*), 895 F.2d 1170, 1172 (7th Cir. 1990).

Next, 11 U.S.C. §523(a)(4) provides that a debt is excepted from discharge if the debt is "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."

According to the Seventh Circuit Court of Appeals, larceny is proven under § 523(a)(4) if it is shown that the debtor wrongfully and with fraudulent intent took property from its owner; *In the Matter of Rose*, 934 F.2d 901, 902 (7<sup>th</sup> Cir. 1991) [citing, *In re Nahabedian*, 87 B.R. 214, 215 (S.D. Fla. 1998); *In re Hoffman*, 70 B.R. 155, 161 (W.D. Ar. 1986)]. Bankruptcy courts have taken the position that larceny requires that felonious intent exist at the time of the taking; *In re Brown*, 2009 WL 2461241, \*6 ( Bankr. N.D. Ill. 2009) [citing, *Black's Law Dictionary* (6<sup>th</sup> ed.

1990)]; *United States life Title ins. Co. V. Dohm*, 19 B.R. 134 (N.D. Ill. 1982); *In re Hoffman*, 70 B.R. 155, 161 (Bankr. W.D. Ark. 1986) [citing, 3 *Collier on Bankruptcy*, ¶ 523.14[3] (15<sup>th</sup> ed. 1981)]. Thus, to constitute larceny, the debtor's original taking of possession of, or exercise of control over, property must be unlawful; *Dobek v. Dobek*, 278 B.R. 496, 509-10 (Bankr. N.D. Ill. 2002) [citing, *Pierce v. Pyritz*, 200 B.R. 203, 205 (Bankr. N.D. Ill. 1996)]. Embezzlement differs from larceny essentially in that in embezzlement, the original possession of, or exercise of control over, property is lawful -- i.e. the property came into the hands of the debtor lawfully, as by consent -- and then the owner's interests are unlawfully compromised; *In re Rose*, 934 F.2d 901, 903 (7<sup>th</sup> Cir. 1991).

A debt is also excepted from discharge under this provision when it arises as a result of the debtor committing fraud or defalcation, which is wrongful or malicious conduct giving rise to harm, while acting in a fiduciary capacity. In *Weichman* this court extensively summarized the concept of "fiduciary capacity":

In *In re Tsikouris*, 340 B.R. 604 (Bankr. N.D.Ind. 2006), this court addressed its analysis of the concept of "fiduciary capacity" under 11 U.S.C. § 523(a)(4). In doing so, the court sought to reconcile the somewhat conflicting decisions of the United States Court of Appeals for the Seventh Circuit with respect to this concept. Certain forms of a "fiduciary capacity" have been relatively well-defined by the case of *In the Matter of Marchiando*, 13 F.3d 1111 (7<sup>th</sup> Cir. 1994). This court commented on *Marchiando's* analysis as follows:

The teaching of *Marchiando* is not only that a statutory or contractual designation of an individual as a "trustee" or "fiduciary" has no real relevance to the determination of "fiduciary capacity" under § 523(a)(4). The primary lesson to be learned from the case is that there must be a "res" in existence *before* the designated "fiduciary" relationship truly arises. In this case, the only "res" there is arose only when Tsikouris did not make payments to the union benefit plans *after* the amount of the required payment was determined. Thus, because there was no "res" prior to that time, Tsikouris did not act in a "fiduciary capacity" in any manner with respect to the "debt" which the

Plaintiffs seek to except from his discharge.

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As the foregoing cases establish, a critical component of a fiduciary relationship within the scope of 11 U.S.C. § 523(a)(4) is a *res* which exists as the focus of the relationship, much as would be the circumstance in the case of an express trust created to manage property deposited into the trust at the inception of the fiduciary relationship; *See, Klingman v. Levinson*, 831 F.2d 1292, 1295 (7<sup>th</sup> Cir.1987). A mere promise to pay a debt when circumstances giving rise to the obligation to pay come into existence, made by an individual to another person or entity of equal or superior standing, is not within the ambit of 11 U.S.C. § 523(a)(4); *In re Woldman*, 92 F.3d 546 (7<sup>th</sup> Cir.1996). Even if a statute or ordinance labels a relationship to be a “fiduciary” relationship, that label has no consequence under § 523(a)(4) unless there is an existing *res* which is mandated by law to be the subject of the labeled relationship; *In re McGee*, 353 F.3d 537 (7<sup>th</sup> Cir.2003) [holding that a municipal ordinance which required the deposit of security deposits paid by tenants to a landlord into a segregated account, created a “fiduciary” relationship under 11 U.S.C. § 523(a)(4), in specifically delineated contrast to the circumstances outlined above in *Marchiando, supra.*]

*Weichman*, 422 B.R. at 151-52.

Finally in the case of *In re Whitters*, 337 B.R. 326 (Bankr. N.D.Ind. 2006), this court stated the elements necessary to establish a cause of action under 11 U.S.C. § 523(a)(6):

[T]he Court determines that in order to sustain an action under 11 U.S.C. § 523(a)(6) a creditor must demonstrate the following:

1. That the debtor's actions caused an “injury” to the person or property interest of the creditor.
2. That the debtor's actions which caused the injury were the result of “willful” conduct by the debtor by which the debtor intended to effect an injury to the person or property interest of the creditor.
3. That the debtor's “willful” acts were undertaken in a “malicious” manner.

Viewed as outlined above, the *Geiger* standard is extremely strict for creditors to meet. That is as it should be. Exceptions to discharge are supposed to hook “bad actors”, not those who merely act poorly. When we troll the murky depths of dischargeability from our place on the shore immediately above the dam, our goal is to snare the lampreys in the stream, not the carp and the catfish. Moreover, in the context of 11 U.S.C. § 523(a)(6), as is true with any exception to discharge, the creditor must prove each element of the dischargeability action by a preponderance of the evidence – *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991); *In re Bero*, 110 F.3d 462, 465 (7<sup>th</sup> Cir.1997), and “exceptions to discharge are to be construed strictly against a creditor and in favor of the debtor.” *In re Scarlata*, 979 F.2d 521, 524 (7<sup>th</sup> Cir.1992), reh. en banc den.1993; *In re Zarzynski*, 771 F.2d 304, 306 (7<sup>th</sup> Cir.1985).

*Whiters*, 337 B.R. at 339.

This court adopted a “subjective” standard with respect to the willfulness element of § 523(a)(6), stating:

As the emphasized portion of the above-quoted section establishes, reference to the Restatement Second of Torts does not negate a totally “subjective” standard: in order to constitute “willful” conduct, a debtor must either “desire the consequences of his act” [target harm to another entity's person or property], or himself/herself *believe* that harm is substantially certain to result from his/her actions. After *Geiger*, there is no room for the “objective” inquiry into the probabilities of harm, because to do so renders the “willful” element of § 523(a)(6) tantamount to the mere intention to act without intending the consequences of the act in relation to the injury. *Geiger* requires “you *knew* that would hurt”, not “any idiot would/should have known that would hurt”.

337 B.R. at 343.

Finally, the court defined “malicious” under the statute as follows:

“Malicious” means “ ‘in *conscious* disregard of one's duties or without just cause or excuse; it does not require ill will or a specific intent to do harm.’ ” *In re Thirtyacre*, 36 F.3d 697, 700 (7<sup>th</sup> Cir.1994) (quoting *Wheeler v. Laudani*, 783 F.2d 610, 615 (6<sup>th</sup> Cir.1986)) (emphasis added). Consequently, a debtor's actions are not automatically labeled malicious simply because they are wrongful. *In re Posta*, 866 F.2d 364, 367 (10<sup>th</sup> Cir.1989). There must also be a consciousness of wrongdoing. *In re Stanley*, 66

F.3d 664, 668 (4<sup>th</sup> Cir.1995). It is this knowledge of wrongdoing, not the wrongfulness of the debtor's actions, that is the key to malicious under § 523(a)(6). *Posta*, 866 F.2d at 367; *In re Cardillo*, 39 B.R. 548, 550 (Bankr.D.Mass.1984). Without it there can be no "conscious disregard of one's duties," *Thirtyacre*, 36 F.3d at 700, only an unconscious one. *Accord, In re Grier*, 124 B.R. 229, 233 (Bankr.W.D.Tex.1991)("Simply because the sale was in violation of the security agreement and was in fact an intentional sale on the part of the debtor should not be enough to trigger a finding of malice."). *See also, Davis*, 293 U.S. at 328, 332, 55 S.Ct. at 153 (a willful and malicious injury does not automatically result from every tortious conversion).

...

That being said, "malicious" intent must be established as a separate element. Under this element, per *Thirtyacre, supra.*, the focus of malice is whether the debtor "*deliberately or intentionally*" disregarded his/her obligations with respect to the creditor's interests in the debtor's property.

*Whiters*, 326 B.R. at 349-50.

The next step is to apply the pleading standards of Fed.R.Civ.P. 8(a) and Fed.R.Civ.P. 9(b), as addressed above, to the elements necessary to establish a base claim under § 523(a)(2)(A), § 523(a)(2)(B), 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(6). The complaint in this case alleges in pertinent part the following:

Centier Bank, by counsel, pursuant to the provisions of 11 U.S.C. §§ 523(a)(2), (4), and (6) and Rules 4007 and 7001 of the Federal Rules of Bankruptcy Procedure, request the Court to determine that certain obligations of Sharon A. Ransom owing to Centier Bank to be nondischargeable, and in support, states as follows:

....

5. Defendant, Ransom, was at all times relevant the sole corporate principal and sole member of Sharon A. Ransom, M.D., LLC, an Indiana limited liability company (hereafter "Ransom, LLC").

6. On or about May 3, 2010, the Defendant, in her capacity as member of Ransom, LLC, executed and delivered a certain Promissory Note to Plaintiff in consideration for receipt of loan proceeds in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00), whereby said company promised to repay to

Plaintiff said principal sum together with interest at the rate of 5.5% per annum on the unpaid principal balance, in a lump sum on or before May 3, 2011. A true and accurate copy of said Promissory Note is attached hereto as Exhibit "A".

7. In consideration of the extension of credit to Ransom, LLC, said Defendant, in her capacity as member of Ransom, LLC, executed a Security Agreement in the Plaintiff's favor dated May 3, 2010. A true and accurate copy of said Security Agreement is attached as Exhibit "B".

8. In further consideration of the extension of credit to Ransom, LLC, said Defendant, in her individual capacity, executed a Guaranty in the Plaintiff's favor dated May 3, 2010. A true and accurate copy of said [*sic*] Security Agreement is attached as Exhibit "C".

9. Prior to May 3, 2010, in response to Plaintiff's request and for purposes of obtaining the aforementioned loan proceeds, the Defendant delivered a list of equipment that she represented was then owned by said Defendant, in her individual capacity, or owned by Ransom, LLC, to the Plaintiff. A true and accurate copy of said list is attached as Exhibit "D".

10. Pursuant to the Security Agreement, Centier Bank was granted a security interest in the [*sic*] "all equipment including, but not limited to ... all equipment described in a list or schedule..." (The "Equipment") and "all rights ... to payments including, but not limited to, payment for property or services sold..." including "any rights and interests (including all liens and security interests) ... against any Account Debtor or obligor..." (The "Accounts").

11. On or about September 2, 2010, the Defendant, in her capacity as member of Ransom, LLC, executed and delivered a certain Promissory Note to Plaintiff in consideration for receipt of loan proceeds in the sum of One Hundred Thousand Dollars (\$100,000.00), whereby said company promised to repay to Plaintiff said principal sum together with interest at the rate of 5.5% per annum on the unpaid principal balance, in a lump sum on or before May 3, 2011. A true and accurate copy of said Promissory Note is attached hereto as Exhibit "E".

12. On or about August 11, 2010, in response to Plaintiff's request and for purposes of obtaining the aforementioned loan

proceeds, the Defendant delivered a second list of the Equipment that she represented was owned by said Defendant, in her individual capacity, or owned by Ransom, LLC, to the Plaintiff. A true and accurate copy of said list is attached as Exhibit "F".

13. The Defendant made such misrepresentations regarding the nature and value of the Equipment that was then purportedly owned by her or Ransom, LLC, knowing them to be false and fraudulent, with the intention of inducing the Plaintiff to make the aforementioned loans to Ransom, LLC.

14. The Plaintiff relied upon the misrepresentations made by the Defendant and sustained pecuniary loss as a result of said Defendant's actions.

15. The damages due and owing to Plaintiff from Defendant are non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2) and/or (4).

WHEREFORE, the Plaintiff, by counsel, respectfully prays for an Order of this Court determining that the above-described claims to be non-dischargeable, for judgment against Defendant for all proper amounts owed by Defendant under the Promissory Notes and Guaranty, including interest, reasonable attorneys' fees, and costs of collection, and all other just and proper relief in the premises.

Clearly, given the theories of liability alleged by the plaintiff, this complaint fails to comply with the basic pleading requirements of Fed.R.Civ.P. 8(a) in several respects.

As to § 523(a)(4), the facts alleged in the complaint do not establish the *existence* of a fiduciary relationship between the parties. Similarly, there are no allegations in the complaint which can be read to assert a claim for either embezzlement or larceny. The bottom line is that the facts as pled do not establish even a glimmer of an action under § 523(a)(4). Therefore, as to this particular claim, the complaint fails to comply with the basic pleading requirements of Fed.R.Civ.P. 8(a), let alone the more stringent requirements of Fed.R.Civ.P. 9(b) for pleading fraud. As a result, the defendant's motion to dismiss is granted with respect to any action

sought to be asserted under 11 U.S.C. § 523(a)(4).

The same problem exists as to the assertion that the debt owed to Centier is excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). The complaint fails to allege the most basic elements required to establish a *prima facie* case under this provision, which would be a willful and malicious injury to Centier or to its property. Besides the statement in the introductory paragraph of the complaint that the action is being brought pursuant to 11 U.S.C. §§ 523(a)(6), the averments set forth therein fail to make any further reference to this provision or its required elements, and the conclusion of the complaint does not mention any requested relief under this provision of the Bankruptcy Code. The bottom line is that the complaint fails to state *any* facts which assert a cognizable claim under 11 U.S.C. § 523(a)(6). The complaint fails to comply with the basic requirements of Fed.R.Civ.P. 8(a). Therefore, the defendant's motion to dismiss is granted with respect to any action sought to be asserted under 11 U.S.C. § 523(a)(6).

The complaint also requests that the debt alleged to be owed to Centier be excepted from discharge under 11 U.S.C. § 523(a)(2)(A). In the apparent context of this case, this section provides that a debt is excepted from discharge in situations in which the debtor obtains credit by acting under false pretenses, making false representations, or through actual fraud. The complaint does not clearly delineate under which of these three bases the plaintiff is proceeding; the facts as pled seem to indicate that Centier is proceeding under the false representation prong of § 523(a)(2)(A). In any event, each involves fraud such that compliance with Rule 9(b) is necessary. *Weichman, supra.*, 422 B.R. at 154.

According to the complaint, there were allegedly two separate loans given by Centier to the limited liability corporation of Sharon A. Ransom, M.D., L.L.C. ("corporation"). Ransom was purportedly the sole corporate principal and member of the corporation. The complaint alleges that the first promissory note was executed by Ransom "in her capacity as member of Ransom,

LLC” on May 3, 2010 and the second on September 2, 2010. In consideration for each loan, it is alleged that the corporation executed a security agreement in favor of Centier. Also, it is alleged that on May 3, 2010, Ransom executed a personal guarantee which covered the first promissory note and any future debt incurred by the corporation. The collateral for each of the security agreements was equipment and inventory, which the complaint alleges were “owned by said Defendant, in her individual capacity, or owned by Ransom, LLC”. Centier alleges that the specific collateral for each of the loans was set forth in the form of a list, and that each list was provided to Centier prior to the execution of each note: the first list was provided “sometime prior to May, 3, 2010” and the second was provided on August 11, 2010– both are attached to the complaint as exhibits and contain items typically found in a physician’s office. The first list is a simple and rudimentary itemization of certain furniture and equipment. The second list is more detailed and is organized into three columns: the first column states a quantity, the second states the name of the item, and the third column -- labeled “EST VALUE” -- states a monetary value for each item. After the foregoing details are set out, Centier alleges the following in paragraph 13 of the complaint:

The Defendant made such misrepresentations regarding the nature and value of the Equipment that was then purportedly owned by her or Ransom, LLC, knowing them to be false and fraudulent, with the intention of inducing the Plaintiff to make the aforementioned loans to Ransom, LLC.

The complaint goes on to allege that the plaintiff relied on these misrepresentations, that as a result it sustained a pecuniary loss, and that these damages are excepted from discharge under § 523(a)(2).

The complaint is deficient under Rule 8(a) in establishing any of the three potential causes of action provided for under § 523(a)(2)(A). According to the complaint the debt was incurred by a limited liability corporation, and Ransom executed a personal guaranty of that

debt. Where is the obtaining of money or the extension of credit *by the debtor Ransom* as required by the statute? This is a key element. Perhaps without the guaranty, Centier would not have given the loans to the corporation, but this is not set out in the complaint. Moreover, after the transactions are set out, the complaint makes a factual leap and alleges that the defendant made, “such misrepresentations regarding the nature and value of the Equipment that was then purportedly owned by her or Ransom, LLC.” What are the misrepresentations to which this assertion refers? This allegation comes totally out of left field, as there are no facts pled with particularity in the complaint which assert any specific misrepresentation made by Ransom to Centier. The complaint fails to satisfy the requirements of Rule 9(b). What was misrepresented and how was it misrepresented: Did Ransom or the corporation not actually own the items stated on the lists; was there a preexisting lien on these items; were items listed which did not exist; were values misrepresented? As Ransom points out in her brief, the first list provided to Centier contains no monetary values.

Therefore, to the extent that Centier is proceeding under the theory that Ransom made false representations under § 523(a)(2)(A), the complaint is deficient under both Rule 8(a) and Rule 9(b). Even if Centier were proceeding under the false pretense or actual fraud prongs of the statute, the same issues exist, and the complaint is equally deficient. The complaint fails to state with particularity the facts surrounding any alleged fraud and fails to state any facts which establish that Ransom incurred a debt for money or an extension of credit obtained by means of “actual fraud” or under false pretenses. Therefore, the defendant’s motion is granted to the extent that the complaint seeks to bring an action pursuant to § 523(a)(2)(A).

Finally, although the court will not decide this issue as a matter of law at this time, with respect to 11 U.S.C. § 523(a)(2)(B), the court questions whether the lists referenced and attached to the complaint qualify under § 523(a)(2)(B)(ii) as statements “respecting the debtor’s

or an insider's financial condition"<sup>2</sup>. The first list referenced in the complaint (Exhibit D) is a simple itemized inventory of furniture and equipment with no dollar amounts stated as to any of these items. This list standing alone is not a document that addresses the financial condition of either Ransom or of the corporation. A stronger case might be made that the second list (Exhibit F) is a statement concerning the financial condition of the corporation. It contains more detail, and a dollar amount was stated as to each item listed. However, the court still questions whether it qualifies as a "statement in writing... respecting ... an insider's financial condition". Like the first list, this list is a far cry from a debtor submitting to a creditor a statement of income and expenses or a schedule of assets and liabilities. Though a dollar value is attached to each of the listed items, are these appraisal values or merely wholesale values and how did the defendant misrepresent these values? What is missing from the complaint is any factual assertion that the list was deemed by Centier to somehow be related to a statement by the corporation of its financial condition— a naked statement of property owned, without more, doesn't establish that the debtor (or insider of the debtor) and the creditor understood that that property owned by the debtor (or an insider of the debtor) was an element in establishing the debtor's financial condition in the transaction at issue. Many, many loans are given to entities which have no significant property, or without material regard to the existence of collateral, based solely upon the entity's income production; the same could have true in this case. Merely alleging, and incompletely at that, that somehow a list of property given in the process of loan application/review wasn't accurate won't advance a claim under §523(a)(2)(B) unless the complaint asserts a claim cognizable under applicable pleading rules that the list – in the context of the financial transaction at issue -- was deemed to be a statement concerning

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<sup>2</sup> The complaint does allege sufficient facts to assert a cognizable theory that the corporation is an "insider" with respect to Ransom under the definition stated in 11 U.S.C. §101(31)(A)(iv).

financial condition material to the lender's decision to advance credit. This complaint does not make the necessary connections. The complaint as to this claim is deficient under both Rule 8(a) and Rule 9(b) in other ways as well: for example, it does not set out or state in what manner these lists are materially false pursuant to § 523(a)(2)(B)(I). Therefore, Ransom's motion is granted to the extent that the complaint seeks to bring an action pursuant to § 523(a)(2)(B).

The final issue confronting the court is whether Centier should have an opportunity to file an amended complaint or should the entire action be dismissed with prejudice. In *Weichman* the court established a clear standard upon which such a determination should be made:

Thus, an unanswered question in the Seventh Circuit is the extent to which a federal trial court must accord a plaintiff an opportunity to file an amended complaint when the court determines that a Rule 12(b)(6) motion to dismiss the plaintiff's original complaint should be granted. The court deems the law of the Seventh Circuit to clearly state that in most instances, federal trial courts should grant the plaintiff an opportunity to file an amended complaint before either the complaint or the action is dismissed with prejudice in response to a Rule 12(b)(6) motion. Absent any controlling precedent to the contrary in the Seventh Circuit, the court is free to adopt a rule on its own which the court deems to be in consonance with pronouncements of the United States Court of Appeals for the Seventh Circuit. As stated, the court does not deem the United States Court of Appeals for the Seventh Circuit to be in parallel with the rule announced by the United States Court of Appeals for the Eleventh Circuit in *Wagner v. Daeoo Heavy Industries America Corp.*, *supra*. Rather, this court views the United States Court of Appeals for the Seventh Circuit to be more in consonance with the rule announced by the United States Court of Appeals for the Eleventh Circuit in *Bank v. Pitt*, *supra*., and it is that rule which the court adopts. Thus, when the court has determined that a Rule 12(b)(6) motion should be granted with respect to a complaint, the court will provide the plaintiff with one chance to file an amended complaint before the case or complaint is dismissed with prejudice, if "a more carefully drafted complaint might state a claim". This rule is subject to two exceptions. First, in a circumstance in which the plaintiff has stated conclusively on the record that he/she/it does not desire in

any context to file an amended complaint, no leave to amend will be granted. Secondly, if a more carefully drafted complaint in the court's view could not state a claim for relief under the standards for review of a Rule 12(b)(6) motion stated in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the court may dismiss the action with prejudice without providing leave to file an amended complaint. The review in this context is limited to the record in which the complaint was filed, and does not encompass any extraneous matters otherwise known by the court.

*Weichman*, 422 B.R. at 160-61.

As to § 523(a)(4) the court finds that it is not possible, given the underlying transactional facts as pled in the complaint, that a cause of action could possibly ever be asserted for fraud or defalcation by the defendant while acting in a fiduciary capacity, or that Ransom committed embezzlement or larceny. The same can be said as to Centier's claim for relief under § 523(a)(6): The complaint is devoid of any facts which even remotely suggest that there exists a debt which arose by way of a willful and malicious injury to either Centier or its property. It is clear from the complaint that the pleader threw pleading slop up against the wall, referenced 11 U.S.C. §§ 523(a)(4) and 523(a)(6), and hoped that something would stick to the wall. It didn't. Therefore, both of these claims are dismissed with prejudice.

On the other hand, with respect to § 523(a)(2)(A), giving the complaint the latitude which the court deems the Seventh Circuit Court of Appeals to require, the court determines that it may be possible for Centier to assert an action under this provision by means of a more carefully drafted complaint. In an amended complaint the court will expect a very specific delineation of the circumstances of any alleged fraud, as required by Rule 9(b). This includes setting out the facts surrounding any and all misrepresentations Ransom purportedly made with respect to the equipment lists which amounted to her acting under false pretenses, making false representations or just being outright fraudulent, *and the manner in which the lists materially played into Centier's lending decision*. Also, it would behoove the plaintiff to consider

the role the *defendant* played in the two transactions and the requirement under § 523(a)(2)(A) that the debtor be the one obtaining the money or extension of credit– in this case it appears that a corporation apart from the debtor obtained the monies from the plaintiff.

As to § 523(a)(2)(B), the court has already stated its reservations concerning whether the lists allegedly relied on by Centier qualify as written statements with respect to financial condition under this provision. Again, given the mandate of the Seventh Circuit Court of Appeals, the court will accord Centier an opportunity to attempt to make a case in this regard if it so chooses. With that said, the court will expect an amended complaint to set out particular facts that establish in what manner the lists were materially false with respect to the debtor's or an insider's financial condition, while keeping in mind the detail required under Rule 9(b). Further, a subsequent complaint needs to allege that the lists were reasonably relied on and that there was an intent to deceive, and that the lists were material as to Centier's evaluation of the corporation's financial condition in relation to its lending decisions.

Pursuant to the foregoing the court determines that Ransom's motion to dismiss is granted in its entirety. Centier will be accorded an opportunity to file an amended complaint as to the claims brought pursuant to § 523(a)(2)(A) and § 523(a)(2)(B). The claims brought pursuant to § 523(a)(4) and § 523(a)(6) will be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Ransom's motion to dismiss filed on May 16, 2011 is granted in its entirety, without prejudice to Centier to file an amended complaint as to the claims sought to be asserted under § 523(a)(2)(A) and § 523(a)(2)(B).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims sought to be asserted by Centier pursuant to § 523(a)(4) and § 523(a)(6) are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Centier shall file an

amended complaint on or before October 17, 2011.

Dated at Hammond, Indiana on September 28, 2011.

/s/ J. Philip Klingeberger

J. Philip Klingeberger, Judge  
United States Bankruptcy Court

Distribution:

Attorneys of Record