NOT RECOMMENDED FOR PUBLICATION

File Name: 24b0001n.06

BANKRUPTCY APPELLATE PANEL

OF THE SIXTH CIRCUIT

IN RE: STEVEN K. BAILEY aka Tri-State Roofing and Remodeling, Inc.,

Debtor.

REBECCA BAILEY,

Plaintiff-Appellant,

v.

STEVEN K. BAILEY,

Defendant-Appellee.

No. 23-8001

Appeal from the United States Bankruptcy Court
for the Eastern District of Kentucky at Ashland.
No. 1:22-bk-10013—Tracey N. Wise, Bankruptcy Judge.

Argued: November 7, 2023

Decided and Filed: April 8, 2024

Before: BAUKNIGHT, DALES, and GUSTAFSON, Bankruptcy Appellate Panel Judges.

COUNSEL

ARGUED: Robert W. Miller, Grayson, Kentucky, for Appellant. Bruce E. Blackburn, BLACKBURN LAW, PLLC, Raceland, Kentucky, for Appellee. **ON BRIEF:** Robert W. Miller, Grayson, Kentucky, for Appellant. Bruce E. Blackburn, BLACKBURN LAW, PLLC, Raceland, Kentucky, for Appellee.

BAUKNIGHT, J., delivered the opinion of the court in which GUSTAFSON, J., joined in full. DALES, J. (pp. 30–34), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SUZANNE H. BAUKNIGHT, Bankruptcy Appellate Panel Judge. In this appeal, Rebecca Bailey ("Plaintiff" or "Appellant") challenges the bankruptcy court's dismissal of her numerous causes of action arising from her divorce from Debtor, Steven K. Bailey ("Appellee," "Defendant," or "Debtor"), in which she was awarded an aggregate lump-sum judgment of $205,000.00 plus interest. Specifically, Appellant challenges the bankruptcy court's orders granting judgment on the pleadings for Defendant on Appellant's cause of action that a portion of the divorce judgment awarded to her is nondischargeable under 11 U.S.C. § 523(a)(4) as defalcation while Defendant was acting in a fiduciary capacity and that the total judgment is nondischargeable under § 523(a)(5) as a domestic support obligation; granting summary judgment for Defendant on Appellant's request for the bankruptcy court to impose an equitable lien on Defendant's real property; and granting judgment for Defendant after trial on Appellant's § 523(a)(4) cause of action asserting that the debt is non-dischargeable as embezzlement.

For the reasons set forth below, we affirm the bankruptcy court's entry of summary judgment against Appellant on her claim for imposition of an equitable lien and judgment after trial against Appellant on her § 523(a)(4) count for embezzlement. The Panel finds, however, that the bankruptcy court erred as a matter of law in granting Defendant's motion for judgment on the pleadings on Appellant's § 523(a)(4) count for defalcation while acting in a fiduciary capacity on the ground that Appellant could not "show an express trust was created since there was no required trust *res*." (Mem. Op. & Order Granting Mot. for J. on the Pleadings in Part & Denying M. for Partial Summ. J. ("September 26, 2022 Opinion") at 6, Adv. Proc. 22-01001, ECF No. 54.) We also find that the bankruptcy court erred as a matter of law in entering judgment on the pleadings dismissing Appellant's § 523(a)(5) count. Thus, we vacate the judgment to the extent it dismissed those two counts and remand for further proceedings consistent with this opinion.

ISSUES ON APPEAL

The Appellant has set forth the following issues on appeal:[1]

I. Did the Honorable Trial Court err in entering summary judgment dismissing Appellant's claim that a portion of the debt owed to the Appellant was non-dischargeable because it was a debt for fraud or defalcation while acting in a fiduciary capacity?

II. Did the Honorable Trial Court err in entering judgment dismissing the Appellant's claim that a portion of the debt owed to the Appellant was non-dischargeable because it was a debt incurred for embezzlement committed by the debtor?

III. Did the Honorable Trial Court err in entering summary judgment dismissing the Appellant's claim that she was entitled to claim an equitable lien for all sums due and owing her by the debtor?

IV. Did the Honorable Trial Court err in entering summary judgment dismissing the Appellant's claim that the debt owed to the Appellant was non-dischargeable as a domestic support obligation?

(Civil Appeal Statement of Parties and Issues, BAP Case 23-8001, ECF No. 10.)

JURISDICTION AND STANDARD OF REVIEW

The Panel has jurisdiction to hear appeals "from final judgments, orders, and decrees" issued by a bankruptcy court pursuant to 28 U.S.C. § 158(a)(1). "Orders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case." *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 37, 140 S. Ct. 582, 586 (2020) (citing *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501, 135 S. Ct. 1686, 1691 (2015)). Orders that "fully dispose of the adversary proceeding" are final. *Church Joint Venture, L.P. v. Bedwell* (*In re Blasingame*), 598 B.R. 864, 868 (B.A.P. 6th Cir. 2019) (citing *Geberegeorgis v. Gammarino* (*In re Geberegeorgis*), 310 B.R. 61, 63 (B.A.P. 6th Cir. 2004) ("[A]n order that

[1]These Issues on Appeal are recited verbatim from Appellant's Civil Appeal Statement of Parties and Issues (Civil Appeal Statement of Parties and Issues, BAP Case 23-8001, ECF No. 10); however, Appellant inaccurately identified the procedural posture of portions of the bankruptcy court's dismissal of Appellant's claims. The defalcation and domestic-support claims were dismissed not on summary judgment but under Federal Rule of Civil Procedure 12(c), on the pleadings. The Panel will address the issues based on the bankruptcy court's procedural chronology, taking first the Rule 12(c) dismissals, then the summary judgment dismissal, and finally, the trial determination in favor of Defendant.

concludes a particular adversarial matter within the larger case should be deemed final and reviewable in a bankruptcy setting." (citations omitted))).

> "A bankruptcy court's order dismissing a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo." *Lefkowitz v. Mich. Trucking, LLC* (*In re Gainey Corp*.), No. 11-8038, 2012 WL 3938521, [at] *1 (B.A.P. 6th Cir. Sept. 11, 2012). "Under a de novo standard of review, the reviewing court decides an issue independently of, and without deference to, the trial court's determination." *Maxus Capital Grp., LLC v. Uhrich* (*In re Level Propane Gases, Inc*.), No. 09-8047, 2010 WL 1255669, at *2 (B.A.P. 6th Cir. Apr. 2, 2010) (citation omitted).

Chenault v. Great Lakes Higher Educ. Corp. (*In re Chenault*), 586 B.R. 414, 417–18 (B.A.P. 6th Cir. 2018). The standard of review for dismissal under Rule 12(c) is the same as for dismissal under Rule 12(b)(6). *Moore v. Hiram Twp.*, 988 F.3d 355, 357 (6th Cir. 2021); *Donovan v. FirstCredit, Inc.*, 983 F.3d 246, 252 (6th Cir. 2020).

Because "[t]he bankruptcy court's grant of summary judgment presents purely a question of law, . . . we [also] review it de novo." *Vara v. McDonald* (*In re McDonald*), 29 F.4th 817, 822 (6th Cir. 2022).

> "In doing so, we draw all reasonable inferences and view the evidence in the light most favorable to the [nonmovant]" to determine whether there is a genuine dispute of material fact. *Henschel v. Clare Cnty. Rd. Comm'n*, 737 F.3d 1017, 1022 (6th Cir. 2013). That means that, in most cases, evidence offered by the nonmovant must be accepted as true and that credibility judgments and weighing of the evidence are improper. *Rorrer v. City of Stow*, 743 F.3d 1025, 1038 (6th Cir. 2014). A genuine dispute of material fact exists if a reasonable jury—viewing the evidence in favor of the nonmovant—could decide for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). And where there is a genuine dispute of any material fact, summary judgment is inappropriate. *Henschel*, 737 F.3d at 1022.

Hostettler v. College of Wooster, 895 F.3d 844, 852 (6th Cir. 2018).

We review the factual determination concerning a claim of embezzlement for clear error under Federal Rule of Civil Procedure 52 and the legal conclusions *de novo*. *See Kraus Anderson Cap., Inc. v. Bradley* (*In re Bradley*), 507 B.R. 192, 196 (B.A.P. 6th Cir. 2014).

FACTS[2]

The parties were married in 1980, and Defendant filed for divorce in 2013. During the marriage, the parties jointly operated Tri-State Roofing and Remodeling Inc. ("Tri-State"), an incorporated construction company. Defendant remained in sole possession and control of the business during the pendency of the divorce; however, Defendant was ordered to deposit all proceeds from Tri-State into "the accounts of Tri-State Roofing & Remodeling" with "[a]ll deposits in the accounts of Tri-State Roofing and Remodeling [to] . . . remain there until further orders of the Court." (Aug. 22, 2013 Order, Adv. Proc. 22-01001, ECF No. 36, Ex. 2 ("August 22, 2013 Order").) The August 22, 2013 Order, which resulted from Plaintiff's having sought a restraining order in the state court to preclude Defendant from disposing of marital assets during the pendency of the divorce proceeding, also provided: "Neither party shall convey, encumber, or dispose of any assets of the parties, including but not limited to, the assets of Tri-State Roofing & Remodeling during the pendency of this action." (*Id.*)

Because Defendant did not comply with the August 22, 2013 Order, the state court held him in contempt and sentenced him to sixty days incarceration with the ability to purge his contempt by posting bond. In the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage ("Divorce Judgment") entered August 8, 2016, the state court held, *inter alia*, that Defendant had used approximately $320,000.00 that should have been segregated in a "separate," "special" account under the requirements of the August 22, 2013 Order. (Divorce Judgment at 2–3, Adv. Proc. 22-01001, ECF No. 1, Ex. 1.) As a result, the state court awarded Plaintiff a lump-sum judgment in the aggregate amount of $205,000.00, consisting of $45,000.00

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[2] "[T]he parties have stipulated or agreed to most, if not all, of the evidence [within the adversarial complaint and the attached documents.]" (Appellee's Br. at 7, BAP Case No. 23-8001, ECF No. 14.) In his brief, Appellee makes no independent argument or attempt to refute Appellant's brief; instead, he simply adopts the bankruptcy court's reasoning by attaching and incorporating the bankruptcy court's two opinions. Although Appellant asserts in her reply brief that Appellee's failure to so argue or refute amounts to a waiver, she is incorrect. Appellee was not required to participate in this appeal, and Appellant still bears the burden of persuasion. *See Fikrou v. Yarnall* (*In re Fikrou*), No. 2:19-BK-13180, 2020 WL 7214141, at *6 n.7 (B.A.P. 9th Cir. Dec. 7, 2020) ("If an appellee chooses not to file a brief, the appellee risks that an appellant may persuade an appellate court to reverse the judgment on appeal, but it is always the appellant's burden to demonstrate error."); *see also United States v. Pinkerton*, 669 F. App'x 508 (10th Cir. 2016) ("Electing not to file an appellee's brief waives the right to participate in oral argument, Fed. R. App. P. 31(c), it does not concede the result of the appeal." (citation omitted)); *Yuan Gao v. Mukasey*, 519 F.3d 376, 379 (7th Cir. 2008) ("An appellee . . . is not required to file a brief. If he doesn't, he weakens his chances for an affirmance, of course, but that is all." (citations omitted)).

for her one-half interest in Tri-State and $160,000.00 for her portion of the Tri-State income that Defendant had been ordered to deposit into a special account while the divorce was pending. The state court also ordered Defendant to make $250.00 monthly maintenance payments[3] to Plaintiff for the remainder of her life or until she remarried or cohabitated with another person.

Defendant commenced his chapter 13 bankruptcy case in the Eastern District of Kentucky on February 14, 2022, and scheduled the debt owed to Plaintiff as unsecured.[4] Plaintiff asserted her claims in Defendant's bankruptcy case by filing a proof of claim, objecting to confirmation of his chapter 13 plan, and filing an adversary proceeding seeking a determination that the amounts she was awarded under the Divorce Judgment are nondischargeable. In her Complaint filed on May 10, 2022 ("Complaint"), and amended on July 7, 2022 ("Amended Complaint"), Plaintiff asserted that $160,000.00 (plus 6% interest) was nondischargeable either as a defalcation while Defendant was acting as a fiduciary or through embezzlement, and that the total judgment was nondischargeable spousal support.[5] She also asserted that the real property subject to the Divorce Judgment (631 Wampler Branch, Greenup, Kentucky) should be valued at $200,000.00[6] and that she was entitled to an equitable lien against the property in the amount of $273,675.00.[7]

After answering the Amended Complaint on July 28, 2022, Defendant filed a motion for judgment on the pleadings ("Rule 12(c) Motion") on August 3, 2022, arguing that the adversary proceeding should be dismissed because the awards made by the state court through the Divorce

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[3]Because Defendant failed to comply with Divorce Judgment's payment requirements, the state court later directed Defendant to pay $500.00 weekly to Plaintiff toward the amounts he owed her under the Divorce Judgment (in addition to the $250.00 monthly maintenance payments).

[4]Apparently, Plaintiff recorded the Divorce Judgment to procure a judgment lien under Kentucky law as Defendant's answer in the adversary proceeding stated: "it is anticipated the plan will allow a portion of plaintiff's claim to be paid as secured under the lien avoidance Section 3.4." (Answer to Adv. Compl. at 1, Adv. Proc. 22-01001, ECF No. 9.)

[5]Plaintiff also asserted counts under 11 U.S.C. § 523(a)(2)(A) and (15), but the bankruptcy court's dismissal of those counts was not appealed.

[6]Appellant did not appeal the bankruptcy court's dismissal of the valuation count for determination in the underlying bankruptcy case.

[7]This amount represents the aggregate Divorce Judgment in the amount of $205,000.00 plus 6% interest calculated from the start of the divorce proceedings to the bankruptcy petition date.

Judgment were in the nature of a property settlement, not in the nature of support under § 523(a)(5). Defendant also argued that the Divorce Judgment did not make any finding "of embezzlement or larceny as a fiduciary[.]" (Rule 12(c) Motion at 3, Adv. Proc. 22-01001, ECF No. 35.) Finally, Defendant argued that valuation of the roofing business was more appropriately heard as a contested matter.

On that same day, Plaintiff filed a motion for partial summary judgment ("Summary Judgment Motion"), arguing that she was entitled to a determination of nondischargeability under § 523(a)(4) for the $160,000.00, plus interest, because Defendant should have segregated and retained the funds as required by the August 22, 2013 Order. Plaintiff also asserted that she was entitled to an equitable lien against Defendant's property in the amount of $273,675.00 under Kentucky law. In support of this motion, Plaintiff attached for the first time the August 22, 2013 Order. (Summary Judgment Motion, Adv. Proc. 22-01001, ECF No. 36, Ex. 2.)

In its September 26, 2022 Opinion, the bankruptcy court granted in part Defendant's Rule 12(c) Motion and denied Plaintiff's Summary Judgment Motion. Concerning Plaintiff's support claim, the bankruptcy court granted the Rule 12(c) Motion, holding that Plaintiff had not stated a claim under § 523(a)(5) because the "Complaint and its attached documents [including the Divorce Judgment] lack[ed] factual allegations which, if taken as true, would plausibly support a finding that (1) the 'state court or parties intended to create a support obligation' or (2) '[this] debt has "the actual effect of providing necessary support."'" (September 26, 2022 Opinion at 5, Adv. Proc. 22-01001, ECF No. 54 (quoting *Thomas v. Clark* (*In re Thomas*), 591 F. App'x 443, 445 (6th Cir. 2015))). Because the state court had awarded monthly maintenance payments separate from the judgment relating to Tri-State and because that debt was not labeled as a support obligation and was not contingent on any subsequent events, the bankruptcy court discounted the state court's finding that the income from Tri-State had supported the parties during their marriage and ruled that Plaintiff failed to state a claim under § 523(a)(5).

The bankruptcy court also dismissed two of Plaintiff's § 523(a)(4) counts. First, concerning the allegation of defalcation regarding a trust allegedly created by the August 22, 2013 Order, the bankruptcy court found that because "the Complaint and the [Divorce] Decree reference[d] an account that was neither established nor funded," Plaintiff could not show the

existence of a trust *res* necessary to create an express trust. (*Id.* at 6.) Concerning the larceny prong of § 523(a)(4), the bankruptcy court held that Plaintiff did not allege that the funds "wrongfully came into the debtor's possession," and thus, did not support a larceny cause of action. (*Id*. at 7.) The bankruptcy court, however, denied the Rule 12(c) Motion in part, refusing to dismiss the § 523(a)(4) claim based on embezzlement because the Complaint sufficiently alleged a plausible claim for embezzlement. The bankruptcy court then denied the Summary Judgment Motion, finding that Plaintiff had not shown the absence of a genuine issue of material fact as to the embezzlement claim.

Finally, the bankruptcy court denied the Summary Judgment Motion as to Plaintiff's claim for an equitable lien in real property that was deemed Defendant's nonmarital property by the state court even though it remained deeded to Plaintiff. Applying Kentucky law, the bankruptcy court held that the facts were not analogous to those for which Kentucky courts had imposed an equitable lien because Plaintiff's lien claim did not "accrue[] from the same subject matter as the debt obligation." (*Id.* at 11.) Simultaneous with the September 26, 2022 Opinion, the bankruptcy court then identified questions it had regarding the viability of the remaining claims, including the request for an equitable lien, and required supplemental briefing for the court to determine whether it could grant summary judgment under Federal Rule of Civil Procedure 56(f).

The bankruptcy court held a trial on all remaining issues on November 30, 2022. Plaintiff did not attend due to illness, and the court heard testimony only from Defendant. Although the bankruptcy court offered Plaintiff an opportunity to submit further evidence or put on further proof, she declined. The bankruptcy court closed the evidence on December 16, 2022, and deemed the matter submitted.

The bankruptcy court entered its memorandum opinion and order following trial on December 21, 2022. (Mem. Op. Granting J. to Def. ("December 21, 2022 Opinion"), Adv. Proc. 22-01001, ECF No. 77.) The December 21, 2022 Opinion included the bankruptcy court's

decision under Rule 56(f) to dismiss Plaintiff's § 523(a)(2)(A) and (a)(15) claims,[8] as well as Plaintiff's request for imposition of an equitable lien and the court's findings of fact and conclusions of law after trial on the § 523(a)(4) embezzlement claim. The bankruptcy court granted summary judgment to Defendant on Plaintiff's equitable-lien request because it found as a matter of law that although a bankruptcy court may enforce equitable liens granted by other courts, it may not impose an equitable lien under its own authority. The bankruptcy court granted judgment to Defendant on the embezzlement claim, finding that Plaintiff had not carried her burden of proof to show Defendant's fraudulent intent.

DISCUSSION

I. Judgment on the Pleadings Under Federal Rule of Civil Procedure 12(c)

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c) (applicable in adversary proceedings under Fed. R. Bankr. P. 7012).

> A motion for judgment on the pleadings essentially constitutes a delayed motion under Rule 12(b)(6) and is evaluated under the same standard. *See, e.g.*, *Holland v. FCA US LLC*, 656 F. App'x 232, 236 (6th Cir. 2016). In other words, judgment on the pleadings is appropriate where, construing the material allegations of the pleadings and all reasonable inferences in the light most favorable to the non-moving party, the Court concludes that the moving party is entitled to judgment as a matter of law. *Anders v. Cuevas*, 984 F.3d 1166, 1174 (6th Cir. 2021). In construing the pleadings, the Court accepts the factual allegations of the non-movant as true, but not unwarranted inferences or legal conclusions. *Holland*, 656 F. App'x at 236–37 (*citing Gregory v. Shelby Cnty.*, 220 F.3d 433, 446 (6th Cir. 2000)).

Kenyon v. Union Home Mortg. Corp., 581 F. Supp. 3d 951, 955 (N.D. Ohio 2022). "[T]he well-pleaded factual allegations must 'plausibly give rise to an entitlement to relief.' Pleaded facts will do so if they 'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 480 (6th Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79, 129 S. Ct. 1937, 1940 (2009)).

[8]Because Plaintiff had abandoned them by failing to address them in her supplemental briefing as directed by the court, the bankruptcy court granted summary judgment to Defendant on the § 523(a)(2)(A) and (a)(15) counts. (*Id.* at 3–4.) Plaintiff has not appealed the dismissal of those counts.

However, "[m]ere labels and conclusions are not enough[,]" *Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017), nor are facts that are "merely consistent with" liability. *Bates*, 958 F.3d at 480 (quoting *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 1966 (2007))).

> This standard "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim or element.]" *Twombly*, 550 U.S. at 556. The key issue is threshold plausibility, to determine whether a plaintiff is entitled to present evidence in support of h[er] claim and not whether it is likely that [s]he will ultimately prevail.

Delker v. MasterCard Int'l, Inc., 21 F.4th 1019, 1024 (8th Cir. 2022); *see also Hamerly v. Fifth Third Mortg. Co.* (*In re J & M Salupo Dev. Co.*), 388 B.R. 795, 802 (B.A.P. 6th Cir. 2008) ("The issue is not whether the plaintiff will ultimately prevail, but whether [s]he is entitled to offer evidence to support [her] claim." (citation omitted)).

A. Rule 12(c) Dismissal of the § 523(a)(4) Defalcation Claim

The bankruptcy court granted the Rule 12(c) Motion and dismissed Plaintiff's § 523(a)(4) claim for fraud or defalcation while acting as a fiduciary, explaining that Plaintiff failed to establish the existence of an express trust because "there was no required trust *res*." (September 26, 2022 Opinion at 6, Adv. Proc. 22-01001, ECF No. 54.) Appellant argues that the bankruptcy court "erred in ruling that there was not a sufficient res to constitute a fiduciary relationship as a matter of law." (Appellant's Br. At 17.) Specifically, Appellant argues that the August 22, 2013 Order "created an express obligation" and "a fiduciary duty . . . to deposit all business funds in the business accounts and to hold said funds in the business accounts" and that Appellee "intentionally and repeatedly refused to comply with said order and eventually went to jail rather than to comply with [the] order." (*Id.* at 14.) Finally, Appellant argues that the state court previously determined that Appellee misappropriated the funds, which cannot be relitigated, and his misappropriation of the business income is a classic case of defalcation while acting as a fiduciary.

Debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny" are nondischargeable. 11 U.S.C. § 523(a)(4). Defalcation, which "may be used to refer to nonfraudulent breaches of fiduciary duty," "includes a culpable state of mind requirement akin

to that which accompanies application of the other terms in the same statutory phrase[:] . . . one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 269, 275, 133 S. Ct. 1754, 1757, 1760 (2013). "To except a debt from discharge as a defalcation, the preponderance of the evidence must establish '(1) a preexisting fiduciary relationship, (2) a breach of that fiduciary relationship, and (3) a resulting loss.'" *Long v. Piercy* (*In re Piercy*), 21 F.4th 909, 926 (6th Cir. 2021) (quoting *Bd. Of Trs. Of the Ohio Carpenters' Pension Fund v. Bucci* (*In re Bucci*), 493 F.3d 635, 639 (6th Cir. 2007) (quoting *Commonwealth Land Title Co. v. Blaszak* (*In re Blaszak*), 397 F.3d 386, 390 (6th Cir. 2005))). In the Sixth Circuit, a fiduciary relationship may be found only in "those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." *R.E. Am., Inc. v. Garver* (*In re Garver*), 116 F.3d 176, 180 (6th Cir. 1997). To establish an express trust, a plaintiff must show "(1) an intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary." *Piercy*, 21 F.4th at 926 (citation omitted).

When deciding the Rule 12(c) Motion, the bankruptcy court was required to view the allegations in a light most favorable to Plaintiff and determine whether she alleged sufficient facts to state a valid claim for defalcation while acting in a fiduciary capacity under § 523(a)(4). Plaintiff asserted in her Amended Complaint the following:

> d.) As a condition of the debtor, Steven Bailey, remaining in possession and control of the business, he was ordered to escrow certain funds obtained by the business in a special account. Steven Bailey repeatedly refused to so escrow said accounts and in fact converted said accounts to his own use, to the prejudice of the Plaintiff herein, Rebecca Bailey. . . .
>
> e.) On one occasion, Steven Bailey was held in contempt of Court, by the Greenup Circuit Court for his failure to so escrow and so maintain business funds received in said escrow account at which time Steven Bailey was placed in jail and remained in jail in contempt of Court for a period of several days until he was able to post bond and be released from jail. . . .
>
> f.) At the conclusion of the divorce case in the Greenup Circuit Court 13-CI-00471, the Trial Court concluded that Steven Bailey had misappropriated approximately Three Hundred Twenty Thousand Dollars ($320,000.00) of funds that should have went into the special account to be divided between Steven Bailey and Rebecca Bailey, and the trial Court awarded Rebecca Bailey judgment

> against Steven Bailey for one-half of said misappropriated funds in the amount of One Hundred Sixty Thousand Dollars ($160,000.00). . . .
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> g.) Following the entry of the judgment of the Greenup Circuit Court aforesaid, Steven Bailey prosecuted an appeal to the Kentucky Court of Appeals which appear was to no avail, and the judgment of the Greenup Circuit Court was affirmed by the Kentucky Court of Appeals.
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> h.) Upon remand from the Kentucky Court of Appeals, Steven Bailey has still failed to pay the sums due and owing to this creditor, Rebecca Bailey.
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> 4. Steven Bailey . . . had appeared before the Greenup Circuit Court and admitted that he was in contempt of Court for his failure to pay the sums ordered by that Court, and he was scheduled to appear on the 20th day of April, 2022, for sentencing, but the contempt sentence was held in abeyance because of the automatic stay from this Court. . . .
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> . . . .
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> 7. Rebecca Bailey further contends that a portion of the indebtedness owed her is nondischargeable pursuant to [Section 523(a)(4)] because a portion of said indebtedness in the amount of One Hundred Sixty Thousand Dollars ($160,000.00)—plus interest thereon, represents funds, which the debtor, Steven Bailey, was required by Court Order of the Greenup Circuit Court to deposit in an escrow account and hold in a fiduciary positions, which funds the debtor failed to so hold in trust and failed to maintain in an escrow account, but rather the debtor, Steven Bailey, converted said sums to his own use and all for which the debtor Steven Bailey was found liable to Rebecca Bailey in the amount of One Hundred Sixty Thousand Dollars ($160,000.00), at the rate of 6% plus interest, as a result of said breach of fiduciary obligation and fraud, and all for which the creditor holds judgment against Steven Bailey by virtue of the judgment of the Greenup Circuit Court for said fraud and failure to maintain said sums in a fiduciary position as a result of the fraudulent acts of Steven Bailey as aforesaid, as said acts all establish a non-dischargeable debt because the Debtor committed fraud, or defalcation, while acting in fiduciary capacity . . . contrary to the provisions of 11 USCA Section 523 (a)(4).

(Am. Compl. at 2–3, Adv. Proc. 22-01001, ECF No. 13.) Plaintiff attached to her initial Complaint, and referred to in her Amended Complaint, the Divorce Judgment and other state-court orders[9] in support of her allegations.

[9]Other state-court orders attached to the initial Complaint were the Order of March 23, 2015, concerning Defendant's civil contempt, and the Order of December 17, 2021, requiring *inter alia* Defendant to pay $500.00 per week to Plaintiff towards the lump sum award of the Divorce Judgment (in addition to the $250.00 per month maintenance obligation).

After correctly noting that a defalcation claim under § 523(a)(4) "applies only to express or technical trusts and does not extend to implied trusts," (September 26, 2022 Opinion at 5, Adv. Proc. 22-01001, ECF No. 54 (quoting *Brady v. McAllister* (*In re Brady*), 101 F.3d 1165, 1173 (6th Cir. 1996))), the bankruptcy court acknowledged Plaintiff's allegations concerning the creation of an express trust but relied on the Divorce Judgment and found that "there are no facts alleged supporting the existence of an express trust or a trust *res*." (*Id.* at 6.) The court continued:

> The [Divorce Judgment] states that the family court had ordered Debtor to establish a 'special account' and deposit the business proceeds therein; however, there is no suggestion in the [Divorce Judgment] that the family court created an express trust for which Debtor would be the trustee. Plaintiff's allegations are nothing more than labels and conclusions—there are no facts alleged supporting the existence of an express trust or a trust *res*. Both the Complaint and [Divorce Judgment] reference an account that was neither established nor funded. Thus, as pled, it is not plausible Plaintiff can show an express trust was created since there was no required trust *res*. . . . Plaintiff's claim is also insufficiently pled because Debtor could only have misappropriated funds or failed to properly account for funds held in a trust if there had been funds deposited in a trust.

(*Id.* at 6–7.)

The Panel disagrees that Plaintiff did not plead sufficient facts, when taken in a light most favorable to her, as to the existence of an express or technical trust required by § 523(a)(4). The Panel first notes that the August 22, 2013 Order is the document that is alleged to have created the express trust (not the Divorce Judgment). Although the August 22, 2013 Order is not attached to the Complaint or Amended Complaint, the bankruptcy court erred in dismissing Appellant's defalcation count by granting the Rule 12(c) Motion because the Amended Complaint alleged that the state court had ordered Appellee to escrow funds. To the extent that the bankruptcy court determined that the state court had not intended to create an express trust, the bankruptcy court's reliance solely on the Divorce Judgment was inappropriate. Notably, the August 22, 2013 Order was included in the record as an attachment to Plaintiff's Summary Judgment Motion (*see* Summary Judgment Motion, Adv. Proc. 22-01001, ECF No. 36, Ex. 2),[10]

[10]While the Panel recognizes that Appellant's Designation of Record did not include the August 22, 2013 Order because it does not designate the Summary Judgment Motion, the Panel finds it appropriate to correct the record pursuant to Rule 8009(e)(2)(C). Moreover, the bankruptcy court must have reviewed the Summary Judgment

and although the bankruptcy court acknowledged that such an order existed, it did not mention the August 22, 2013 Order in its reasoning for dismissing the defalcation claim, appearing to rely solely on the Divorce Judgment.

Both the Complaint and Amended Complaint allege that the state court ordered Defendant to escrow and deposit business funds into a special account to be held in trust that were then to be paid, in part, to Plaintiff. These averments in the Complaint and Amended Complaint do not assert that the Divorce Judgment created the trust but that the trust was created by an order earlier in the divorce proceedings, that Defendant's failure to comply with that prior order resulted in his being found in contempt of court, and that the Divorce Judgment memorialized both and awarded Plaintiff a judgment of $160,000.00. The bankruptcy court's reliance solely on the language of the Divorce Judgment to determine whether the state court had previously created an express or technical trust was misplaced. Accordingly, it was procedurally premature and erroneous for the bankruptcy court to decide the existence of or intent to create a trust without reviewing or relying on the document purporting to create the trust.[11]

Moreover, the bankruptcy court's ruling that Appellant could not establish the elements of a defalcation claim under § 523(a)(4) because "an account was neither established nor funded" (September 26, 2022 Opinion at 6, Adv. Proc. 22-01001, ECF No. 54) was an error of law. To reiterate, in the Sixth Circuit, a fiduciary relationship is found only in "those situations involving an express or technical trust relationship arising from placement of a specific res *in the hands of the debtor*." *In re Garver*, 116 F.3d at 180 (emphasis added). No requirement exists for the purported trustee of an express trust to actually fund an account for the trust *res*. Indeed, if such were the law, a fiduciary could avoid a defalcation claim by simply never funding an account.

Motion because the September 26, 2022 Opinion disposed of it as well as the Rule 12(c) Motion. Thus, the August 22, 2013 Order, which was attached as an exhibit to the Summary Judgment Motion was a part of the record at the time the bankruptcy court ruled. Further, Plaintiff was not required to respond with documentary evidence under Rule 12(c). The well-pleaded factual allegations in the Complaint, standing alone, were required to be taken as true. *Hake v. Simpson*, 770 F. App'x 733, 735 (6th Cir. May 1, 2019).

[11]The Panel also notes here that the August 22, 2013 Order required Defendant to deposit "any and all proceeds" of the business "in the accounts of [the business] . . . [to] remain there until further order of the Court." (August 22, 2013 Order, Adv. Proc. 22-01001, ECF No. 36, Ex. 2.) Thus, although establishment of an account to hold funds is not required to establish the existence of a trust *res*, the August 22, 2013 Order directed Defendant to deposit the business funds into existing business accounts where they were to remain until further order of the court.

Although a specific account that is already funded can be impressed with a trust, the creation of a special account funded by specific dollars is not a necessity for finding an express trust. *See In re Arctic Exp. Inc*., 636 F.3d 781, 797 (6th Cir. 2011) (citing *Begier v. I.R.S.*, 496 U.S. 53, 60–62, 110 S. Ct. 2258, 2265 (1990) (holding that the segregation of funds was not a prerequisite to the establishment of a statutory trust under the Internal Revenue Code)).

Although a trust *res* is required for the creation of an express trust, the *res* – which is simply the property subject to the trust – is not required to be a specific or defined amount, may be defined by statute, and may include property such as materials for construction projects or real property. *See, e.g.*, *In re Piercy*, 21 F.4th at 928 (finding that the partner-defendants "were holding the partnership profits in an express or technical trust *before* they wrongfully withheld them from [the plaintiff]"); *In re Bucci*, 493 F.3d at 640 (holding that the Michigan Builders Trust Fund Act defines "the trust res as all payments made to a contractor for the benefit of laborers, subcontractors, or materialmen" (citing *Carlisle Cashway, Inc. v. Johnson* (*In re Johnson*), 691 F.2d 249, 252 (6th Cir. 1982)); *Miller v. Safford* (*In re Safford*), Adv. Proc. No. 19-3023, 2021 WL 5509264, at *4 (Bankr. E.D. Mich. Nov. 23, 2021) ("Supplying materials on open account is not sufficient to establish a res required under § 523(a)(4); however, supplying materials for a specific project does create the required trust under the Act."); *Dr. Gil Ctr. For Back, Neck & Chronic Pain Relief v. Rigney* (*In re Rigney*), Adv. No. 4:21-ap-01002-NNW, 2021 WL 3868241, at *5 (Bankr. E.D. Tenn. Aug. 27, 2021) ("The res [of the trust] is the proceeds of any settlement proceeds that were assigned to the plaintiff but coming into the possession of the defendant, including the insurance proceeds paid by Progressive. . . . [T]he defendant was obligated to turn over the settlement proceeds to the plaintiff, but instead, she kept and used the funds [the *res* of the trust].").

Here, Appellant adequately alleged that the business proceeds that came into Defendant's hands were the defined and intended trust *res*, even if he did not segregate or protect them as required. Specifically, the Amended Complaint clearly alleged that the state court ordered Defendant to segregate the funds and hold them for the benefit of the Plaintiff — a hallmark of any trust, express or otherwise — and that Defendant had intentionally failed to do so, resulting in the state court's holding him in contempt and entering a judgment against him for the amount

of the business income that Plaintiff would have been entitled to under the August 22, 2013 Order. Such allegations sufficiently state the elements of a § 523(a)(4) defalcation claim: "(1) a preexisting fiduciary relationship, (2) a breach of that fiduciary relationship, and (3) a resulting loss." *In re Piercy*, 21 F.4th at 926. Further, nothing about Appellant's allegations, which are sufficient to plead defalcation under § 523(a)(4), is contradicted by the Divorce Judgment that was before the bankruptcy court on the Rule 12(c) Motion.

Accordingly, with respect to the § 523(a)(4) claim for defalcation while acting in a fiduciary capacity, the September 26, 2022 Opinion is VACATED and the case REMANDED to allow Plaintiff to establish that the August 22, 2013 Order created a trust when it issued the August 22, 2013 Order and an intentional, wrongful breach[12] by Defendant of his fiduciary relationship arising out of any such trust, with the resulting loss by Plaintiff as already determined by the state court.

B. Rule 12(c) Dismissal of the § 523(a)(5) Claim

In its September 26, 2022 Opinion, relying on *Thomas v. Clark* (*In re Thomas*), 592 F. App'x 443, 445 (6th Cir. 2015) and *Sorah v. Sorah* (*In re Sorah*), 163 F.3d 397, 401 (6th Cir. 1998), the bankruptcy court expressly held that the Complaint and the attached Divorce Judgment did not plausibly support a finding that the state court intended for any portion of the awarded judgment[13] to be support or that the judgment had an actual effect of providing support.

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[12]*See In re Piercy*, 21 F.4th at 919, 928 ("[Plaintiff]'s state-court judgment may therefore be declared nondischargeable as a debt for fraud or defalcation while [Defendants] were acting in a fiduciary capacity under § 523(a)(4), provided that [Plaintiff] can produce evidence of their wrongful intent[,]" which "requires only a showing of gross recklessness." (citing *Bullock*, 569 U.S. at 269, 275)). Although the bankruptcy court did not find the Defendant possessed the requisite intent to support the Plaintiff's embezzlement count, the bankruptcy court's rejection of the embezzlement count does not preclude a finding that the Defendant knew his conduct was improper or at least was reckless as to the impropriety, such as might support excepting the debt from discharge as a "defalcation" under § 523(a)(4). The possible existence of a trust makes the Defendant's scienter a matter to address on remand.

[13]Under the Divorce Judgment, Plaintiff was awarded $45,000.00 as her one-half share in Tri-State and $160,000.00 for the proceeds that were to have been deposited and held during the pendency of the divorce. In the September 26, 2022 Opinion, the bankruptcy court recognized that the $273,675.00 judgment amount referenced in the complaint included accrued interest on the original $205,000.00. (September 26, 2022 Opinion at 4 n.4, Adv. Proc. 22-01001, ECF No. 54.) Although Plaintiff limited her requests under § 523(a)(4) to the $160,000.00 that was ordered to be segregated during the pendency of the divorce case, she requested that the entire lump-sum amount awarded in the Divorce Judgment be nondischargeable as a domestic support obligation under § 523(a)(5).

Appellant argues that the bankruptcy court erred when it determined that the money awarded to her under the Divorce Judgment was not a domestic support obligation without looking "at the underlying facts and circumstances giving rise to said Judgment." (Appellant's Br. at 28.) She asserts that the court should have considered that the business was Appellant's sole financial support and the sums Appellee was required to pay otherwise would have been Appellant's draws from the business. (*Id*. at 28–29.)

"A debtor's obligation to pay alimony, maintenance, or support to his or her former spouse may not be discharged." *In re Perlin*, 30 F.3d at 40–41 (citing 11 U.S.C. § 523(a)(5)). Specifically, § 523(a)(5), applicable to full-compliance discharges under Chapter 13 (*see* 11 U.S.C. § 1328(a)(2)), provides that "[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 . . . for a domestic support obligation." The term "domestic support obligation" is defined in the Bankruptcy Code as a debt:

> (A) owed to or recoverable by–
>
> > (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
> >
> > (ii) a governmental unit;
>
> (B) in the nature of alimony, maintenance, or support . . . of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
>
> (C) established . . . [by] a separation agreement, divorce decree, or property settlement agreement; [or] an order of the court of record; . . . and
>
> (D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A)(A)–(D).

An obligation not labeled as support nevertheless may fall within the definition of domestic support obligation. *See Long v. Calhoun* (*In re Calhoun*), 715 F.2d 1103, 1107 (6th Cir. 1983) (enunciating a four-part analysis for determining whether an award that is not specifically designated as alimony, maintenance, or support (under the pre-BAPCPA version of

the Code) was actually in the nature of support and, therefore, nondischargeable under § 523(a)).[14] The Sixth Circuit Bankruptcy Appellate Panel reiterated the required analysis in *In re Thomas*, 511 B.R. 89, 95 (B.A.P. 6th Cir. 2014), *aff'd*, 591 F. App'x 443 (6th Cir. 2015) (quoting *Fitzgerald v. Fitzgerald* (*In re Fitzgerald*), 9 F.3d 517, 520 (6th Cir. 1993) (citing *Calhoun*, 715 F.2d at 1109–10)):

> First, the obligation constitutes support only if the state court or parties intended to create a support obligation. Second, the obligation must have the actual effect of providing necessary support. Third, if the first two conditions are satisfied, the court must determine if the obligation is so excessive as to be unreasonable under traditional concepts of support. Fourth, if the amount is unreasonable, the obligation is dischargeable to the extent necessary to serve the purposes of federal bankruptcy law.

The non-debtor seeking a determination of nondischargeabilty under § 523(a)(5) bears the burden of proving all elements by a preponderance of the evidence, *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661 (1991), including "[t]he burden of demonstrating that an obligation is in the nature of support." *In re Thomas*, 511 B.R. at 95 (quoting *In re Fitzgerald*, 9 F.3d at 520 (citing *Calhoun*, 715 F.2d at 1111)).

Reviewing the bankruptcy court's legal determination de novo, the Panel finds that the bankruptcy court erred by prematurely dismissing Appellant's § 523(a)(5) claim under Rule 12(c).

> "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." . . . The plausibility standard is not akin to a "probability requirement," but instead requires more than a "sheer possibility" that the defendant has committed the misconduct. . . . If the complaint pleads only facts that are merely "consistent with" a defendant's liability, the complaint has fallen short and has merely alleged, but not shown, that the plaintiff is entitled to relief.

Mahoney v. Sanders-Davenport (*In re Sanders-Davenport*), 641 B.R. 157, 160 (Bankr. W.D. Mich. 2022) (quoting *Iqbal*, 556 U.S. at 678).

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[14] Although *In re Calhoun* and *In re Fitzgerald* were decided before the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was enacted in 2005, "the pre-BAPCPA case law continues to have relevance post-BAPCPA because both versions of the statute require a determination that the debt be in the nature of support." *Taylor v. Taylor* (*In re Taylor*), 737 F.3d 670, 676 n.4 (10th Cir. 2013).

In the Sixth Circuit, "a complaint must allege more than a mere 'formulaic recitation' of the elements of a claim to withstand a 12(b)(6) [or 12(c)] challenge." *Church Jt. Venture, L.P. v. Bedwell* (*In re Blasingame*), 598 B.R. 864, 874 (B.A.P. 6th Cir. 2019) (citing *NM EU Corp. v. Deloitte & Touche LLP* (*In re NM Holdings Co.*), 622 F.3d 613, 623 (6th Cir. 2010)). "A court should only dismiss a complaint under Rule 12(b)(6) [or 12(c)] when 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *In re Chenault*, 586 B.R. at 420 (quoting *Twombly*, 550 U.S. at 561 (citing *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102 (1957))).

The Amended Complaint set out the lengthy history of "the long, adversarial, contested divorce proceeding" (Am. Compl. at 1, Adv. Proc. 22-01001, ECF No. 13), including the basis of the lump-sum award to Appellant relating to the failure of Defendant to escrow the business income while the divorce was pending. She then alleged that the award is nondischargeable under § 523(a)(5) "because said sum[] . . . is owed to her as a judgment for a domestic support obligation." (*Id.* at 3.)

In reaching its conclusion under Rule 12(c) that the Amended Complaint did not plausibly allege that the lump-sum award in the Divorce Judgment was in the nature of support, the bankruptcy court looked to the text of the Divorce Judgment, which was attached to the initial Complaint. The court found that the Divorce Judgment lacked indicia that the state court or the parties intended to create a support obligation or that the debt had the actual effect of providing necessary support. Instead, the bankruptcy court construed the Divorce Judgment's lump-sum award as not in the nature of support because the state court specifically "awarded Plaintiff $250 in monthly maintenance payments from [Defendant] separate from the" lump-sum award, which was "not labeled . . . as a support obligation and . . . [was not] contingent upon any subsequent events." (September 26, 2022 Opinion at 5, Adv. Proc. 22-01001, ECF No. 54.) The bankruptcy court, thus, held that the lump-sum award, which was comprised of the $160,000.00 resulting from Defendant's failure to preserve the income of the business as required by the August 22, 2013 Order and one-half of the business value (i.e., $45,000.00), was not a support obligation under § 523(a)(5) "regardless of any finding by the state court that the business supported the parties during the marriage." (*Id.*)

As explained by the *Calhoun* court, "the bankruptcy court may consider any relevant evidence including those factors utilized by state courts to make a factual determination of intent to create support." *In re Calhoun*, 715 F.2d at 1109. Such factors might include "(1) the disparity of earning power between the parties; (2) the need for economic support and stability; (3) the presence of minor children; and (4) marital fault." *Bailey v. Bailey* (*In re Bailey*), 254 B.R. 901, 906 (B.A.P. 6th Cir. 2000). Other indicia might include the nature of the obligation assumed, the structure and language of the court's decree, the provision of other lump sum or periodic payments, the duration of the marriage, and the work skills and abilities of the parties. *See Luman v. Luman* (*In re Luman*), 238 B.R. 697, 706 (Bankr. N.D. Ohio 1999), *cited with approval in In re Bailey*, 254 B.R. at 906.

The *Calhoun* factors, however, need not be pleaded for a court to allow a domestic-support-claim to survive a Rule 12(c) challenge. *Cf. Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12, 135 S. Ct. 346, 347 (2014) ("Having informed the [defendant] of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim."). Here, the bankruptcy court reviewed only the four corners of the Divorce Judgment. While that document contains the state court's rationale for its maintenance award of $250.00 per month, expressly addressing several of the *Calhoun* factors, if Appellant can present evidence of the state court's intent, the Bankruptcy Code's definition of "domestic support obligation" does not preclude a finding that all or part of the lump-sum award was intended as support regardless of whether the "debt is expressly so designated." 11 U.S.C. § 101(14A)(B). The Panel also finds notable that the bankruptcy court expressly discounted that the state court explicitly recognized that Tri-State had "provided the sole means and support for the family during most of the marriage." (Divorce Judgment at 9, Adv. Proc. 22-01001, ECF No. 1, Ex. 1.) Simply, the dismissal of the § 523(a)(5) count was premature given the restrictions on the bankruptcy court at the Rule 12(c) stage.

The Panel recognizes that, although the bankruptcy court did not expressly note it, the state court apportioned the parties' marital property over eleven paragraphs before addressing its express maintenance award to Appellant in the final paragraph of its findings of fact:

> 12. The Court finds that the Wife:
>
> a. Lacks sufficient property including marital property apportioned to her to provide for her reasonable needs and is unable to support herself through appropriate employment.
>
> b. And therefore the Wife is entitled to receive maintenance from the Husband.
>
> c. After considering the financial resources of the Wife, including the marital property apportioned to her, and her ability to meet her needs independently, the time necessary to acquire sufficient education or training to enable the Wife to find appropriate employment, the standard of living established during the marriage, the duration of the marriage, the age and the physical and emotional condition of the Wife, and the ability of the Husband to meet his needs while meeting those of the spouse seeking maintenance[,]
>
> d. The Court finds that the Husband shall pay maintenance to the Wife in the amount of Two Hundred Fifty Dollars ($2,50.00) [*sic*] per month until such time as the Wife, for the remainder of her lifetime, or should re0marry [*sic*] or otherwise co-habit with another person.

(Divorce Judgment at 14, Adv. Proc. 22-01001, ECF No. 1, Ex. 1.) Similarly, the section labeled Decree of Dissolution of Marriage sets forth five enumerated paragraphs apportioning the parties' property, including the lump-sum award to Appellant consisting of $45,000.00 for her interest in the business and $160,000.00 for the business proceeds that Appellee was ordered to hold during the pendency of the divorce proceedings, followed by a sixth paragraph requiring the monthly payment to Appellant as maintenance.

At the time it issued the September 26, 2022 Opinion, the bankruptcy court had before it only the Amended Complaint and the Divorce Judgment. At later stages of the litigation, absent other evidence of the state court's intent, a *factual finding* might appropriately rely solely on the Divorce Judgment and even discount the state court's reference to the business income supplying "the sole means of support for the family" (Am. Compl. at 9, Adv. Proc. 22-01001, ECF No. 13). However, the bankruptcy court's dismissal of the § 523(a)(5) count at the Rule 12(c) stage failed to construe the facts contained in the Amended Complaint and the Divorce Decree in the light most favorable to Appellant. If Appellant could produce no further evidence of the state-court's intent in support of or opposition to a summary judgment motion, the bankruptcy court might have appropriately considered the structure of the Divorce Judgment along with the state court's

express consideration of the state-law factors concerning maintenance[15] as an intentional and meaningful separate delineation of property allocation from maintenance. But the bankruptcy court did not reference those factors in its ruling, and in any event, the state court's clear delineation of the future maintenance award does not, by itself, preclude a factual finding that some or all of the lump-sum award also was support, especially for the lengthy time during which the divorce proceeding was pending. The bankruptcy court's conclusion that the state court did not intend for any portion of the lump-sum award to be maintenance reflects that the bankruptcy court failed to construe the allegations in the light most favorable to Plaintiff as required for a Rule 12(c) ruling, for which the Panel must find error.

As noted in the dissent on this issue, the bankruptcy court's dismissal might be interpreted as merely performing the gatekeeping function permitted by *Iqbal* and *Twombly*. *Cf. Morrell v. Stamp* (*In re Stamp*), 626 B.R. 397, 406 (Bankr. E.D. Pa. 2021) (granting a Rule 12(c) motion to find that an attorney's fee award was nondischargeable under § 523(a)(5) because "the record [was] complete on the issue[, and n]o purpose would be served by deferring a ruling on the § 523(a)(5) issue"). Although the question might be a close one, the Panel finds it most appropriate to remand this matter to the bankruptcy court with the § 523(a)(4) count to allow Appellant to further develop the record for a proper procedural disposition of both issues on either summary judgment or after trial.

Thus, the September 26, 2022 Opinion dismissing Plaintiff's § 523(a)(5) count is VACATED and the case REMANDED to allow Plaintiff to present evidence of the state court's intent in awarding the lump-sum judgment to Plaintiff.

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[15]For example, the Divorce Judgment contains the state court's express determination of the relevant factors under *Calhoun* and its progeny, with findings concerning Appellant's "financial resources" (including the marital property apportioned in the preceding paragraphs), her "ability to meet her needs independently," the possibility that she might need "to acquire sufficient education or training" to find employment, "the standard of living established during the marriage," the Appellant's age and health, and the Appellee's ability to meet his own needs while providing Appellant some measure of maintenance. (Divorce Judgment at 14, Adv. Proc. 22-01001, ECF No. 1, Ex. 1.)

II. Summary Judgment Dismissal of Appellant's Equitable Lien Claim

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (applicable to adversary proceedings through Fed. R. Bankr. P. 7056). The parties must present facts through "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or must prove "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). When deciding a summary judgment motion, the court does not weigh the evidence to determine the truth of the matter asserted but only determines whether a genuine issue for trial exists, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.[16] Additionally, it is appropriate for the court to resolve "pure questions of law" on summary judgment. *Inmet Mining, LLC v. Blackjewel Liquidation Tr.* (*In re Inmet Mining, LLC*), Adv. No. 23-7002, 2023 WL 4411852, at *3 (Bankr. E.D. Ky. July 7, 2023) (citing *Cook v. Little Caesar Enters., Inc*., 210 F.3d 653, 655–56 (6th Cir. 2000); *Berkovich v. Cal. Franchise Tax Bd.* (*In re Berkovich*), 619 B.R. 397, 400 (B.A.P. 9th Cir. 2020)).

In its December 21, 2022 Opinion, the bankruptcy court rejected Plaintiff's request that the bankruptcy court impose an equitable lien and granted summary judgment in favor of Defendant. The bankruptcy court adopted the analysis of the bankruptcy court in *In re Blume*, 582 B.R. 178 (Bankr. E.D. Mich. 2017). The *Blume* court found that an equitable lien is the equivalent of a constructive trust and that, under Sixth Circuit precedent, state courts may impose an equitable lien or a constructive trust, but bankruptcy courts may not. *Id*. at 179-80 (citing

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[16] As summarized by the Sixth Circuit in *Saunders v. Ford Motor Co.*, 879 F.3d 742, 748 (6th Cir. 2018):

> A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The moving party bears the burden to "demonstrate the absence of a genuine [dispute] of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). Finally, "[i]n making this assessment, [the court] must view all evidence in the light most favorable to the nonmoving party." *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 301 (6th Cir. 2016).

XL/Datacomp, Inc. v. Wilson (*In re Omegas Grp. Inc.*), 16 F.3d 1443, 1449–53 (6th Cir. 1994); *Kitchen v. Boyd* (*In re Newpower*), 233 F.3d 922, 935–37 (6th Cir. 2000); *Poss v. Morris* (*In re Morris*), 260 F.3d 654, 666 (6th Cir. 2001)); *cf. Corzin v. Decker, Vonau, Sybert & Lackey, Co., L.P.A.* (*In re Simms Constr. Servs. Co., Inc.*), 311 B.R. 479, 488 (B.A.P. 6th Cir. 2004) (noting that bankruptcy courts are authorized to enforce constructive trusts and other types of equitable relief). Thus, the bankruptcy court's conclusion is correct that it could not under its own authority impose a new equitable lien, and there are no issues of fact or evidence that Appellant could have presented to change this conclusion as a matter of law.

Appellant argues to this Panel facts that might support imposition of an equitable lien under Kentucky law. (Appellant's Br. at 7–14.) In essence, Appellant argues that because Appellee has not complied with the Divorce Judgment, she should not be required to turn over the property awarded to him without imposition of an equitable lien on it. (*Id*. at 8–9.) Appellant, however, does not address the bankruptcy court's legal determination that it does not possess the authority to impose an equitable lien in the first instance. (*Id*. at 8, 11–14.) Similarly, at oral argument, counsel did not address the authority of the bankruptcy court to impose an equitable lien but argued that to form an equitable lien, Kentucky law requires only "magical words of right and justice."

Notwithstanding Appellant's arguments, the question on appeal is not whether an equitable lien could or should have been imposed by a state court under Kentucky law. The issue on appeal is whether the bankruptcy court erred in finding that it did not possess authority to impose an equitable lien. Appellant made no attempt to address the case law cited by the bankruptcy court or refute the court's conclusion that it lacked authority to impress the property with an equitable lien. Thus, Appellant has not carried her burden of proving that the bankruptcy court made an error of law regarding its ability to impose an equitable lien.

Simply, Appellant does not argue on appeal that an equitable lien already existed under Kentucky law before Appellee's bankruptcy filing. Instead, she argues that a lien should be imposed post-petition by the bankruptcy court, an act that, under Sixth Circuit authority, it cannot perform. Therefore, the bankruptcy court's grant of summary judgment to Defendant on the equitable lien issue is AFFIRMED.

III. Trial Determination to Deny Appellant's § 523(a)(4) Embezzlement Claim

Exceptions to discharge are construed liberally in favor of debtors and strictly against creditors, who generally bear the burden of proving the necessary elements of nondischargeability by a preponderance of the evidence. *Pazdzierz v. First Am. Title Ins. Co.* (*In re Pazdzierz*), 718 F.3d 582, 586 (6th Cir. 2013) (citing *Grogan*, 498 U.S. at 291; *Rembert v. AT&T Universal Card Servs., Inc.* (*In re Rembert*), 141 F.3d 277, 281 (6th Cir. 1998)). "[I]f there is room for an inference of honest intent, the question of nondischargeability must be resolved in favor of the debtor." *Gaft v. Sheidler* (*In re Sheidler*), No. 15-8011, 2016 WL 1179268, at *5 (B.A.P. 6th Cir. Mar. 28, 2016) (citation omitted).

Section 523(a)(4) excepts from discharge debts incurred through embezzlement, which the Sixth Circuit defines as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172–73 (6th Cir. 1996). "A creditor proves embezzlement under § 523(a)(4) 'by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than for which it was entrusted, and the circumstances indicate fraud.'" *In re Piercy*, 21 F.4th at 919 (quoting *In re Brady*, 101 F.3d at 1173). "The 'fraud' required under § 523(a)(4) is 'fraud in fact, involving moral turpitude or *intentional* wrong.'" *Cash Am. Fin. Servs., Inc. v. Fox* (*In re Fox*), 370 B.R. 104, 116 (B.A.P. 6th Cir. 2007) (emphasis in original) (citations omitted).

The parties did not dispute that the first two elements for embezzlement were satisfied. Appellee was entrusted with income that belonged to the business that he owned jointly with Appellant. Further, Appellee misappropriated the entrusted business income by using it for his personal expenses rather than holding the funds in escrow in compliance with the August 22, 2013 Order. Therefore, the sole issue was whether Appellee possessed a fraudulent intent when doing so.

The bankruptcy court initially denied both the Rule 12(c) Motion and the Summary Judgment Motion as to the § 523(a)(4) claim for embezzlement, recognizing that matters regarding intent are rarely amenable to summary judgment. After further briefing, a trial, and the

closing of the evidence, the bankruptcy court held that Appellant had not proven that Appellee acted with the requisite fraudulent intent when he misappropriated the $160,000.00 he had failed to segregate and pay to her. In so deciding, the bankruptcy court considered the parties' stipulations, examined Appellee's deposition transcript as well as the state-court order finding him in contempt of court for his failure to segregate the business income, and heard Appellee's testimony at trial. In concluding that Appellant did not prove any fraudulent intent, the bankruptcy court found that the business income had come into Appellee's hands in the normal course of business operations and that he had in turn spent the money on normal expenses.

The bankruptcy court first made it clear that "[b]eing found in contempt based on a willful failure to obey a court order does not prove embezzlement" and that Appellant was still required to prove that Appellee had the requisite fraudulent intent for embezzlement "as evidenced by deception, artifice, a wrongful scheme, or a clever plan." (December 21, 2022 Opinion at 11, Adv. Proc. No. 22-01001, ECF No. 77.) The bankruptcy court referred to the *Fox* case in which the bankruptcy court was affirmed in its finding of a lack of intent to defraud "because 'the [d]ebtor acted openly rather than hiding or concealing' activity and 'the circumstances failed to show any artifice, wrongful scheme, or clever plan of fraud' to support an embezzlement claim." (*Id.* at 11 (quoting *In re Fox*, 370 B.R. at 117).)

The bankruptcy court then reviewed the evidence, noting the state court's finding that Appellant "certainly had no problem with [Appellee's] practice [of 'operat[ing] the business in cash as he had for decades'] when they were married and she was enjoying the benefits." (*Id*. at 13 (quoting Divorce Judgment at 3, Adv. Proc. 22-01001, ECF No. 1, Ex. 1).) Noting that Appellant "had every reason to know that Debtor continued to operate the roofing business in cash," the bankruptcy court found that Appellant had not been deceived "regarding Debtor's failure to segregate the business funds, as evidenced by her repeated efforts to compel his compliance." (*Id*.[17]) Finally, the bankruptcy court observed that "the family court's orders in this case do not state that Debtor acted to deceive or trick Plaintiff in connection with the

[17]The bankruptcy court pointed out that during his deposition, "Debtor flatly admitted that he was not depositing the business income in the bank" and that "Debtor suffered the consequences of his failure to obey the court's order through the contempt sanction of incarceration." (*Id*. at 13.)

business income." (*Id.* at 14.) Nor did "Plaintiff . . . adduce evidence at trial that Debtor engaged in deception or trickery sufficient to prove his fraudulent intent." (*Id.*)

Although the bankruptcy court's factual findings are reviewed for clear error,[18] the determination of fraudulent intent is a mixed factual and legal question that is best determined by the trial court. *See, e.g.*, *Sequatchie Mtn. Creditors v. Lile*, 585 B.R. 426, 440 (N.D. Ohio 2018) (stating that the court's conclusion that there was no fraudulent intent "contains both factual and legal components").

> Notably, the Sixth Circuit has long held that fraudulent intent is determined under a subjective standard. *See In re Rembert*, 141 F.3d at 281. Absent direct evidence of fraudulent intent, the court must determine whether fraudulent intent may be "inferred as a matter of fact" based on a totality of the circumstances when a defendant has engaged in "blameworthy" conduct. *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 759 (Bankr. E.D. Tenn. 2003). "It is well-settled that issues concerning credibility and intent are questions of fact that must be resolved by observing a witness's demeanor and presence on the stand" and a "determination of nondischargeability often comes down to which witnesses are most credible and a debtor's conduct prior to, at the time of, and subsequent to the representations at issue." *Kloeber v. Montanari (In re Montanari)*, No. 12-33189, 2015 WL 603874, at *8 (Bankr. E.D. Tenn. Feb. 12, 2015) (quoting *Hall v. Carter (In re Carter)*, No. 13-3094, 2014 WL 4187123, at *4 (Bankr. E.D. Tenn. Aug. 21, 2014) (citations omitted)); *see also Estate of Cora v. Jahrling (In re Jahrling)*, 816 F.3d 921, 926 (7th Cir. 2016) (finding that the bankruptcy court did not err when it based its findings about the debtor's state of mind on circumstantial evidence and drew inferences "based on the objective circumstances, but . . . applied the correct subjective standard"); *Nev. Prop. 1 LLC v. D'Amico* (*In re D'Amico*), 509 B.R. 550, 557 (S.D. Tex. 2014) ("The debtor's subjective motive to cause harm, however, is a question of fact[.]"); *Ross v. Cecil Cnty. Dep't of Social Servs.*, 878 F. Supp. 2d 606, 621 n.26 (D. Md. 2012) ("Resolution of questions of intent often depends upon the credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross examination." (citation omitted)).

[18] *See, e.g.*, *Eifler v. Wilson & Muir Bank & Trust Co.*, 588 F. App'x 473, 477, 479 (6th Cir. 2014) (examining a finding of fraudulent intent under § 727); *Gen. Motors Acceptance Corp. v. Cline* (*In re Cline*), 431 B.R. 307 (B.A.P. 6th Cir. 2010) ("[T]he Panel must determine whether the bankruptcy court's finding that Appellant possessed the requisite fraudulent intent [as to embezzlement under § 523(a)(4)] was clearly erroneous.").

Long v. Piercy (*In re Piercy*), Adv. Proc. No. 3:18-AP-3043-SHB, 2023 WL 2227563, at *6 (Bankr. E.D. Tenn. Feb. 24, 2023).

"[W]hen there are two permissible views of the evidence, the court may not hold that the trial court's findings are clearly erroneous." *Duddy v. Kitchen & Bath Distrib., Inc*. (*In re H.J. Scheirich Co*.), 982 F.2d 945, 949 (6th Cir. 1993) (citing *Anderson v. City of Bessemer City, N.C*., 470 U.S. 564, 573, 105 S. Ct. 1504, 1511–12 (1985)). Moreover, "factual findings based on credibility determinations warrant even greater deference[.]" *Id*.; *see also Camp Inn Lodge, LLC v. Kirvan* (*In re Kirvan*), No. 21-1250, 2021 WL 4963363, at *1 (6th Cir. Oct. 26, 2021) ("[A]ppellate judges do not second-guess the credibility determinations of [trial] courts in the absence of clear error."). Thus, the Panel may not reverse unless it is left with a definite and firm conviction that the bankruptcy court has committed a clear error. Nor may the Panel "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 574.

> The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 123, 89 S. Ct. 1562, 1576, 23 L. Ed. 2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co*., 338 U.S. 338, 342, 70 S. Ct. 177, 179, 94 L. Ed. 150 (1949); *see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982).

Id. at 573–74.

Accordingly, because the bankruptcy court's decision is plausible and based primarily on the court's assessment of Appellee's credibility and testimony, the bankruptcy court's judgment for Appellee regarding the § 523(a)(4) embezzlement count is AFFIRMED.

CONCLUSION

For the foregoing reasons, with respect to the dismissal under Rule 12(c) of the § 523(a)(4) cause of action for defalcation while acting in a fiduciary capacity and the § 523(a)(5) cause of action seeking a determination that the lump-sum judgment totaling $205,000.00 plus interest constitutes a nondischargeable domestic support obligation, the judgment of the bankruptcy court is VACATED and REMANDED. With respect to the granting of summary judgment in favor of Appellee concerning Appellant's request for imposition of an equitable lien, the judgment is AFFIRMED. Finally, the judgment that Appellant failed to prove intent on the § 523(a)(4) claim for embezzlement is AFFIRMED.

CONCURRENCE / DISSENT

SCOTT W. DALES, Bankruptcy Appellate Panel Judge, dissenting in part and concurring in part.

I join the lion's share of the Panel's opinion and judgment. I write separately, however, to register my disagreement with its reversal of the Bankruptcy Court's dismissal of the count under 11 U.S.C. § 523(a)(5), and to address my concern that the balance of today's ruling may be misconstrued to leave the Appellant, Rebecca Bailey, entirely unprotected against the disparity motivating her request to impose an equitable lien. The Bankruptcy Court properly served as gatekeeper under Rule 12(c) when it dismissed the § 523(a)(5) claim on the pleadings. Moreover, even though our cases preclude imposition of an equitable lien, the Bankruptcy Code almost certainly protects the interests that Ms. Bailey tried to vindicate when she asked the Bankruptcy Court to impose an equitable lien against the real estate commonly known as 631 Wampler Branch, Greenup, Kentucky (the "Property").

The delay in issuing the Panel's decision resulted from considerable and productive deliberation about the admittedly close call in rejecting—at the pleading stage—Ms. Bailey's request to except from discharge her ex-husband's "Business Debt" in the amount of $273,675.00 as a "domestic support obligation" or "DSO" under § 523(a)(5).

Ms. Bailey, the creditor with the burden of proof,[1] filed an amended complaint the Bankruptcy Court properly criticized as relying on "labels and conclusions" and a "formulaic recitation"—a pleading convention our Supreme Court condemned in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007), and elsewhere. The pleading—her second attempt at articulating her claim—did not contain a single factual allegation touching on Ms. Bailey's need for support or other factors the Sixth Circuit identified in *Sorah v. Sorah (In re Sorah)*, 163 F.3d 397, 399 (6th Cir. 1998), or *Singer v. Singer (In re Singer)*, 787 F.2d 1033,

[1] *In re Cummings*, 523 B.R. 93, 103 (Bankr. W.D. Mich. 2014) (citing *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 520 (6th Cir.1993), for the proposition that a creditor-spouse has the burden of proving a debt is in the nature of support).

1034 (6th Cir. 1986). Without any support-related factual allegations within the complaint itself, the Bankruptcy Court turned to the pleading's attachments, only one of which pertained to the support question—the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage. The language and structure of that divorce decree—to which bankruptcy courts generally must defer under *Sorah*[2] —show that the only obligation created in that document that is "in the nature of alimony, maintenance, or support" is the $250.00 per month payment that the state court described as, well, "maintenance." The state court used this term of art after considering Ms. Bailey's needs, separate property, earning potential, education, length of the marriage and other customary support-related factors. Relying on the only data point within the pleading that had any bearing on the motion under Rule 12(c), the Bankruptcy Court did not err in dismissing the § 523(a)(5) claim at the pleading stage. Ms. Bailey bears the burden not just of proving her case but also alleging it. Aside from the divorce decree (which arguably contradicted her allegations),[3] she gave the Bankruptcy Court nothing else to go on, so the court properly dismissed the DSO count. Trial courts are not required to speculate at the pleading stage, nor should appellate courts do so later in the process. Because the Panel and I read the amended complaint's § 523(a)(5) allegations differently, I dissent to this extent.

As noted above, however, I join the balance of the Panel's decision but write separately to offer observations (admittedly in *dicta*) that have no place in the main opinion.

The Bankruptcy Court declined to impose an equitable lien based on its straightforward application of the Sixth Circuit's decision in *XL/Datacomp, Inc. v. Wilson (In re Omegas Grp. Inc.)*, 16 F.3d 1443, 1449–53 (6th Cir. 1994), and similar authorities. *See, e.g.*, *In re Blume*, 582 B.R. 178 (Bankr. E.D. Mich. 2017) (finding that an equitable lien is the equivalent of a constructive trust and that, although state courts may impose equitable liens or constructive trusts, bankruptcy courts may not). I concur in upholding the Bankruptcy Court's well-reasoned

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[2]163 F.3d at 401–02; *see also In re Cummings*, 523 B.R. at 103–04 (Under *Sorah*, the "bankruptcy court should only look to the structure of an obligation to determine if it is in the nature of support").

[3]The language and structure of the divorce decree are at most "merely consistent" with treating the Business Debt as a DSO, and therefore I would find that Ms. Bailey's pleading "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1955).

decision in this respect. Nevertheless, I am concerned about the reverberations of that decision (and the Panel's affirmance) in the base case where, as counsel reported during oral argument, the chapter 13 plan remains in flux.

Ms. Bailey argues for treatment as an equitable lien holder based on the inequity of requiring her to honor her obligations under the divorce decree while excusing her ex-husband from paying his debt to her under the same prepetition order, upon entry of a discharge under § 1328(a). In the amended complaint, she summarized her appeal to equity as follows:

> The equities demand that if the Debtor is to receive the benefit of the Judgment awarded in the Greenup Circuit Court, that the Debtor, must by the same token and rationale, be required to comply with the obligations imposed upon the debtor [sic] in said judgment, and that this Creditor be allowed to receive the benefits that she was to receive pursuant to said judgment of the Greenup Circuit Court.

Amended Complaint at ¶ 11.

Given the way she phrased her request for relief, the reader may lose sight of the premise of Ms. Bailey's claim which, distilled to essentials, rests on a prepetition setoff right—an equitable right the Bankruptcy Code scrupulously protects through several statutory provisions.[4] By labeling the relief she sought as an "equitable lien," she naturally prompted the Bankruptcy Court to apply the *Omegas* prohibition against awarding such relief in a proceeding under title 11. I agree with the Panel that the Bankruptcy Court did not err in withholding this relief.

Nevertheless, in seeking an equitable lien Ms. Bailey did not thereby forfeit the protections the Bankruptcy Code otherwise expressly provides for offsetting mutual, prepetition obligations. In other words, nothing in *Omegas* or its progeny, or the Panel's affirmance of the Bankruptcy Court on this point, undermines the federal statutory preservation of prepetition setoff rights.

First, given the broad definition of "claim" in § 101(5), the ex-spouses in this matter each have a "claim" against the other: Ms. Bailey has a right to payment from her ex-husband for

[4]At oral argument, her counsel, who also represented her in the divorce proceedings, disclaimed expertise in bankruptcy law. Such expertise would have gone a long way toward assuaging his client's concerns much earlier in the proceeding, and presumably at less expense.

$273,675.00 plus interest, and her ex-husband (the Debtor) has a right to payment for half of the proceeds of the sale of the Property, currently titled in her name. These rights arise under the same divorce decree, obviously prepetition and obviously mutual.

Second, Ms. Bailey's "allowed claim"[5] under the divorce court's judgment also qualifies as a "secured claim," *ipso jure*, "to the extent of the amount subject to setoff." 11 U.S.C. § 506(a)(1). Any chapter 13 plan presumably must treat her secured claim appropriately to satisfy the confirmation requirements of § 1325(a)(1), (a)(5), and perhaps (a)(7).

Third, and most generally, Congress took great pains to protect setoff rights in § 553, which provides in relevant part as follows:

> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case …

11 U.S.C. § 553(a). Title 11 includes § 1328 (chapter 13 discharge) among the many provisions omitted from § 553's short-list of Bankruptcy Code provisions that may affect prepetition setoff rights. Consequently, although a discharge entered in her ex-husband's case may preclude her from collecting her claim as his personal obligation,[6] § 553 nevertheless protects her setoff rights – the basis for seeking the equitable lien in the first place. Of course, this concern arises mainly because of the *possibility* of discharge under § 1328(a).[7]

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[5]The effect of the Bankruptcy Court's order sustaining the chapter 13 trustee's objection to Ms. Bailey's claim is not entirely clear: the Bankruptcy Court sustained the objection, but the objection did not seek disallowance, only entry of an order establishing a reserve on the claim and preventing distributions until the claim is amended to clarify the nature of the claim.

[6]11 U.S.C. § 524(a) (effect of discharge).

[7]Given the Panel's remand of the DSO controversy, perhaps the Bankruptcy Court may decide that some portion of the Business Debt qualifies for an exception to discharge under § 523(a)(15) or (a)(5), or neither. *See* Fed. R. Civ. P. 15(a)(2) and 54(c) (made applicable by Fed. R. Bankr. P. 7015 and 7054(a), respectively). A decision declaring a divorce-related debt non-dischargeable under § 523(a)(15) (even early in a chapter 13 proceeding) is no less ripe than declaring a debt non-dischargeable under § 523(a)(5) or any other subparagraphs within § 523(a) for that matter, because so many chapter 13 cases end without a discharge under § 1328(a). It is worth noting that divorce-related property settlement obligations will survive a "hardship" discharge under § 1328(b) and (c)(2).

For these reasons, the Panel's affirmance of the Bankruptcy Court's application of *Omegas* and its progeny to Ms. Bailey's request for an equitable lien hardly leaves her unprotected from the inequities prompting her to make that request. Therefore, I have no compunction in joining the Panel's decision, except as noted above with respect to its conclusions regarding Rule 12(c) and § 523(a)(5), from which I respectfully dissent.