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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (SEPTEMBER 29, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In Re: JERRY DEWAYNE GADDY,

Debtor.

SE PROPERTY HOLDINGS, LLC,

Plaintiff-Appellant,

v.

JERRY DEWAYNE GADDY,

Defendant-Appellee.

No. 19-11699

D.C. Docket No. 1:18-cv-00027-JB-N

Bkcy. No. 17-bkc-01568-HAC-7

Appeal from the United States District Court
for the Southern District of Alabama

Before: WILLIAM PRYOR, Chief Judge., GRANT, Circuit Judge., and ANTOON*, District Judge.

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* Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

ANTOON, District Judge:

A Chapter 7 bankruptcy is intended to give the debtor a fresh start, free from debt. The process usually entails liquidating the debtor's assets and applying the proceeds toward satisfaction of creditors' claims. If all goes well for the debtor, the court will, in the end, discharge the outstanding debts. But the Bankruptcy Code, in 11 U.S.C. § 523(a), exempts certain kinds of debts from discharge.

This is an appeal from an order rejecting a claim that a debt was not exempt from discharge under § 523(a). SE Property Holdings, LLC ("SEPH") brought an adversary proceeding in Jerry Gaddy's Chapter 7 bankruptcy. SEPH requested that the court declare Gaddy's debt to SEPH exempt from discharge under 11 U.S.C. § 523(a)(2)(A) and (a)(6) because Gaddy fraudulently conveyed his property, thwarting SEPH's efforts to collect the debt. But the bankruptcy court determined that Gaddy had not fraudulently obtained money or property as required for exemption from discharge under § 523(a)(2)(A) and that Gaddy had not injured SEPH within the meaning of § 523(a)(6). The court thus rejected SEPH's claims, granted Gaddy's motion for judgment on the pleadings, and dismissed the adversary proceeding. SEPH now appeals the district court's affirmance of the bankruptcy court's dismissal. We affirm.

I. Background

Gaddy's debt to SEPH arose from two business loans made in 2006 by SEPH's predecessor-in-interest, Vision Bank, to Water's Edge LLC. The loans were made to fund a real estate development project in

Baldwin County, Alabama. Gaddy, an investor in the project, personally guaranteed repayment of the entire first loan—$10 million—and $84,392.00 of the second loan. In 2008, he reaffirmed those guaranties and increased his obligation on the first guaranty to $12.5 million. About a year after the reaffirmances, several of the more than thirty guarantors began missing required capital contributions, and it became clear that the development project was in trouble. The missed payments prompted the bank to send a letter to the guarantors warning of potential default.

In October 2009, less than two weeks after the bank's warning, Gaddy conveyed parcels of real property to a newly formed LLC, of which the initial members were Gaddy, his wife, and his daughter; Gaddy later conveyed his own membership interest in the LLC to his wife and daughter. These were part of a series of conveyances of personal assets—including real property, cash, and business interests—that Gaddy made over the next five years to family members and entities that he controlled.

Water's Edge defaulted on both loans in 2010, and the bank demanded payment from Gaddy as a guarantor. Four months later, the bank sued Water's Edge, Gaddy, and other guarantors in an Alabama state court. Meanwhile, Gaddy continued to transfer his assets. In December 2014, SEPH, by then having been substituted for Vision Bank due to a merger, prevailed in the Water's Edge litigation. The state court entered a judgment in favor of SEPH and against Gaddy for more than $9.1 million. Gaddy made two more transfers of assets that same month.

Eventually, SEPH sued Gaddy and his wife in federal court to set aside Gaddy's transfers of property

under the Alabama Uniform Fraudulent Transfer Act ("AUFTA"). After SEPH amended its complaint to add Gaddy's daughter and several business entities as defendants in the AUFTA case, Gaddy filed for bankruptcy. This prompted SEPH to initiate the adversary proceeding in the bankruptcy court objecting to the discharge of its debt. In its complaint, SEPH described Gaddy's allegedly fraudulent transfers and asserted they had damaged SEPH by "depriv[ing SEPH] of assets of Jerry Gaddy that could be used to satisfy the judgment entered in the Water's Edge Litigation."

SEPH's complaint requested that the bankruptcy court declare its Water's Edge judgment against Gaddy exempt from discharge under 11 U.S.C. § 523(a)(2)(A) and (a)(6). In relevant part, these provisions state:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> . . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud . . . ; [or]
>
> . . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(2)(A), (a)(6). SEPH urged the court to find that the debt was exempt from discharge under § 523(a)(2)(A) because Gaddy had fraudulently

transferred assets to "hinder SEPH's collection." And SEPH claimed that the debt was exempt under § 523(a)(6) because through his transfers of assets, Gaddy had "willfully and maliciously injured" SEPH or its property.

A month after answering SEPH's complaint, Gaddy filed a motion for judgment on the pleadings.[1] Gaddy argued that SEPH's complaint failed to state a claim under either § 523(a)(2)(A) or § 523(a)(6) because he did not defraud SEPH in guarantying the loans and because his conveyances did not injure SEPH or its property. In its response to Gaddy's motion, SEPH argued not only that the Water's Edge judgment debt was exempt from discharge but also that "any fraudulent transfer judgment SEPH obtains against Gaddy would be" exempt if, as SEPH claims, those transfers were made "with a willful and malicious intent." And during oral argument on Gaddy's motion, SEPH requested leave to amend its complaint to add allegations that Gaddy's conveyances resulted in a separate debt to SEPH that was not exempt from discharge.

The bankruptcy court granted Gaddy's motion for judgment on the pleadings and dismissed the adversary proceeding. The court found that SEPH's § 523(a)(2)(A) claim failed because SEPH did "not contend that the underlying debt from the guaranties was obtained by fraud or was anything other than a standard contract debt." And the court similarly rejected SEPH's

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[1] Federal Rule of Civil Procedure 12(c) provides: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Federal Rule of Bankruptcy Procedure 7012(b) incorporates Rule 12(c) in adversary proceedings.

§ 523(a)(6) argument because "[t]he underlying debt is the result of personal guaranties, not any willful and malicious injury by Gaddy." Finally, the court found no basis for amendment of SEPH's complaint to add a claim that a new, separate, fraudulent transfer debt under the AUFTA was exempt from discharge, noting that SEPH had "not provided any Alabama law that [a] debtor/transferor who fraudulently transfers property is liable to a creditor for the value of the transferred property."

SEPH appealed the bankruptcy court's decision, and the district court affirmed, "agree[ing] with [the bankruptcy judge] for all the reasons articulated in his order." It is from that decision that SEPH now appeals.

II. Standard of Review

"Judgment on the pleadings is appropriate when material facts are not in dispute and judgment can be rendered by looking at the substance of the pleadings and any judicially noticed facts." *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1295 (11th Cir. 1998). "We review legal determinations made by either the bankruptcy court or the district court *de novo*." *Crumpton v. Stephens* (*In re Northlake Foods, Inc.*), 715 F.3d 1251, 1255 (11th Cir. 2013). We also "review the legal significance accorded to the facts *de novo*." *Id.* And in reviewing a ruling on a motion for judgment on the pleadings, "we must accept all facts in the complaint as true and view those facts in the light most favorable to the plaintiff." *Sun Life Assurance Co. of Canada v. Imperial Premium Fin., LLC*, 904 F.3d 1197, 1207 (11th Cir. 2018). While the Bankruptcy Code

protects creditors harmed by a debtor's "egregious conduct," statutory exemptions to discharge of debts are construed strictly against the creditor and liberally in favor of the honest debtor. *St. Laurent v. Ambrose* (*In re St. Laurent*), 991 F.2d 672, 680 (11th Cir. 1993) (quoting *In re Britton*, 950 F.2d 602, 606 (9th Cir. 1991)).

Generally, we review the denial of a motion for leave to amend a complaint for abuse of discretion. *Fla. Evergreen Foliage v. E.I. DuPont De Nemours & Co.*, 470 F.3d 1036, 1040 (11th Cir. 2006). But where the lower court denies leave to amend based on futility of the proposed amendment, we review that decision *de novo* because it is a "conclu[sion] that as a matter of law an amended complaint would necessarily fail." *Id.* (internal quotation marks omitted) (quoting *Freeman v. First Union Nat'l*, 329 F.3d 1231, 1234 (11th Cir. 2003)).

III. Discussion

On appeal, SEPH challenges the bankruptcy court's rulings that SEPH failed to state a claim that the Water's Edge judgment debt is exempt from discharge under § 523(a)(2)(A) or (a)(6). It also challenges the court's ruling that the AUFTA does not support a claim against Gaddy based on a "new" debt created by the fraudulent transfers themselves. We address these contentions in turn.

A. The Water's Edge Debt Is Not Exempt From Discharge Under 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) exempts from a debtor's discharge "any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the

extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A) (emphasis added). That is, "it prevents discharge of 'any debt' respecting 'money, property, services, or . . . credit' that the debtor has fraudulently obtained." *Cohen v. de la Cruz*, 523 U.S. 213, 218 (1998) (alteration in original). The bankruptcy court and the district court both concluded that SEPH's § 523(a)(2)(A) claim failed because the loans that Gaddy guarantied were not "obtained by . . . false pretenses, a false representation, or actual fraud." They were correct, and we reject SEPH's efforts to expand case law to encompass the circumstances presented by this case.

SEPH does not—and cannot—argue that Gaddy or the entity whose debt he guarantied fraudulently obtained money or property from SEPH's predecessor. A state court awarded SEPH a judgment on its ordinary breach of contract claim, and that judgment makes no findings of fraud. The only fraud that SEPH alleges— Gaddy's conveyances of real and personal property—happened years after Gaddy incurred the debt by signing the guaranties. The money that the bank loaned is obviously not traceable to those later conveyances.

SEPH nonetheless asserts that Gaddy's post-guaranty transfers of assets render the judgment debt exempt from discharge because Gaddy made those transfers to hinder its collection. In doing so, SEPH relies largely on a strained interpretation of, and dicta in, the Supreme Court's 2016 decision in *Husky International Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016). But *Husky* does not advance SEPH's position.

In *Husky*, the Supreme Court reviewed the ruling of the Court of Appeals for the Fifth Circuit that the

"obtained by . . . actual fraud" language in § 523(a)(2)(A) requires a fraud that "involves a false representation to a creditor," 136 S. Ct. at 1585, something not typically present in the fraudulent transfer context. Reversing the Fifth Circuit, the Supreme Court held that "[t]he term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Id.* at 1586. In doing so, the Court reached the same conclusion the Seventh Circuit had reached sixteen years earlier in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), the other case upon which SEPH heavily relies.

But the facts of *Husky* and *McClellan* are distinguishable, and their holdings are narrow. In both cases, someone other than the bankruptcy debtor initially owed a debt for which the bankruptcy debtor later became at least partially liable. In *Husky*, a corporation owed an ordinary debt to Husky. 136 S. Ct. at 1585. A corporate insider then became potentially personally liable to Husky under a Texas veil-piercing statute when he "drained [the corporation] of assets it could have used to pay its debts to creditors like Husky." *Id.* And in *McClellan*, the bankruptcy debtor's brother owed money on a loan. 217 F.3d at 892. The brother fraudulently transferred the creditor's security to his more-than-complicit sister, the debtor, who then became potentially liable to McClellan based on her role in the fraud. *See id.* at 892, 895. Because of the sister's fraud, depriving McClellan of his security interest, the sister's debt was exempt from discharge in her bankruptcy. *Id.* at 895.

Neither the Supreme Court nor the Seventh Circuit eliminated the requirement that for a debt to

be exempt from discharge under § 523(a)(2)(A), the money or property giving rise to the debt must have been "obtained by" fraud, actual or otherwise. Instead, these Courts merely recognized the possibility that fraudulent schemes lacking a misrepresentation—including fraudulent transfers of assets to avoid creditors—can satisfy the "obtained by" requirement in some circumstances. *See* 136 S. Ct. at 1589 (noting that "fraudulent conveyances are not wholly incompatible with the 'obtained by' requirement" of § 523(a)(2)(A), though "[s]uch circumstances may be rare"); *McClellan*, 217 F.3d at 895 (noting that although the debtor did not obtain the money by a fraud against her brother, she "would not have obtained a $160,000 windfall" but for fraud).[2]

SEPH seizes on this dictum and on the Supreme Court's comment that if a recipient of a fraudulent transfer "later files for bankruptcy, any debts 'traceable to' the fraudulent conveyance will be nondischarg[e-]able under § 523(a)(2)(A)." *Husky*, 136 S. Ct. at 1589 (citation omitted). But these are not the facts of the case before us, and nothing in *Husky* suggests that a debtor's fraudulent transfer of assets renders an existing breach of contract judgment debt exempt from discharge under § 523(a)(2)(A). In both *Husky* and *McClellan*, fraudulent acts created or potentially created the very debts at issue. *See Husky*, 136 S. Ct. at 1585 (describing debtor's "drain[ing]" of corporate assets); *McClellan*, 217 F.3d at 895 ("The debt that McClellan is seeking to collect from [the bankruptcy debtor] (and prevent her from discharging) arises by

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[2] As to whether the "obtained by" requirement was satisfied under the facts of *Husky*, the Supreme Court remanded to the circuit court. 136 S. Ct. at 1589 n.3.

operation of law from her fraud. That debt arose not when her brother borrowed money from McClellan but when she prevented McClellan from collecting from the brother the money the brother owed him." (emphasis in original)). Here, SEPH's assertions fail not because Gaddy did not engage in "actual fraud" by conveying his assets[3] but because the Water's Edge loans were not "obtained by" fraud as required for exemption under § 523(a)(2)(A).

Again, the Water's Edge debt existed long before Gaddy began transferring his assets, and that debt is an ordinary contract debt that did not arise from fraud of any kind. SEPH presents no binding authority that supports its assertion that a debtor's fraudulent conveyance of assets in an attempt to avoid collection of a preexisting debt renders that preexisting debt exempt from discharge under § 523(a)(2)(A).

B. The Water's Edge Debt Is Not Exempt From Discharge Under 11 U.S.C. § 523(a)(6)

To qualify as exempt from discharge under § 523 (a)(6), a debt must be a "debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). SEPH claims that the Water's Edge debt is exempt under this provision because SEPH was injured by Gaddy's fraudulent conveyances of his personal assets—conveyances that SEPH asserts Gaddy made willfully

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[3] We make no findings on whether Gaddy's transfers were indeed fraudulent. We accept the allegations of SEPH's complaint as true in reviewing a ruling on a motion for judgment on the pleadings. *See Sun Life Assurance*, 904 F.3d at 1207.

and maliciously. We are not persuaded; SEPH has not alleged cognizable "injury" under § 523(a)(6).

"A debtor is responsible for a 'willful' injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." *Kane v. Stewart Tilghman Fox & Bianchi, P.A.* (*In re Kane*), 755 F.3d 1285, 1293 (11th Cir. 2014) (quoting *Maxfield v. Jennings* (*In re Jennings*), 670 F.3d 1329, 1334 (11th Cir. 2012)). And "'[m]alicious' means wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *Id.* at 1294 (quoting *Maxfield*, 670 F.3d at 1334).

In focusing on the nature of Gaddy's conduct, SEPH skips an important step in its § 523(a)(6) analysis. To be exempted from discharge under this provision, an obligation must be a "debt . . . for willful and malicious injury." 11 U.S.C. § 523(a)(6) (emphasis added). As the Supreme Court has explained, "'debt for' is used throughout [§ 523(a)] to mean 'debt as a result of,' 'debt with respect to,' 'debt by reason of,' and the like." *Cohen*, 523 U.S. at 220 (citing *American Heritage Dictionary* 709 (3d ed. 1992) and *Black's Law Dictionary* 644 (6th ed. 1990)). In this case, the Water's Edge debt is a contract debt that was incurred long before the challenged conveyances. SEPH's complaint in the adversary proceeding did not allege that the Water's Edge debt was the "result of," "with respect to," or "by reason of" Gaddy's tortious conduct. The only misconduct alleged by SEPH pertains to Gaddy's fraudulent conveyances of assets. But those conveyances occurred years after Gaddy became indebted to SEPH for the Water's Edge guaranties, and

the conveyances are not traceable to that debt, which arose from an ordinary breach of contract.

SEPH argues that it should prevail under *Maxfield*, in which this Court affirmed a ruling that a fraudulent transfer judgment was exempt from discharge under § 523(a)(6). But as the bankruptcy court correctly concluded, *Maxfield* is distinguishable because the debt at issue there—the debtor's joint and several liability for part of her ex-husband's preexisting debt—arose from the debtor's participation as a conspirator in the fraudulent transfer of property; it thus was "for willful and malicious injury" and qualified for exemption under § 523(a)(6). *Maxfield*, 670 F.3d at 1331–34. In contrast, the Water's Edge debt arose from breach of guaranty, not from a "willful and malicious injury."

We are not persuaded by SEPH's argument that actions taken by a debtor after a debt is incurred, even if in an effort to thwart a creditor's collection efforts by fraudulently conveying assets, create a separate injury for the purposes of § 523(a)(6). The Water's Edge debt—incurred long before Gaddy's conveyances of assets—was not "for willful and malicious injury" to SEPH or its property, and SEPH's § 523(a)(6) claim that its Water's Edge judgment is exempt from discharge fails as a matter of law.

C. The Bankruptcy Court Correctly Denied Leave to Amend Because of the Futility of SEPH's Proposed Amendment Under the AUFTA

We now turn to the issue that SEPH belatedly raised in the bankruptcy court. SEPH contends that Gaddy's fraudulent transfers of assets gave rise to a new debt to SEPH under the AUFTA—separate from the Water's Edge judgment—that qualifies as exempt

from discharge under both § 523(a)(2)(A) and § 523(a)(6). Although SEPH did not rely on this theory in its adversary complaint, during oral argument in the bankruptcy court SEPH requested leave to amend to specifically add it as a basis for relief. Under this alternative approach, SEPH argues that the transfers resulted in Gaddy becoming indebted to SEPH for an amount equal to the value of the assets conveyed. These debts, SEPH maintains, arise from "actual fraud" under § 523(a)(2)(A) and were "for willful and malicious injury" within the meaning of § 523(a)(6). The bankruptcy court rejected the proposed amendment on the view that Alabama law would not permit recovery against a fraudulent transferor. We also reject the proposed amendment, though for a different reason. We conclude that Alabama law would not permit the double recovery SEPH seeks.

There can be no issue as to dischargeability unless a debt or potential debt exists. Although there is no dispute that Gaddy owes the Water's Edge debt—which, as discussed earlier, did not arise from fraud or willful and malicious injury—SEPH has not established a basis for a "fraudulent transfer debt" owed or potentially owed by Gaddy to SEPH.

The AUFTA specifies the remedies available to creditors when a debtor fraudulently transfers property:

> (a) In an action for relief against a transfer under this chapter, the remedies available to creditors . . . include:
>
> (1) Avoidance of the transfer to the extent necessary to satisfy the creditor's claim;
>
> (2) An attachment or other provisional remedy against the asset transferred or

other property of the transferee in accordance with the procedure prescribed by any applicable provision of any other statute or the Alabama Rules of Civil Procedure;

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

a. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

b. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

c. Any other relief the circumstances may require.

Ala. Code § 8-9A-7(a). SEPH relies on the "[a]ny other relief the circumstances may require" language of § 8-9A-7(a)(3)(c) to argue that it is entitled to a money judgment against Gaddy in the amount of the fraudulent transfers, and it relies on 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6) to argue that this judgment is exempt from discharge.

Generally, Alabama permits only one recovery for a given harm. *Braswell v. ConAgra, Inc.*, 936 F.2d 1169, 1173–74 (11th Cir. 1991); *see also Steger v. Everett Bus Sales*, 495 So. 2d 608, 609 (Ala. 1986). Yet SEPH seeks a new judgment for the same debt. It already has a judgment against Gaddy for the unpaid Water's Edge guaranties. It now seeks a second judgment

entitling it to the same damages. SEPH asserted below no independent, freestanding harm from the fraudulent transfers themselves; it complained only that the transfers kept it from collecting the underlying debt.

Attempting to support its double-recovery theory, SEPH directs our attention to *Johns v. A.T. Stephens Enterprises, Inc.*, 815 So. 2d 511 (Ala. 2001). There, the Supreme Court of Alabama affirmed a jury's award of compensatory damages under § 8-9A-7(a)(3)(c) on a conspiracy-to-defraud claim. *Id.* at 516–17. But *Johns* is not helpful to SEPH's argument. That case involved the plaintiff's lease of trucks to a corporate defendant. The jury awarded compensatory damages on plaintiff's conspiracy claim against that defendant and conspiring codefendants for the plaintiff's lost profits—a harm separate from the underlying debt. *Id.*; *see also A.T. Stephens Enters., Inc. v. Johns*, 757 So. 2d 416 (Ala. 2000) (prior appeal providing background facts). Here, by contrast, SEPH asserts no harm from the fraudulent transfers other than its inability to collect the underlying debt. *Johns* offers no support for that theory of recovery because it does not change the principle that "Alabama law bars double recovery of compensatory damages for a fraud claim and a contract claim based on a single transaction." *Braswell*, 936 F.2d at 1173.

SEPH now also asserts that it could potentially recover punitive damages, attorney's fees, lost profits, or consequential damages on its fraudulent transfer claims against Gaddy. However, not only are these claims vague, but also SEPH did not raise these points before the bankruptcy court. We therefore decline to address them. *See JWL Entm't Grp., Inc.*

v. Solby+Westbrae Partners (*In re Fisher Island Invs., Inc.*), 778 F.3d 1172, 1193–94 (11th Cir. 2015).

For these reasons, we conclude that the bankruptcy court correctly determined that SEPH was not entitled to leave to amend its adversary complaint because such amendment would have been futile.

IV. Conclusion

Accordingly, we affirm the judgment of the district court.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA (APRIL 1, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SE PROPERTY HOLDINGS, LLC,

Appellant,

v.

JERRY DEWAYNE GADDY,

Appellee.

Civil No. 1:18-CV-00027

Before: Jeffrey U. BEAVERSTOCK,
United States District Judge.

This matter is before the court on SE Property Holdings LLC's ("SEPH" or "Appellant") appeal of an order from the U.S. Bankruptcy Court for the Southern District of Alabama. For its determination, the court has considered each party's respective brief(s) (Docs. 10–12), as well as the complete record of the adversarial proceedings from the Bankruptcy Court (Doc. 6). For the reasons stated herein, the Bankruptcy Court's order granting Appellee's Motion for Judgment the Pleadings is AFFIRMED.

I. Background

According to the record, SEPH filed the complaint objecting to discharge that birthed the instant appeal on July 7, 2017. In its complaint, SEPH provided a chronological account of events that led the parties to their present status before the court. Those events are briefly summarized as follows. On December 5, 2006, SEPH's predecessor in interest ("Bank") issued two loans to Water's Edge, LLC, to fund the construction of a real estate project in Baldwin County, Alabama, ("Water's Edge project"). The first loan ("first loan") totaled $10 million. Jerry Dewayne Gaddy ("Appellee" of "Gaddy") acted as a guarantor for that loan, executing a Continuing Unlimited Guaranty Agreement to that effect on November 28, 2006. The second loan ("second loan") for the project amounted to $4.5 million. For the second loan, Appellee executed an agreement designating himself as a limited guarantor for the amount of $84,392.

On or about April 25, 2008, Appellee reaffirmed his guaranty of the first loan with a principal increase to $12.5 million and reaffirmed his limited guaranty of the second loan for $84,392. Thereafter, several circumstances arose which led to the default of payments on the loans for the "Water's Edge" project. As a result, SEPH's predecessor in interest filed suit against Water's Edge, LLC and a number of guarantors for the Water's Edge project, including Appellee. On November 14, 2017, the Baldwin County Circuit Court ruled in favor of SEPH on its claims against Appellee and other defendants. One month later, that court entered a judgment against Appellee in the amount of $9,168,468.14. Thereafter, SEPH discovered several transactions undertaken by Appellee, which it alleges

violate the United States Bankruptcy Code. Those actions serve as the basis for this appeal.[1]

Following Appellant's filing of its adversarial complaint, the Bankruptcy Court conducted a hearing on Appellee's Motion for Judgment on the Pleadings. On January 5, 2018, the Bankruptcy Court entered an order in Appellee's favor. In its order, the Bankruptcy Court found that the provisions of the Bankruptcy Code upon which Appellant relied to except Appellee's debt from discharge were inappropriate, citing, *inter alia*, *BancorpSouth Bank v. Shahid,* No. 3:16cv621-RV/EMT (N.D. Fla 2017) for the proposition that Bankruptcy Code § 523(a)(6) did not support excepting Appellee's debt from discharge because "the underlying debt is the result of personal guaranties, not any willful and malicious injury by Gaddy" (Doc. 6, p. 167), and Bankruptcy Code § 523(a)(2)(A) could not support Appellant's cause of action because, *inter alia*, Appellee did not obtain the debt in controversy via actual fraud. (Doc. 6, p. 171).[2] SEPH appealed.

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[1] For a summary of the alleged fraudulent transfers and conveyances that serve as the underlying conduct of this action, *see* Doc. 6, pp. 15–23.

[2] Section 523(a) provides, in relevant part, that:

> A discharge under [this chapter] does not discharge an individual debtor from any debt–
>
> . . . (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> (A) false pretenses, a false misrepresentation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

II. Standard of Review

Generally, district courts operate as appellate courts in bankruptcy matters. *In re Sublett*, 895 F. 2d 1381, 1383–1384 (11th Cir. 1990). As such, district courts will not make independent factual findings. Instead, district courts must affirm a bankruptcy court's factual findings unless the court applied an incorrect legal standard, applied the law in an unreasonable manner, followed improper procedures in making its determination, or made findings of fact that are clearly erroneous. *In re Horne*, 876 F. 3d 1076, 1083 (11th Cir. 2017); *Alabama Dept. of Human Resources v. Lewis*, 313–314 (Bkrtcy. S.D. Ala. 2002) (citing *In re Club Assoc.*, 956 F.2d 1065, 1069 (11th Cir. 1992)). *See also, In re International Pharm., & Discount II, Inc.*, 443 F.3d 767, 770 (11th Cir. 2005) ("[t]he bankruptcy court's findings of fact are not clearly erroneous, unless, in light of all of the evidence, we are left with the definite and firm conviction that a mistake has been made[]"); *In re Spiwak*, 285 B.R. 744, 747 (Bkrtcy. S.D. Fla. 2002) (providing that "[a] district court reviewing a bankruptcy appeal is not authorized to make independent factual findings; that is the function of the bankruptcy court[]"); Fed. R. Bank. Proc. 8013 (on appeal, a bankruptcy court's findings of fact are reviewed for clear error).

District courts review a bankruptcy court's legal conclusions *de novo*; district court must accept bankruptcy court's factual findings unless they are clearly erroneous and give due regard to bankruptcy court's opportunity to judge credibility of witnesses. 28 USCS

> . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

§ 158. *See also In re Simmons*, 200 F.3d 738, 741 (11th Cir. 2000); *In re Monetary Group*, 2 F.3d 1098, 1103 (11th Cir. 1993) (providing that legal determination are reviewed *de novo*). The reviewing court may affirm the bankruptcy court's decision on any basis supported by the record. *Big Top Koolers, Inc. v. Circus-Man Snacks, Inc.,* 528 F.3d 839, 844 (11th Cir. 2008).

III. Discussion

After full review, this court agrees with Judge Callaway for all the reasons articulated in his order. As Appellee has noted in his brief on appeal, the flaw in Appellant's position is the lack of an essential element in its requests for relief under §§ 523(a)(2)(A), and (a)(6). Specifically, Appellant's position is untenable as to the requirement that the "debt" be connected to the alleged improper conduct. (Appellee's Br. p. 7, 13).

As to § 523(a)(2)(A), the debt Appellant seeks to discharge is for the pre-petition state court judgments rendered against Appellee based upon his promissory note guaranties. That debt was not "debt for money . . . to the extent obtained by . . . actual fraud" as required by the Bankruptcy Code. *See In re Wilson,* 2017 WL 1628878, at *8 (Bankr. N.D. Ohio 2017).[3]

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[3] Appellant cites, *inter alia, In re Smith*, to support its contention that fraudulent conveyances are due redress under § 523(a)(2)(A) following the *Husky* decision. (Appellant's Br. p. 18). However, the Bankruptcy Court for the Northern District of Mississippi found that the debtor lied to a creditor to actually induce said creditor to make a loan for the debt at issue, holding consistent with the standard that a fraudulent statement must actually induce the debt at issue. As stated by that court:

As noted by the bankruptcy court, the majority opinion in *Husky* did not go so far as to rule out the "[debt] obtained by . . . fraud" requirement. Instead, the Court only commented on the "[debt] obtained by . . . fraud" requirement in passing criticism of Justice Thomas's dissent.[4] This was only *dicta.* In this instance, Appellee undertook no fraudulent actions to acquire the debt it presently holds. Instead, the underlying debt appears to be the products of guaranties via contract. This court shall not go so far as to adopt an inapposite conclusion under the circumstances.

Nor was Appellee's debt a "debt for" willful and malicious injury by Appellant to another entity, or to

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> [T]he Debtor lied to Mr. Robinson to induce him to make the loan . . . The Debtor told Mr. Robinson that CGM presently needed $837,000 to pay Mr. Flautt. The evidence shows, however, that Mr. Flautt had already been paid when the loan was solicited by the Debtor. In addition, the Debtor told Mr. Robinson that CGM had a current receivable from PECO/ Lansing for 200,000 bushels of corn, when, in fact, that receivable had already been paid. These two representations, from the Debtor to Mr. Robinson, were false at the time the Debtor made them. The Court further finds that the Debtor knew they were false at the time. The Debtor knew that Mr. Flautt had already been paid, because he was the one who paid him. Furthermore, as set forth above, the Court does not believe that the Debtor did not know that CGM had already received the payment from PECO/Lansing. Thus, the first and second elements are satisfied, to the extent of the $837,000 that the Debtor actually requested from Mr. Robinson.

585 B.R. 359, 368–69 (Bankr. N.D. Miss. 2018).

[4] *See Husky* at 1590 (2016) (reversing and remanding as to the meaning of "actual fraud").

the property of another entity as required by § 523(a)(6). In this instance, Appellant did not conceal anything to incur the debt-at-issue. *See In re* Best, 109 Fed. App. 1, 5 (6th Cir. 2004). This court is satisfied that a debtor's actions after a debt has been incurred cannot support a claim under this provision, as the "injury is the underlying debt." *In re Kirwan*, No. 15-14012-MSH, 2016 WL 5110677, 4 (Bankr. D. Mass. 2016); *see also In re Saylor*, 108 F.3d 219, 221 (9th Cir. 1997) (creditor's potential fraudulent transfer remedies do not constitute "debt" or "property" under § 523(a)(6)).

Accordingly, the decision and judgment rendered by the Bankruptcy Court on January 5, 2018, is hereby AFFIRMED.

DONE and ordered this 1st day of April, 2019.

/s/ Jeffrey U. Beaverstock
United States District Judge

ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF ALABAMA GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS (JANUARY 5, 2018)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In Re: JERRY DEWAYNE GADDY,

Debtor.

SE PROPERTY HOLDINGS, LLC,

Plaintiff,

v.

JERRY DEWAYNE GADDY,

Defendant.

Case No. 17-01568

Adversary Case No. 17-00054

Before: Henry A. CALLAWAY,
Chief U.S. Bankruptcy Judge.

This adversary proceeding is before the court on the motion (doc. 16) for judgment on the pleadings filed by defendant/debtor Jerry Dewayne Gaddy

("Gaddy" or "debtor") with respect to the complaint objecting to discharge (doc. 1) filed by plaintiff SE Property Holdings, LLC ("SEPH" or "plaintiff") pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). In summary, the debtor guaranteed in 2006 and 2008 substantial loans made by plaintiff's predecessor Vision Bank related to a real estate project which ultimately failed. Plaintiff contends that the debtor from 2009 through 2014 then undertook an extensive series of transfers of real and personal property to his wife and daughter or entities controlled by his family or him to avoid collection before ultimately filing for bankruptcy in 2017.

This court has jurisdiction under 28 U.S.C. §§ 1334(b) and 157 and the order of reference of the district court. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I), and the court has authority to enter a final order (the parties also so stipulated on the record at a scheduling conference on September 19, 2017). For the reasons discussed herein, the court grants the debtor's motion.

Background

Gaddy's debt to SEPH arose from the breach of Gaddy's personal guaranty of two business loans to Water's Edge, LLC related to an unsuccessful real estate project in Baldwin County, Alabama (the "project"). Gaddy executed personal guaranties for the two loans in 2006 and reaffirmed those obligations in 2008. Water's Edge defaulted on its obligation to SEPH's predecessor-in-interest Vision Bank in June 2010. SEPH filed suit against Gaddy and other guarantors in October 2010 in the Circuit Court of Baldwin County, Alabama. Gaddy's debt to SEPH was reduced

to a judgment on December 17, 2014 in the amount of $9,168,468.14, although the Alabama Supreme Court later held that the judgment was not final because of one defendant's bankruptcy.[1] *See Gaddy v. SE Prop. Holdings, LLC*, 218 So. 3d 315, 324 (Ala. 2016).

SEPH alleges that from 2009 through 2014, with knowledge of Water's Edge potential and then actual default, Gaddy began transferring his property to family members and others. The following is a summary of pertinent events from SEPH's complaint:

12/5/2006
First loan to Water's Edge (#98809) for $10 million

11/28/2006
Gaddy's unlimited guaranty for Loan 1

12/5/2006
Second loan to Water's Edge (#98817) for $4.5 million

11/28/2006
Gaddy's limited guaranty for Loan 2 (limited to $84,392)

4/25/2008
Gaddy reaffirms guaranty of Loan 1 with principal increase to $12.5 million

4/25/2008
Gaddy reaffirms limited guaranty of Loan 2

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[1] SEPH and Gaddy disagree as to whether the judgment is now final. As discussed by the court at oral argument and below, the finality or non-finality of the state court judgment does not affect the court's analysis.

March 2009
It becomes clear that the project will not be completed on time

3/13/2009
Guarantors begin missing capital contributions

May 2009
First guarantors file for bankruptcy

10/3/2009
Letter to guarantors from the bank regarding upcoming payment and potential default

10/16/2009
Gaddy deeds Marengo County, Alabama parcels to Rembert, LLC

10/30/2009
Rembert, LLC formed per Secretary of State with debtor, wife Sharon, and daughter Elizabeth as members

11/2/2009
Gaddy transfers 46% of Gaddy Electric & Plumbing, LLC to his wife Sharon

11/20/2009
Gaddy quitclaims three Marengo County parcels to his wife Sharon

June 2010
Water's Edge defaults on both Loans and the bank demands payment from Gaddy pursuant to his guaranties

10/4/2010
Gaddy conveys real property (110 Barley Avenue) to daughter Elizabeth

10/11/2010
SEPH files lawsuit against Water's Edge and guarantors, including Gaddy, in Baldwin County Circuit Court

2/23/2012
SLG Properties, LLC ("SLG") formed by Gaddy's wife Sharon

4/18/2012
Gaddy conveys real property (145 Industrial Park) to SLG

4/18/2012
Gaddy conveys real property (179 Industrial Park) to SLG

11/17/2014
Baldwin County Circuit Court judgment against Gaddy and other guarantors for $9.1 million (later held on appeal to not be final)

11/23/2014
Gaddy transfers $293,945.51 to Gaddy Electric

12/15/2014
Gaddy transfers 41% interest in Gaddy Electric to his wife Sharon

4/26/2017
Gaddy files the above-captioned chapter 7 bankruptcy

Standard

Pursuant to Federal Rule of Civil Procedure 12(c), made applicable by Federal Rule of Bankruptcy Procedure 7012, a party may move for judgment on the pleadings after the pleadings are closed. "Judg-

ment on the pleadings is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1273 (11th Cir. 2008). "All facts alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving party." *Id.* In deciding the motion, "the court considers the complaint, answer[], and the exhibits thereto." *See Barnett v. Baldwin Cty. Bd. of Educ.*, 60 F. Supp. 3d 1216, 1224 (S.D. Ala. 2014).

Discussion

SEPH alleges that the transfers by Gaddy outlined above "were actually fraudulent as to SEPH as they were made to hinder SEPH's collection of its debt owed by" Gaddy, and that Gaddy's "actual fraud in connection with these fraudulent transfers is an exception to discharge to the extent of those transfers under" § 523(a)(2)(A). (*See* Compl., doc. 1, at ¶¶ 69-71). It also contends that in making the transfers Gaddy "willfully and maliciously injured SEPH and/or the property of SEPH[,]" and that "such conduct creates an exception to discharge to the extent of those transfers under" § 523(a)(6). (*See id.* at ¶¶ 73-75). It requests that the court declare its debt nondischargeable pursuant to §§ 523(a)(2)(A) and 523(a)(6).

In its motion for judgment on the pleadings, Gaddy contends that SEPH's allegations do not state a claim under either § 523(a)(2)(A) or § 523(a)(6). SEPH filed a response to the motion, Gaddy filed a reply, SEPH filed a sur-reply, and the court heard extensive oral argument.

I. *BancorpSouth Bank v. Shahid*

The court is not writing on a blank slate; it has considered the issues raised by Gaddy's motion in the case of *BancorpSouth Bank v. Shahid*, Adversary Proceeding No. 16-03009, while sitting as a visiting judge in the U.S. Bankruptcy Court for the Northern District of Florida, Pensacola Division. In *Shahid*, the creditor obtained state court judgments totaling $1.8 million against the debtor, who then undertook a series of allegedly fraudulent transfers to avoid collection. The undersigned granted the debtor's motion to dismiss the bank's nondischargeability actions under 11 U.S.C. §§ 523(a)(2) and 523(a)(6). The bank appealed, and the district court affirmed. *See BancorpSouth Bank v. Shahid*, No. 3:16cv621-RV/EMT (N.D. Fla. 2017). In addition to the district court's affirmance, at least one other court has adopted this court's holding in *Shahid*. *See, e.g.*, *In re Wilson*, No. 16-3068, 2017 WL 1628878, at *8 (Bankr. N.D. Ohio May 1, 2017) (citing this court's *Shahid* opinion with approval); *see also In re Vanwinkle*, 562 B.R. 671, 677-78 (Bankr. E.D. Ky. 2016) (reaching same conclusion as *Shahid*). Because the bankruptcy's and district court's opinions in *Shahid* are not reported, copies are attached as Exhibits A and B, and those opinions are incorporated as if set out fully herein.

II. SEPH's allegations

SEPH contends that the *Shahid* opinions were wrongly decided or can be distinguished on the facts. The court discusses SEPH's arguments below.[2]

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[2] Several of SEPH's arguments blur the lines between §§ 523(a)(6) and 523(a)(2). The court's analysis in each section below applies

A. Bankruptcy Code § 523(a)(6)

Bankruptcy Code § 523(a)(6) creates an exception to discharge "for willful and malicious injury by the debtor to another entity or to the property of another entity. . . . " As discussed in this court's *Shahid* opinion, other courts have held that a debtor's actions after a debt has been incurred cannot support a § 523(a)(6) claims because the "injury" is the underlying debt. *See Shahid* op., Ex. A hereto, at pp. 2-3. This reasoning is also dispositive here. The underlying debt is the result of personal guaranties, not any willful and malicious injury by Gaddy. The parties' disagreement about whether or not the state court judgment based on the guaranties is a final judgment is immaterial; even if the judgment is final, the "injury" is still the debt underlying the judgment. *In re Jennings*, 670 F.3d 1329 (11th Cir. 2012) is distinguishable because the "injury" there arose from the fraudulent transfer itself by the application of California state law. *See Shahid* op., Ex. A hereto, at pp. 3-4.

The only debt that SEPH seeks to have declared nondischargeable in its complaint is the state court judgment based on the guaranties. (*See* Compl., doc. 1, at pp. 14-15). Nevertheless, SEPH's counsel argued in brief and at oral argument that it is not only the underlying guaranties that SEPH seeks to have declared nondischargeable but also a subsequent liability created by Gaddy's allegedly fraudulent transfers.[3]

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with equal force to both claims, regardless of the section in which the analysis is included.

[3] The court has considered this argument even though it is not specifically pleaded in the complaint. For this reason, the court does not find it necessary to allow amendment under Federal

SEPH contends that it suffered a separate "injury" to it or its property under § 523(a)(6) in the form of Gaddy's liability to it under Alabama law for the fraudulent transfers described in the complaint. In this respect, SEPH urges the court to adopt the dicta in *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000), (*see* SEPH Resp., doc. 25, at p.6), suggesting that a debtor/transferor who transfers property with the intent to defraud creates a new, nondischargeable debt for the value of the transferred property. Thus, the court must examine whether Alabama law supports such a claim.

Alabama Code § 8-9A-7 sets out the remedies available to creditors under Alabama's Uniform Fraudulent Transfer Act ("AUFTA"):

> (1) Avoidance of the transfer to the extent necessary to satisfy the creditor's claim;
>
> (2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by any applicable provision of any other statute or the Alabama Rules of Civil Procedure;
>
> (3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure,
>
> a. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

Rule of Civil Procedure 15, incorporated by Federal Rule of Bankruptcy Procedure 7015.

b. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

c. Any other relief the circumstances may require.

Although the statute specifically states that the creditor's remedies are not limited to those listed, SEPH has not provided any Alabama law that the debtor/transferor who fraudulently transfers property is liable to a creditor for the value of the transferred property. In Alabama, if a court avoids a fraudulent transfer under Alabama Code § 8-9A-7, title does not revest in the debtor; "[i]nstead, the transferee continues to own the fraudulently transferred assets [and] the transfer is void only as to the creditor, and the creditor can execute on those assets directly" under Alabama Code § 8-9A-7(b). *See Ex parte HealthSouth Corp.*, 974 So. 2d 288, 297 (Ala. 2007); *SE Prop. Holdings, LLC v. Center*, No. 15-0033-WS-C, 2017 WL 3403793, at *34 (S.D. Ala. Aug. 8, 2017). Because title remains with the transferee, Alabama law "creates a remedy for the creditor" against the transferee for "(i) a money judgment . . . for the lesser of the value of the asset at the time of transfer or 'the amount necessary to satisfy the creditor's claim;' or (ii) a judgment . . . for conveyance of the asset itself." *See SEPH v. Center*, 2017 WL 3403793, at *34 (citing Ala. Code § 8-9A-8(b)). Alabama law does not contemplate a similar claim against the transferor, though, as Gaddy is here.[4]

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[4] The court discusses SEPH's argument that Gaddy was in essence both transferee and transferor below in conjunction with SEPH's § 523(a)(2) claim.

The Alabama Supreme Court did affirm a conspiracy-to-defraud money judgment against a debtor-transferor in *Johns v. T.T. Stephens Enterprises*, 815 So. 2d 511, 516-17 (Ala. 2001). However, the damages awarded against the debtor-transferor were profits which the plaintiff lost as a result of the debtor's inability to perform its contract with the plaintiff because of the fraudulent conveyances, not the value of the transferred property itself as SEPH seeks here. *See id.* at 517. In this district, District Judge William H. Steele recently declined to award SEPH monetary damages against a debtor/transferor because, among other reasons, SEPH had not proven any consequential damages that were the "natural and proximate result of the [borrower and his wife]'s conspiracy to fraudulently transfer assets beyond its reach." *See SEPH v. Center*, 2017 WL 3403793, at *34. In other words, in both those cases, the fraudulent transfer itself did not create a damages claim against the debtor/transferor under AUFTA. SEPH has not alleged in its complaint, briefs, or oral argument that it has suffered damages as a result of the alleged fraudulent transfers, other than the original contractual debt or the value of the transferred property.

Furthermore, it is unclear how creating a separate monetary liability on the part of a debtor/transferor for the value of the transferred property would work under SEPH's theory. Assume a debtor owed a specific creditor $100,000 and fraudulently transferred property worth $20,000; does he now owe the creditor both amounts, for a total of $120,000? If the debtor has ten creditors, does he have a separate liability to each creditor for the $20,000 value of fraudulently transferred property, for a total of $200,000 ($20,000

x 10 creditors)? Is the debtor liable for money damages to even future creditors under Alabama Code § 8-9A-4? In the absence of any law supporting this theory, the court declines to find that an alleged fraudulent transfer in itself creates an "injury" to an individual creditor by the debtor/transferor that would support a § 523(a)(6) claim.

Finally, as it did in *Shahid*, the court also finds that SEPH cannot sustain a claim under § 523(a)(6) for damage to its property because it has not alleged a security interest, judgment lien, or any other interest in any of the transferred properties. SEPH's inchoate right to collect did not constitute its "property" under § 523(a)(6). *See Shahid* op., Ex. A hereto, at p.3. If the transfers were to SEPH's detriment, it was a detriment that was not specific to itself and that it suffered with all of Gaddy's creditors–both existing and future.

B. Bankruptcy Code § 523(a)(2)

Bankruptcy Code § 523(a)(2) states in pertinent part that a debtor is not discharged "from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . actual fraud, other than a statement respecting the debtor's or an insider's financial condition. . . . " (emphasis added). SEPH does not contend that the underlying debt from the guaranties was obtained by fraud or was anything other than a standard contract debt. Instead, it relies on the U.S. Supreme Court's decision in *Husky International Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016), to argue that Gaddy's alleged fraudulent transfer "scheme" after incurring the underlying debt entitles it to have its debt declared nondischargeable under § 523(a)(2). While *Husky* potentially

expanded the universe of § 523(a)(2) causes of action against transferees, it does not reach as far as SEPH argues for the same reasons outlined in *Shahid*. *See Shahid* op., Ex. A hereto, at pp. 4-5; *see also, e.g.*, *In re Vanwinkle*, 562 B.R. at 677-78.

SEPH argues that Gaddy was essentially both transferor and transferee, and thus the distinction that this court made in *Shahid* should not apply. However, the court is unaware of any bankruptcy or state law to support a cause of action to set aside a transfer as fraudulent where the same person is both the transferor and transferee which would support a § 523 claim. For example, if SEPH contends that Gaddy controls Gaddy Electric through his family such that Gaddy Electric should be part of the debtor's bankruptcy estate, then it needs to work with the chapter 7 trustee to bring that company into the estate; its remedy is not to have its debt declared nondischargeable under § 523. *In re Bilzerian*, 100 F.3d 886 (11th Cir. 1996), cited by SEPH, did not involve alleged fraudulent transfers and is otherwise distinguishable from the situation presented here.

SEPH further tries to distinguish *Shahid* on the ground that SEPH had filed a fraudulent transfer action against the debtor in district court, which action was stayed by the filing of the bankruptcy case. SEPH argues that it would have obtained a money damages award against Gaddy in the fraudulent transfer action for the value of the transferred property. However, as discussed above in conjunction with SEPH's § 523 (a)(6) claim, it has not pointed to any Alabama law which would create a "debt for money, property, services, or an extension, renewal, or refinancing of credit" in favor of a creditor against a debtor/transferor

based solely on the value of the fraudulently transferred property.

SEPH's argument that "even a transferor should be subject to § 523(a)(2) to the extent of their fraud[,]" (*see* SEPH Resp., doc. 25, at p.6), ignores that fraudulent transfers such as those alleged here are an offense against all creditors, present and future. Gaddy's schedules reflect significant unsecured debt other than that of SEPH, including $1.631 million owed to Union State Bank, and $784,991 owed to West Alabama Bank & Trust. Under Alabama law, transfers made by a debtor with the actual intent to hinder, delay, or defraud any creditor can be set aside even as to future creditors whose claims did not arise until after the transfers took place. *See* Ala. Code § 8-9A-4. Under bankruptcy law, the chapter 7 trustee can file actions to set aside such transfers and bring those assets into the bankruptcy estate for the benefit of all creditors, if warranted, and those assets will then be liquidated for the benefit of all creditors based upon the priority scheme set out in the Code. *See* 11 U.S.C. § 548. As discussed above, to the extent that the Seventh Circuit dicta cited by SEPH from *McClellan*, 217 F.3d 890, suggests that a debtor/transferor could create a new, nondischargeable debt to one creditor in the amount of the allegedly fraudulently transferred property that would support a claim under § 523(a)(2), the court declines to follow that suggestion under Alabama or bankruptcy law. And in *McClellan*, the creditor had a security interest (although unperfected) in the transferred assets. *See id.* at 892. Here, SEPH has never contended that it had a security or other interest in the transferred items. *See, e.g.*, *In re*

Wigley, 533 B.R. 267, 273 (B.A.P. 8th Cir. 2015) (distinguishing *McClellan* on that basis).

Bankruptcy Code § 727(a)(2)(A) bars the discharge of a debtor who has transferred his property with intent to hinder, delay, or defraud creditors within a year of the bankruptcy petition. A holding that a debtor is not entitled to a discharge under this section benefits all creditors. But to hold that a single unsecured creditor like SEPH can have its debt declared nondischargeable under § 523(a)(2)(A) because of allegedly fraudulent transfers which took place long after its debt arose (and which affect all unsecured creditors equally) would conflate and confuse that section with § 727(a)(2).

Finally, the court is not persuaded by SEPH's attempt to distinguish *Shahid* on the ground that, unlike in *Shahid*, the transfers here took place before the creditor obtained a state court judgment against debtor. Although the fact that the transfers in *Shahid* took place after the judgments had already been entered added color to the point that the judgments were not "obtained by" the alleged fraud, all that is required under § 523(a)(2) is that the extension of credit arose as a result of fraud–not the judgment being entered on the extension of credit.[5]

Conclusion

To the extent the court has not specifically addressed any of the parties' arguments, it has considered them and determined that they would not alter the result. For the reasons discussed above, Gaddy

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[5] Although not argued in conjunction with the § 523(a)(6) claim, this analysis similarly applies to the "injury" element of that claim.

is entitled to judgment as a matter of law on SEPH's claims brought pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). Therefore, the court grants the debtor's motion (doc. 16) for judgment on the pleadings and will enter a separate order dismissing the adversary proceeding.

/s/ Henry A. Callaway
Chief U.S. Bankruptcy Judge

Dated: January 5, 2018

ORDER AND JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF ALABAMA (JANUARY 5, 2018)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In Re: JERRY DEWAYNE GADDY,

Debtor.

SE PROPERTY HOLDINGS, LLC,

Plaintiff,

v.

JERRY DEWAYNE GADDY,

Defendant.

Case No. 17-01568

Adversary Case No. 17-00054

Before: Henry A. CALLAWAY,
Chief U.S. Bankruptcy Judge.

For the reasons stated in its separate order granting the defendant's motion for judgment on the pleadings, the court enters judgment in favor of defendant/debtor Jerry Dewayne Gaddy with respect

to the complaint objecting to discharge (doc. 1) filed by plaintiff SE Property Holdings, LLC. The adversary case is dismissed with prejudice, all parties to bear their own costs.

/s/ Henry A. Callaway
Chief U.S. Bankruptcy Judge

Dated: January 5, 2018

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR PANEL REHEARING (NOVEMBER 3, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In Re: JERRY DEWAYNE GADDY,

Debtor.

SE PROPERTY HOLDINGS, LLC,

Plaintiff-Appellant,

v.

JERRY DEWAYNE GADDY,

Defendant-Appellee.

No. 19-11699-HH

Appeal from the United States District Court
for the Southern District of Alabama

Before: WILLIAM PRYOR, Chief Judge., GRANT, Circuit Judge., and ANTOON*, District Judge.

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* Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

The Petition for Panel Rehearing filed by SE Property Holdings, LLC is DENIED.

11 U.S.C. § 523

(a) A discharge under section 727, 1141, 1192 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required—

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

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

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(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 to whom the debtor 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; or

(C)

(i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $725 [originally "$500", adjusted effective April 1, 2019]2 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $1,000 [originally "$750", adjusted effective April 1, 2019] that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the

same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

(3) neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)

(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because

the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28

(or a similar non—Federal law), or the debtor's status as a prisoner, as defined in section 1915 (h) of title 28 (or a similar non—Federal law);

(18) owed to a pension, profit—sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—

(A) is for—

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher

Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)

(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution—affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution—affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution—affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

COMPLAINT OBJECTING TO DISCHARGE (JULY 21, 2017)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In Re: JERRY DEWAYNE GADDY

SE PROPERTY HOLDINGS, LLC,

Plaintiff,

v.

JERRY DEWAYNE GADDY,

Defendant.

Chapter 7
Civil Action No. 17-01568

Plaintiff, SE Property Holdings, LLC, as Successor by Merger to Vision Bank ("SEPH"), by and through its undersigned counsel, hereby sues Debtor/Defendant, Jerry Dewayne Gaddy ("Jerry Gaddy," "Jerry," or the "Debtor") seeking a declaration and a judgment in this case that an obligation owed to SEPH is not dischargeable pursuant to 11 U.S.C. § 523(a)(2)(a) and 523(a)(6). Obligations owed to SEPH by the Debtor are excepted from discharge to the extent described below in the underlying Chapter 7 Case No. 17-01568

(the "Chapter 7 Case"), if any, in this case for the following reasons:

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), and (J).

3. Venue is proper pursuant to 28 U.S.C. § 1409(a).

4. This is an adversary proceeding in which SEPH is seeking to except a debt from Debtor's discharge in the Chapter 7 Case pursuant to 11 U.S.C. §§ 523(a)(2) and (6), as well as a declaration of such pursuant to 28 U.S.C. § 2201 & 11 U.S.C. § 105.

5. Pursuant to Federal Rule of Bankruptcy Procedure 7001(6), this proceeding is governed by the rules contained in Part VII of the Federal Rules of Bankruptcy Procedure.

PARTIES AND RELEVANT NON-PARTIES

6. Debtor filed a voluntary Chapter 7 Petition pursuant to Title 11 of the United Stated Bankruptcy Code on April 26, 2017 (the "Petition Date"). The Debtor is a citizen of the State of Alabama, residing in Marengo County, Alabama.

7. Plaintiff SE Property Holdings, LLC, is an Ohio limited liability company with its principal place of business in Newark, Ohio. SE Property Holdings, LLC, has one member, Park National Corporation, which is an Ohio corporation with its principal place of business in Newark, Ohio. Accordingly,

SE Property Holdings, LLC is a citizen of the state of Ohio. SE Property Holdings, LLC, is the successor in interest to Vision Bank, pursuant to a merger occurring in February of 2012.

8. Sharon Gaddy ("Sharon Gaddy" or "Sharon") is a citizen of the State of Alabama, residing in Marengo County, Alabama.

9. Elizabeth Gaddy Rice ("Rice") is a citizen of the State of Alabama, residing in Marengo County, Alabama.

10. Gaddy Electric & Plumbing, L.L.C. ("GEP") is an Alabama limited liability company with its principal place of business in Marengo County, Alabama. Its members are Sharon Gaddy and Elizabeth Gaddy Rice.

11. Rembert, L.L.C. ("Rembert") is an Alabama limited liability company with its principal place of business in Marengo County, Alabama. Its members are Sharon Gaddy and Elizabeth Gaddy Rice.

12. SLG Properties, LLC ("SLG") is an Alabama limited liability company with its principal place of business in Marengo County, Alabama. Its sole member is Sharon Gaddy.

Facts

Basis of SEPH's Claim Subject to this Objection to Discharge

13. Water's Edge, LLC ("Water's Edge") is an Alabama Limited Liability Company formed for the purpose of purchasing and developing a marina located in Baldwin County, Alabama. Water's Edge is indebted to the Bank on two separate loans (the "Water's Edge

Loans"), which loans were guaranteed by Jerry Gaddy and approximately thirty-six other individual investors (the "Guarantors").

14. Loan No. 98809 (the "First Water's Edge Loan") is evidenced by a Promissory Note dated December 5, 2006, in the principal amount of $10,000,000.00 executed by Water's Edge in favor of the Bank, as later renewed, extended and/or modified. A true and correct copy of the Promissory Note is attached hereto as Exhibit A.

15. On or about November 28, 2006, Jerry Gaddy executed a Continuing Unlimited Guaranty Agreement guaranteeing payment of all sums due under the First Water's Edge Loan. A true and correct copy of the Continuing Unlimited Guaranty Agreement is attached hereto as Exhibit B.

16. On or about April 25, 2008, Jerry Gaddy executed an Acknowledgement, Ratification and Consent, reaffirming his obligation under the Continuing Unlimited Guaranty Agreement to guarantee payment of all sums due under the First Water's Edge Loan, including a minimum principal increase of $2,500,000.00. A true and correct copy of the Acknowledgement, Ratification and Consent is attached hereto as Exhibit C.

17. Loan No. 98817 (the "Second Water's Edge Loan") is evidenced by that certain Promissory Note dated December 5, 2006, in the principal amount of $4,500,000.00 executed by Water's Edge in favor of the Bank, as later renewed, extended and/or modified. A true and correct copy of the Promissory Note is attached hereto as Exhibit D.

18. On or about November 28, 2006, Jerry Gaddy executed a Continuing Limited Guaranty Agreement guaranteeing payment of the Second Water's Edge Loan in an amount up to $84,392.00. A true and correct copy of the Continuing Limited Guaranty Agreement is attached hereto as Exhibit E.

19. On or about April 25, 2008, Jerry Gaddy executed an Acknowledgement, Ratification and Consent, reaffirming his obligations under the Continuing Limited Guaranty Agreement to guarantee payment in an amount up to $84,392.00 of sums due under the Second Water's Edge Loan. A true and correct copy of the Acknowledgement, Ratification and Consent is attached hereto as Exhibit F.

20. To induce the Bank to loan Water's Edge $17,000,000.00, Jerry Gaddy submitted multiple personal financial statements representing to the Bank that his net worth was between $3,685,000 and $4,753,000.

21. Jerry Gaddy submitted a personal financial statement dated April 27, 2006 to the Bank in which he represented that he had a personal net worth of $4,753,000. A true and correct copy of the Gaddy's April 27, 2006 Personal Financial Statement is attached hereto as Exhibit G.

22. Jerry Gaddy submitted a personal financial statement dated August 15, 2007 to the Bank in which he represented that he had a personal net worth of $4,511,450. A true and correct copy of Jerry Gaddy's August 15, 2007 Personal Financial Statement is attached hereto as Exhibit H.

23. Jerry Gaddy submitted a personal financial statement dated December 15, 2008 to the Bank in

which he represented that he had a personal net worth of $3,685,000. A true and correct copy of the Gaddy's December 15, 2008 Personal Financial Statement is attached hereto as Exhibit I.

24. By March 2009, it was clear that the Water's Edge development project would not be completed on schedule. As a result, the Guarantors made capital contributions to Water's Edge to cover Water's Edge's operating costs and maintain its interest payments on the Water's Edge Loans.

25. As early as March 13, 2009 (possibly earlier), several Guarantors stopped paying their proportionate share of these capital contributions, thus requiring other Guarantors to cover these payments.

26. In May 2009, the first of several Guarantors filed for bankruptcy relief.

27. On October 3, 2009, Jerry Gaddy and the other Guarantors were notified by the Bank that in the event of a default in the upcoming payments due the Bank, that the Bank intended to take "legal action to enforce contractual obligations of the borrower and guarantors." *See* October 3, 2009 email from Andrew Braswell, attached hereto as Exhibit J.

28. On June 10, 2010, Water's Edge defaulted on the First Water's Edge Loan and the Second Water's Edge Loan by failing to make the required payment on the Loans. The Bank demanded payment from Jerry Gaddy pursuant to his Water's Edge Guaranties. True and correct copies of the demand letters are attached hereto as Exhibit K.

29. On October 11, 2010, the Bank filed a lawsuit against Water's Edge, Jerry Gaddy, and other Guaran-

tors in the Circuit Court of Baldwin County in a matter styled *SE Property Holdings, LLC v. Water's Edge, LLC, et. al.*, 05-CV-2010-901862 (the "Water's Edge Litigation").

30. On November 17, 2014, the court in the Water's Edge Litigation ruled in favor of SEPH on its claims and against Jerry Gaddy and the other Defendants on their counterclaims, cross-claims and third-party claims.

31. On December 17, 2014, a judgment was entered in the Water's Edge Litigation in favor of the Bank and against Jerry Gaddy in the amount of $9,084,076.14 on the First Water's Edge Loan, and $84,392.00 on the Second Water's Edge Loan. A true and correct copy of the Judgment is attached hereto as Exhibit L.

32. After the entry of judgment in favor of the Bank and against Jerry Gaddy by the Circuit Court on December 17, 2014, the Bank discovered that Jerry Gaddy had transferred his membership interest in Gaddy Electric & Plumbing, LLC to his wife and transferred several parcels of real property to his wife and daughter directly or through corporate entities controlled by them in an attempt to place assets beyond the reach of the Bank.

33. The judgment entered in the Water's Edge Litigation has not been satisfied.

34. On February 25, 2015, the Circuit Court of Baldwin County entered a charging order against Gaddy Electric & Plumbing, L.L.C. ("Gaddy Electric"). A true and correct copy of the Order is attached hereto as Exhibit M.

Fraudulent Transfers of Personal Property

A. Fraudulent Transfer of Membership Interest in Gaddy Electric from Jerry Gaddy to Sharon Gaddy in 2014.

35. On July 24, 2015, Robertson Bank responded to a subpoena, revealing, for the first time, the transfer of all of Jerry Gaddy's 41% membership interest in Gaddy Electric from Jerry Gaddy to Sharon Gaddy. While the documents assigning the interest are undated, the transfer purports to be effective December 15, 2014, just 27 days after the Court ruled in SEPH's favor and two days prior to the Water's Edge judgment being entered.

36. Based on a personal financial statement dated February 13, 2014, provided by Jerry Gaddy and Sharon Gaddy to Robertson Bank, the value of the total membership interest in Gaddy Electric & Plumbing, L.L.C. was $1,500,000.00. A copy of the February 13, 2014 Personal Financial Statement (redacted) is attached hereto as Exhibit N.

37. In a personal financial statement dated October 29, 2014, provided by Jerry Gaddy to the Bank, the value of the total membership interest in Gaddy Electric & Plumbing, L.L.C. was reported to be $212,951.00. A copy of the October 29, 2014 Personal Financial Statement (redacted) is attached hereto as Exhibit O.

38. Jerry Gaddy continues to exert control over the transferred property as the manager of Gaddy Electric & Plumbing, L.L.C., despite the transfer of his membership interest.

39. Jerry Gaddy's possession and control over the transferred property is further evidenced by the fact that following the transfer Gaddy Electric continued to make monthly payments on a personal loan of his, make payments on personal investments and make payments on hunting leases.

40. Upon information and belief, Jerry Gaddy was either insolvent at the time of the above described conveyance, or became insolvent as a result thereof.

41. As a result of this fraudulent transfer, the Bank has been damaged by being deprived of assets of Jerry Gaddy that could be used to satisfy the judgment entered in the Water's Edge Litigation.

B. Fraudulent Transfer of Membership Interest in Gaddy Electric from Jerry Gaddy to Sharon Gaddy in 2009.

42. On March 10, 2017, Sharon Gaddy responded to SEPH's First Set of Interrogatories, Requests for Production, and Requests for Admission, revealing, for the first time, the transfer of Jerry Gaddy's 46% membership interest in Gaddy Electric & Plumbing, LLC to Sharon Gaddy on November 2, 2009. An excerpt of Sharon Gaddy's Responses to Interrogatories is attached hereto as Exhibit P.

43. The November 2, 2009 Gaddy Electric transfer resulted in Sharon Gaddy owning a 51% or controlling membership interest in Gaddy Electric.

44. Jerry Gaddy's possession and control over the transferred property is further evidenced by the fact that following the transfer Gaddy Electric continued to make monthly payments on a personal loan of his.

45. Jerry Gaddy was either insolvent at the time of the above described conveyance, or became insolvent as a result thereof.

46. As a result of this fraudulent transfer, the Bank has been damaged by being deprived of assets of Jerry Gaddy that could be used to satisfy the judgment entered in the Water's Edge Litigation.

C. Fraudulent Transfer of Membership Interest in Rembert, LLC from Jerry Gaddy to Sharon Gaddy and/or Elizabeth Gaddy Rice.

47. On February 28, 2017, Defendants served their initial disclosures, revealing, for the first time, the transfer of all of Jerry Gaddy's membership interest in Rembert, LLC from Jerry Gaddy to Sharon Gaddy and/or Elizabeth Gaddy Rice.

48. Upon information and belief, Rembert, LLC was worth more than $75,000.00 at the time of the conveyance.

49. Jerry Gaddy continues to exert control over the transferred property as the registered agent of Rembert, L.L.C., despite the transfer of his membership interest.

50. Upon information and belief, Jerry Gaddy continues to use the assets of Rembert, L.L.C.

51. Jerry Gaddy was either insolvent at the time of the above described conveyance, or became insolvent as a result thereof.

52. As a result of this fraudulent transfer, the Bank has been damaged by being deprived of assets of Jerry Gaddy that could be used to satisfy the judgment entered in the Water's Edge Litigation.

D. Fraudulent Transfer of Currency from Jerry Gaddy to Gaddy Electric & Plumbing, LLC.

53. On March 3, 2017, Naheola Credit Union responded to a nonparty subpoena revealing, for the first time, the transfer of $293,945.51 from Jerry Gaddy to Gaddy Electric & Plumbing, LLC on December 23, 2014, only 6 days after judgment was entered against Jerry Gaddy in the Water's Edge Litigation.

54. The transfer was made with actual intent to hinder, delay, and defraud the Bank.

55. The transfer of $293,945.51 from Jerry Gaddy to Gaddy Electric was fraudulent for the following reasons:

a. Jerry Gaddy did not receive any consideration for the conveyance described hereinabove, or any consideration Jerry Gaddy did receive for the above described transfer was not reasonably equivalent to the value of the currency transferred.

c. At the time of these conveyance, Jerry Gaddy was indebted to the Bank in an amount in excess of $9,000,000.00.

d. Jerry Gaddy was insolvent or became insolvent as a result of the transfer;

e. The result of the conveyance was to place assets beyond the reach of the Bank.

f. Gaddy Electric & Plumbing, LLC is an insider off Jerry Gaddy, *i.e.* it is a closely held company owned and controlled by Jerry Gaddy, his wife Sharon Gaddy, and their daughter Elizabeth Gaddy Rice;

g. The currency was transferred for an antecedent debt;

h. Gaddy Electric & Plumbing, LLC had reasonable cause based on to believe that Jerry Gaddy was insolvent on December 23, 2014 when it accepted the transfer.

56. As a result of this fraudulent transfer, the Bank has been damaged by being deprived of assets of Jerry Gaddy that could be used to satisfy the judgment entered in the Water's Edge Litigation.

Fraudulent Conveyances of Real Property

E. Fraudulent Conveyance of Real Property From Jerry Gaddy to Rembert, LLC.

57. On October 30, 2009, Jerry Gaddy formed Rembert, LLC, listing himself as registered agent and using his home address (817 Carter Dr., Linden, Alabama 36748 as its registered office).

58. Jerry Gaddy, Sharon Gaddy, and Elizabeth Gaddy Rice were the initial members of Rembert, LLC.

59. On October 16, 2009, just two weeks after the Water's Edge guarantors were notified by the Bank that in the event of a default in the upcoming payments due the Bank, that the Bank intended to take "legal action to enforce contractual obligations of the borrower and guarantors," Jerry Gaddy conveyed to Rembert, LLC (which was not actually formed until October 30, 2009) by Warranty Deed for the alleged consideration of "$100.00," all his interest in two parcels of real property (the "Rembert Conveyance") located in Marengo, County, Alabama. The property

is more particularly described in the Warranty Deed recorded in the Records of the Probate Office of Marengo County on October 30, 2009, in Book 2009, Page 728. A copy of the recorded Warranty Deed is attached hereto as Exhibit Q.

60. The two parcels are further identified in the tax assessor's records as:

a. Parcel #17-07-35-0-000-006.0000, a 28 acre parcel. A copy of the Marengo County Property Record Card is attached hereto as Exhibit R.

b. Parcel # 17-07-26-0-000-001.002, a 145 acre parcel. A copy of the Marengo County Property Record Card is attached hereto as Exhibit S.

F. Fraudulent Conveyance of Real Property from Jerry Gaddy to Sharon Gaddy

61. On November 20, 2009, approximately one and a half months after the Water's Edge guarantors were notified by the Bank that in the event of a default in the upcoming payments due the Bank, the Bank intended to take "legal action to enforce contractual obligations of the borrower and guarantors," Jerry Gaddy conveyed to Sharon Gaddy by Quitclaim Deed for the alleged consideration of "$1.00," all his interest in three parcels of real property (the "Cahaba Avenue Conveyance") located in Marengo County, Alabama. The three parcels are more particularly described in the Quitclaim Deed recorded in the Records of the Probate Office of Marengo County on February 4, 2010, in Book 2010, Page 76. A copy of the Quitclaim Deed is attached hereto as Exhibit T.

62. The three parcels are further identified in the tax assessor's records at:

a. Parcel #12-09-32-0-001.000, a 28 acre parcel. A copy of the Marengo County Property Record Card is attached hereto as Exhibit U.

b. Parcel #12-09-32-0-001.002, an 18 acre parcel. A copy of the Marengo County Property Record Card is attached hereto as Exhibit V.

c. Parcel #12-09-32-1-004.000, a 6 acre parcel. A copy of the Marengo County Property Record Card is attached hereto as Exhibit W.

G. Fraudulent Conveyance of Real Property (110 Barley Avenue) from Jerry Gaddy to Elizabeth Gaddy Rice on October 4, 2010.

63. On October 4, 2010 (one week before SEPH sued Jerry Gaddy), for the alleged consideration of "$100.00" Gaddy conveyed to his daughter Elizabeth Gaddy Rice all his interest in a 7.41 acre parcel of real property with a street address of 110 Barley Avenue, Linden, Alabama (the "Barley Avenue Conveyance"). The property is more particularly described in the Deed recorded in the Records of the probate Office of Marengo County on October 6, 2010, in Book 2010, Page 687. A copy of the Deed is attached hereto as Exhibit X.

H. Fraudulent Conveyances of Real Property (145 Industrial Park, Demopolis and 179 Industrial Park Rd., Demopolis) from Jerry Gaddy to SLG Properties, LLC on April 18, 2012.

64. Sharon L. Gaddy formed SLG Properties, LLC on or about February 23, 2012 (16 months after

SEPH sued Jerry Gaddy), listing the home address (817 Carter Drive, Linden, Alabama 36748) she shares with Jerry Gaddy as the registered office of the company.

65. On or about April 18, 2012, Jerry Gaddy conveyed to SLG Properties, LLC by Warranty Deed, for alleged "good and valuable consideration," all his interest in a 2.74 acre parcel of real property with a street address of 145 Industrial Park, Demopolis, Alabama (the "145 Industrial Park Conveyance"). The property is more particularly described in the Warranty Deed recorded in the Records of the Probate Office of Marengo County on April 27, 2012, in Book 2012, Page 272. A copy of the Deed is attached hereto as Exhibit Y.

66. The parcel is further identified in the tax assessor's records as Parcel #06-01-010-000-015-009, a 2 acre parcel. A copy of the Marengo County Property Record Card is attached hereto as Exhibit Z.

67. On or about April 18, 2012, Jerry Gaddy conveyed to SLG Properties, LLC by Warranty Deed, for alleged "good and valuable consideration," all his interest in a 2.8 acre parcel of real property with a street address of 179 Industrial Park, Demopolis, Alabama (the "179 Industrial Park Conveyance"). The property is more particularly described in the Warranty Deed recorded in the Records of the Probate Office of Marengo County on April 27, 2012, in Book 2012, Page 273. A copy of the Deed is attached hereto as Exhibit AA. The property is further identified in the tax assessor's records as Parcel #06-01-01-0-000-015-010, a 2 acre parcel. A copy of the Marengo County Property Record Card is attached hereto as Exhibit BB.

Count One

Exception to Discharge Pursuant to 11 U.S.C. § 523(a)(2) for actual fraud

68. SEPH re-alleges the allegations contained in Paragraphs 1-67 above.

69. The transfers of personal property described above in Paragraphs 35-56 were actually fraudulent as to SEPH as they were made to hinder SEPH's collection of its debt owed by Jerry Gaddy.

70. The transfers of real property described above in Paragraphs 57-67 were also actually fraudulent as to SEPH as they were made to hinder SEPH's collection of its debt owed by Jerry Gaddy.

71. The Debtor's actual fraud in connection with these fraudulent transfers is an exception to discharge to the extent of those transfers under 11 U.S.C. § 523(a)(2)(A).

WHEREFORE, for the foregoing reasons, SEPH seeks confirmation, a declaration and/or a judgment in this Adversary Proceeding that the Judgment obtained in the Water's Edge Litigation is non-dischargeable to the extent of the fraud under 11 U.S.C. § 523(a)(2)(A).

Count Two

Exception to Discharge Pursuant to 11 U.S.C. § 523(a)(6) for willful and malicious injury

72. SEPH re-alleges the allegations contained in Paragraphs 1-71 above.

73. In making the fraudulent transfers of personal property described above in Paragraphs 35-56, the

Debtor willfully and maliciously injured SEPH and/or the property of SEPH.

74. In making the fraudulent transfers of real property described above in Paragraphs 57-67, the Debtor willfully and maliciously injured SEPH and/or the property of SEPH.

75. The Debtor's willful and malicious conduct caused SEPH injury in connection with the fraudulent transfers, and such conduct creates an exception to discharge to the extent of those transfers under 11 U.S.C. § 523(a)(6).

WHEREFORE, for the foregoing reasons, SEPH seeks confirmation, a declaration and/or a judgment in this Adversary Proceeding that the Judgment in the Water's Edge Litigation is non-dischargeable to the extent of the malicious and willful fraud under 11 U.S.C. § 523(a)(6).

Count Three

Declaratory Judgment

76. SEPH re-alleges the allegations contained in Paragraphs 1-75 above.

77. The Debtor lists SEPH on Schedule E/F in the Chapter 7 Case. (Doc. 33.) Upon information and belief, the Debtor includes the Judgment in the Water's Edge Litigation as such scheduled debt to be included in his Chapter 7 Case and will or may seek to have such debt discharged in the Chapter 7 Case.

78. As such, an actual case or controversy exists on this issue, and SEPH seeks a declaration that any and all such scheduled debt, including, but not limited to, that amount set forth in the Judgment in

the Water's Edge Litigation is in fact non-dischargeable to the extent of the Debtor's fraudulent and malicious activity pursuant to 11 U.S.C. § 523(a)(2)(A) and 523(a)(6). See 28 U.S.C. § 2201 & 11 U.S.C. § 105.

79. This actual case and controversy is ripe for determination, there being a substantial controversy, the parties having adverse legal interests, and there being sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

WHEREFORE, for the foregoing reasons, SEPH seeks a declaration and/or a judgment in this Adversary Proceeding that the Judgment in the Water's Edge Litigation is fully non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and 523(a)(6) even after the filing of the Chapter 7 Case by Debtor.

Respectfully submitted,

/s/ Richard M. Gaal
(GAALR3999)
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OF COUNSEL:

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Defendant to be served:

Jerry Wayne Gaddy
817 Carter Drive
Linden, Alabama 36748

Jerry Wayne Gaddy
c/o Lee R. Benton
2019 Third Avenue North
Birmingham, AL 35203

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS (NOVEMBER 21, 2017)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In Re: JERRY DEWAYNE GADDY

SE PROPERTY HOLDINGS, LLC,

Plaintiff,

v.

JERRY DEWAYNE GADDY,

Defendant.

Chapter 7
Case No. 17-01568

Adversary Proceeding No.: 17-00054

Plaintiff, SE Property Holdings, LLC, as Successor by Merger to Vision Bank ("SEPH"), by and through its undersigned counsel, hereby files its response to the Defendant/Debtor Jerry Dewayne Gaddy's ("Gaddy") motion for judgment on the pleadings pursuant to Federal Rule of Bankruptcy Procedure Rule 7012. Gaddy argues that SEPH fails to state a cause of action for nondischargeability under either 11 U.S.C. § 523(a)(2)(A) or 11 U.S.C. § 523(a)(6), and thus Gaddy

is entitled to a judgment as a matter of law based solely on the pleadings. SEPH's Complaint contained numerous and detailed factual allegations regarding Gaddy's guarantee of debt owed to SEPH and Gaddy's fraudulent transfers that were made with the intent to frustrate and hinder SEPH's efforts to collect by placing assets out of SEPH's possible reach. For the reasons stated below, Gaddy's assertions are incorrect, and thus Gaddy is not entitled to a judgment on the pleadings under Bankruptcy Rule 7012 and Rule 12(c) of the Federal Rules of Civil Procedure.

I. Gaddy's arguments related to the finality of SEPH's judgment are inappropriate in a Rule 7012 motion for a judgment on the pleadings.

Gaddy correctly identifies the standard for a Rule 12(c) motion for judgment on the pleadings. A court must consider only the statements which appear in the pleadings. *See Hotel St. George Assoc. v. Morgenstern*, 819 F. Supp. 310, 317 (S.D.N.Y. 1993). "The court must accept as true all material facts alleged in the non-moving party's pleading, and . . . view those facts in the light most favorable to the non-moving party." *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014). Furthermore, "[i]f a comparison of the averments in the competing pleadings reveals a material dispute of fact, judgment on the pleadings must be denied." *Id.*

However, despite acknowledging that "the court will consider only" the complaint and answer filed in this case, *see* Doc. 16, at p. 2, Gaddy asserts an additional "fact" not set forth in the complaint: the judgment obtained by SEPH against Gaddy is not a final judgment. This assertion by Gaddy is a key focus of

Gaddy's argument related to SEPH's claim for nondischargeability under 11 U.S.C. § 523(a)(6). (*See, e.g.*, Doc. 16, at ¶ 13, arguing that SEPH cannot have valid lien supporting "malicious injury to property" claim under § 523(a)(6).) This new assertion is outside the pleadings, and SEPH does not agree with Gaddy that the judgment SEPH obtained against him is not a final judgment. Essentially, Gaddy has referenced facts outside of the pleadings, which he himself admits is improper. SEPH did not include a statement that the judgment was not final in its pleadings precisely because SEPH does not agree regarding that fact. Therefore, to the extent Gaddy relies on the alleged non-finality of the judgment, his motion must be denied under the agreed-upon standard under which the Court must analyze Gaddy's motion for a judgment on the pleadings.

II. SEPH has adequately stated a claim for relief under 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) of the Bankruptcy Code provides:

> 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—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. . . .

(Emphasis added). As noted by Gaddy in his motion, the Supreme Court has held that § 523(a)(2)(A)'s "actual fraud . . . encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Int'l Elecs., Inc. v. Ritz*, 136 S.Ct. 1581 (2016). SEPH has alleged that Gaddy committed a fraudulent conveyance scheme like the one discussed in *Husky*, and thus it has adequately alleged the "actual fraud" element required under § 523(a)(2)(A) pursuant to *Husky*. Furthermore, not only has Gaddy transferred assets out of his hands to his wife and daughter, but he has retained the control over and use of many of those assets. (*See, e.g.*, Doc. 1, at ¶¶ 38, 44, 49, 55.) While his wife and daughter are transferees of these transfers, Gaddy has retained control and benefitted from the ownership interests in his entities such that Gaddy retains equitable ownership over those entities as a result of his fraud. *See* 11 U.S.C. § 541(a)(1). Gaddy has clearly received benefits from these transferred assets, and in some cases has even had his own personal loans paid by Gaddy Electric & Plumbing, LLC. (*Id.* at ¶ 44.) In effect Gaddy is equitably also a transferee of the transferred assets. He is thus in a similar position to the debtor in *Husky*, who had entities controlled by him receive fraudulently transferred assets from a transferor corporation also controlled by the debtor. *See* 116 S. Ct. at 1589. ("[T]he recipient of the transfer—who, with the requisite intent, also commits fraud—can 'obtai[n]' assets 'by' his or her participation in the fraud."). Here, Gaddy obtained continued use of the assets but also placed them out of SEPH's reach. He thus obtained benefits and property as a result of his fraud. Without such

fraud, the assets transferred would be subject to SEPH's collection remedies.

Other case law also supports the conclusion that Gaddy's fraudulent conduct, from which he has received benefits by retaining control and deriving monetary benefits from entities now "owned" by his wife and/or daughter, is nondishchargeable under § 523(a)(2)(A). *See, e.g.*, *In re Bilzerian*, 413 F.3d 980, (11th Cir. 1996) (holding that debtor who receives either indirect or direct benefit as a result of fraud may have debt excepted from discharge and noting that "granting a debtor a discharge based solely on the fact that he or she did not *directly* receive a benefit places a limitation on § 523 that is not apparent from the text of the provision itself. Moreover, such a limitation would provide a dangerous incentive for the sophisticated debtor, who could circumvent the provision by creating a shell corporation to receive the fruits of his or her fraud.") (emphasis added); *In re Arm*, 87 F.3d 1046, 1049 (9th Cir. 1996) ("[T]he indirect benefit to the debtor from a fraud in which he participates is sufficient to prevent the debtor from receiving the benefits that bankruptcy law accords the honest person.). Gaddy, rather than create a shell corporation, has essentially used his wife and daughter as shells separating himself directly from the ownership in the assets transferred. The effect of his conduct is precisely the type of conduct the Eleventh Circuit warned of in *Bilzerian*. Gaddy is still receiving the benefits of his assets transferred away while not allowing SEPH to reach such assets to satisfy its debt. Therefore, SEPH respectfully asserts that this Court should not bless Gaddy's fraud by allowing him to obtain a discharge.

Furthermore, due to Gaddy's continued control and obtaining benefits from his fraud, Gaddy's debt to SEPH should be excepted from discharge from a policy standpoint because fraudulent conveyance schemes like the scheme put in place by Gaddy run contrary to the openness and candor required of debtors in bankruptcy proceedings. Furthermore, avoidance actions and other means of undoing such transfers are costly and waste judicial resources. If a debtor commits such schemes to the detriment of a creditor, it would only make sense that the bankruptcy system would not condone such dishonest and malicious behavior. *See Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) ("The Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an honest but unfortunate debtor.") (internal quotations omitted); *In re Bilzerian*, 100 F.3d at 891 (the courts "will not allow 'the malefic debtor [to] hoist the Bankruptcy Code as protection from the full consequences of fraudulent conduct'").

In support of his motion, Gaddy cites *In re Vanwinkle*, 562 B.R. 671, 677-78 (Bankr. E.D. Ky. 2016) and this Court's decision in *Bancorpsouth Bank v. Shahid*, Adv. Proc. No. 1603009, Doc. 47 (Bankr. N.D. Fla. Nov. 3, 2016). However, in those cases, the creditors seeking to discharge a debt had not raised claims for fraudulent transfers. *See In re Vanwinkle*, 562 B.R. at 678. Furthermore, the courts there did not address whether the debtors' equitable ownership in the assets transferred satisfied § 523(a)(2)(A)'s requirement that the debtor obtain property by actual fraud. Here, SEPH has brought fraudulent transfer claims against Gaddy, and was only unable

to reduce them to judgment due to Gaddy's bankruptcy filing. Furthermore, the cases cited by Gaddy addressed post-judgment fraudulent conveyance schemes rather than the prejudgment (and even pre-default) transfers made by Gaddy at issue here. *See, e.g.*, *In re Vanwinkle*, 562 at 678 ("The Plaintiffs' allegations address post-judgment fraud that may be actionable, but not through § 523(a)(2)(A) alone.). This Court in *Shahid* specifically stated that, "[t]he legal issue is whether the debtor's alleged fraudulent transfers and other actions taken after the judgments will support a claim that the judgments are non-dischargeable pursuant to Bankruptcy Code § 523(a)(2)(A) and/or (6)." (*Shahid*, Adv. Proc. No. 16-03009, Doc. 47, at p. 1.) Thus, those cases do not adequately address the situation here and are distinguishable such that the Court should not consider those opinions as binding when determining Gaddy's motion.

While Gaddy highlights that the debtor in *Husky* was the transferee of fraudulent conveyances and not the transferor, there are two issues with this attempted distinction. First, as discussed above, Gaddy was a transferee of assets given that he has retained control and the benefits of his ownership of the assets transferred. Secondly, even a transferor should be subject to § 523(a)(2)(A) to the extent of their fraud. As the Seventh Circuit has stated

> [It would be] paradoxical if . . . the [transferee] could not discharge her fraud debt in bankruptcy, the [transferor] could have discharged the same debt had he declared bankruptcy. [Section 523(a)(2)(A)] does not mean this. What is true is that if [the transferor] had merely defaulted on his original

> debt to [the creditor], which so far as appears was not created by a fraud, and later declared bankruptcy, that debt would have been dischargeable. If, however, he had rendered the debt uncollectible by making an actually fraudulent conveyance of the property . . . his actual fraud would give rise to a new debt, nondischargeable because created by fraud, just as in the case of the [transferee], his accomplice in fraud. But it would be a new debt only to the extent of the value of the [property] that he conveyed, for that would be the only debt created by the fraud itself.

McClellan v. Cantrell, 217 F.3d 890, 895 (7th Cir. 2000). It would promote the integrity of the bankruptcy system not to allow a transferor to discharge his debts after fraudulently conveying assets away. In any event, Gaddy here should be classified as a transferee of the assets given his continued control and benefit from those assets. But even if the Court views Gaddy as merely a transferor that should not mean that Gaddy's debt to SEPH is non-dischargeable.

Because SEPH has adequately alleged that Gaddy committed actual fraud against it and that Gaddy did so knowingly and intentionally to deceive SEPH to SEPH's injury, SEPH's § 523(a)(2)(A) claim should survive the motion for judgment on the pleadings.[1]

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[1] Discovery is not yet underway in this case, and it would be prudent to allow SEPH discovery regarding Gaddy's assets and his fraudulent retention of benefits from and equitable ownership in those assets. If the Court grants Gaddy's motion now, Gaddy will be able to avoid the consequences of his fraud. Such an undesirable result should not be allowed at this early stage of the proceedings.

See Matter of Johnson, No. 09-00240-TOM7, 2017 WL 1839159, at * 9 (Bankr. N.D. Ala. May 5, 2017); *see also In re Bloemendaal*, Adv No. 16–00047, 2016 WL 7852312 (Bankr. D. Mont. Dec. 22, 2016) (plaintiff stated plausible claim against transferor of alleged fraudulently conveyed assets). Furthermore, Gaddy's continued use and control over the transferred assets while also having those assets technically out of his hands constitutes a benefit that satisfies the requirement that Gaddy obtain "money [or] property" by actual fraud. *See* 11 U.S.C. § 523(a)(2)(A).

III. SEPH has adequately stated a claim for relief under 11 U.S.C. § 523(a)(6)

Section 523(a)(6) provides: "[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- . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity." The Eleventh Circuit has held that, "[a] debtor is responsible for a 'willful' injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." *In re Kane*, 755 F.3d 1285, 1293 (11th Cir. 2014). Furthermore, § 523(a)(6) does not require a showing of tortious conduct; so long as the debtor shows a willful and malicious act. *Id.* at 1296 (*citing In re Williams,* 337 F.3d 504, 510 (5th Cir. 2003) ("[A] knowing breach of a clear contractual obligation that is certain to cause injury may prevent discharge under Section 523(a)(6), regardless of the existence of separate tortious conduct.")). The Eleventh Circuit has held that fraudulent transfer schemes such as the one implemented here by Gaddy can, if done willfully and maliciously, be excepted from discharge

under § 523(a)(6). *See In re Jennings*, 670 F.3d 1329, 1332-34 (11th Cir. 2012) (upholding district court's determination that fraudulent transfer judgment was nondischargeable where "the evidence in the record showed that Janice transferred Shoreview willfully and with malice. She knew that the purpose of the transfer was to keep Shoreview out of the reach of creditors. She was acutely aware of [the underlying debt]"). The *Husky* Court also recognized that a fraudulent conveyance scheme can give rise to § 523(a)(6) nondischargeability claim as well as a § 523(a)(2)(A) claim. *See* 136 S. Ct. at 1588 ("[D]ebtors who commit fraudulent conveyances . . . could likewise also inflict 'willful and malicious injury' under § 523(a)(6).").

In his motion, Gaddy essentially argues that because the transfers occurred before the judgment was entered and because that judgment is allegedly not final, SEPH fails to state a claim under § 523(a)(6) because SEPH did not have a property interest that would have been injured by Gaddy's fraudulent transfer scheme. However, Gaddy's argument fails for a number of reasons. First, as noted above, Gaddy's argument relies in part on Gaddy's assertion that SEPH's judgment against him is not final as to support a valid judgment lien. This assertion is improper at this stage, and SEPH's judgment should be considered final by this Court in determining whether to grant the motion for judgment on the pleadings.

More importantly, Gaddy completely ignores and fails to address the full language of the statute. For example, Gaddy concludes that, "[b]ecause the alleged fraudulent transfer did not 'willfull [sic] or maliciously' injure SEPH's property, SEPH cannot recover on its claims under § 523(a)(6)." However, Gaddy has ignored

that § 523(a)(6) also excepts from discharges debts "for willful and malicious injury by the debtor to another entity." Instead, he focuses on the property aspect of the subsection. SEPH only has to allege that it or its property suffered an injury due to the malicious and willful conduct of Gaddy. While the Court in *Jennings* noted that the judgment creditor there had obtained a fraudulent transfer judgment, the Eleventh Circuit noted the fraudulent transfer to make it clear that there had been an injury to the creditor's property. *See* 670 F.3d at 1333. ("And because here Maxfield obtained a fraudulent transfer judgment, complete with a finding that Janice intended to prevent Maxfield from satisfying his personal injury claim, we conclude that Janice's transfer was an injury to Maxfield's property.") Furthermore, the Eleventh Circuit in *Kane* cited Fifth Circuit law that an intentional breach of contract may prevent discharge under § 523(a)(6). *See* 755 F.3d at 1296 (*citing In re Williams,* 337 F.3d at 510)). Gaddy, rather than transfer assets to pay off his debt to SEPH when Water's Edge went into default, intentionally transferred assets out of his hands. He intentionally and knowingly breached his contract and then put assets out of SEPH's reach by a malicious scheme of fraudulent transfers.

SEPH has alleged it has suffered an injury due to the willful and malicious conduct of Gaddy, as Gaddy intentionally injured SEPH's chances of collecting on any future judgment by engaging in a detailed plot to shift assets out of his name in hindrance of SEPH's collection. While it is true that the underlying fraudulent transfer claims of SEPH have not been reduced to judgment, SEPH has brought those claims, and

has been unable to reduce them to judgment due to Gaddy's bankruptcy filing. It is clear that under Eleventh Circuit law any fraudulent transfer judgment SEPH obtains against Gaddy would be nondischargeable if Gaddy made such fraudulent transfers with a willful and malicious intent. It would promote fraud and opportunistic bankruptcy filings if SEPH's debt is rendered dischargeable based on the lack of judgment for fraudulent transfer where the debtor has prevented such judgment. *See Eldridge v. Waugh*, 198 B.R. 545, (E.D. Ark. 1995) (finding that claims for fraudulent transfers were non-dischargeable even though creditors had not obtained judgment on those fraudulent transfer claims). The allegations of the Complaint are detailed and numerous, and they state a plausible claim for relief under § 523(a)(6).

While Gaddy cites *In re Best*, 109 F. App'x 1, 6 (6th Cir. 2004), *Shahid*, and *In re Pouliot*, 196 B.R. 641, 653 (Bankr. S.D. Fla. 1996) as all supporting the proposition that willfully disposing of assets to the detriment of a creditor such as SEPH does not constitute willful and malicious injury, those cases run counter to the Eleventh Circuit's holding in *Jennings*. The Eleventh Circuit has specifically held that willful and malicious fraudulent transfer schemes are a type of claim that is subject to nondischargeability under § 523(a)(6). Gaddy, in anticipation of a potential future default given the struggling position of Water's Edge, made the first transfer of property on October 16, 2009. Gaddy continued making fraudulent transfers after being sued by SEPH and after SEPH obtained its judgment. Such actions constitute malicious and willful acts made with an intent to harm SEPH. While this Court in *Shahid* noted that the creditor

there had not reduced its fraudulent transfer to judgment and thus distinguished *Jennings*, in light of the fact that the Court did not address the "injury to an entity" and focused instead on the injury to property element of 523(a)(6), SEPH respectfully requests this Court deny Gaddy's motion for judgment on the pleadings.

IV. SEPH is entitled to a declaratory judgment

Gaddy's argument with regard to SEPH's claim for declaratory judgment stated in the complaint relies solely on the alleged failure of SEPH to state claims under § 523(a)(2)(A) or § 523(a)(6). For the reasons discussed above, SEPH's claims are plausible and should survive Gaddy's motion for a judgment on the pleadings since Gaddy is not entitled to a judgment as a matter of law. Therefore, SEPH claims seeking a declaration of non-dischargeability under either of the applicable subsections of § 523 should survive the motion, as well.

V. Conclusion

Gaddy's arguments contain improper references to alleged facts that are outside of the pleadings and attempts to improperly have the Court consider such allegations in his motion that is restricted to only the pleadings in this case. Furthermore, Gaddy, prior to SEPH's obtaining a judgment against him, willfully and with a malicious intent to injure SEPH, committed numerous fraudulent transfers seeking to injure SEPH's collection efforts before they could get off the ground. As the Supreme Court has recognized that fraudulent transfer schemes constitute "actual fraud" under § 523(a)(2)(A), such pre-judgment scheming by

Gaddy supports a claim for non-dischargeability under both § 523(a)(2)(A) and § 523(a)(6). Therefore, SEPH respectfully requests that the Court deny Gaddy's motion for judgment on the pleadings.

Respectfully submitted,

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