IT IS SO ORDERED.

Dated: February 27, 2026

Tiffany Strelow Cobb
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	
	:	Case No. 25-50346
JOSEPH M. BAZELL,	:	Chapter 7
	:	Judge Cobb
Debtor.	:	
	:	
Go-Mart, Inc.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Adv. Pro. No. 25-2024
	:	
Joseph M. Bazell,	:	
	:	
Defendant.	:	

OPINION AND ORDER ON MOTION TO DISMISS (DOC. 10)

I. Introduction

The plaintiff in this adversary proceeding, Go-Mart, Inc. ("Go-Mart"), has filed an amended complaint (Doc. 2) (the "Amended Complaint") seeking a determination that the debt of

more than $600,000 allegedly owed to it by the defendant, Joseph M. Bazell ("Mr. Bazell"), is nondischargeable as a debt for fraud or defalcation, embezzlement or larceny under § 523(a)(4) of title 11 of the United States Code (the "Bankruptcy Code") and for willful and malicious injury to its property under § 523(a)(6). Go-Mart's allegations are conclusory and do not add up to a claim for fraud and defalcation, embezzlement or larceny or for willful and malicious injury. Thus, as explained more fully below, the Court grants Mr. Bazell's dismissal motion, without prejudice to Go-Mart's filing a further amended complaint that states a claim upon which relief can be granted.

II. Jurisdiction and Constitutional Authority

The Court has jurisdiction to hear and determine this adversary proceeding under 28 U.S.C. §§ 157 and 1334 and the general order of reference entered in this district. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). Because bankruptcy courts have the constitutional authority to enter final orders adjudicating the dischargeability of debts, *Hart v. S. Heritage Bank (In re Hart)*, 564 Fed. App'x 773, 777 (6th Cir. 2014), the Court also has the constitutional authority to enter this order.

III. Analysis

A. Standards Governing Motions to Dismiss for Failure to State a Claim

In his motion to dismiss the Amended Complaint (Doc. 10) (the "Dismissal Motion"), Mr. Bazell requests dismissal of the Amended Complaint for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Civil Rules"), made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure. "The defendant has

the burden of showing that the plaintiff has failed to state a claim for relief." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

In deciding a motion under Civil Rule 12(b)(6), courts must view the facts "in the light most favorable to the plaintiff," *Chen v. City of Lansing*, No. 21-2896, 2022 WL 3585635, at *2 (6th Cir. Aug. 22, 2022), and "[c]ourts must accept as true the factual allegations pleaded in the complaint." *DBI Invs., LLC v. Blavin*, 617 F. App'x 374, 380 (6th Cir. 2015). That said, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Viet v. Le*, 951 F.3d 818, 823 (6th Cir. 2020) (holding that plaintiffs "may not rely on conclusory allegations to proceed past the pleading stage") (citing *Twombly*, 550 U.S. at 570).

Go-Mart attached exhibits to its Amended Complaint. Civil Rule 10(c) provides that a "written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c). Thus, if a written instrument is attached to a complaint, a court is required to consider it in adjudicating a motion to dismiss. *See Pratt v. Corr. Corp. of Am.*, 124 F. App'x 465, 466 (8th Cir. 2005). Some courts have construed "written instrument" narrowly to mean only a "legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate[.]" *Smith v. Hogan*, 794 F.3d 249, 254 (2d Cir. 2015) (quoting *Black's Law Dictionary* (10th ed.2014)). The Sixth Circuit, however, "has broadly interpreted Rule 10(c)'s 'written instrument' language to allow consideration of documents

'referred to in the pleadings' and 'integral to the claims without converting a motion to dismiss into one for summary judgment.'" *Rose v. Bersa*, No. 1:17-CV-252, 2020 WL 5210913, at *11 (S.D. Ohio Aug. 31, 2020) (quoting *Fulton v. Enclarity, Inc.*, 962 F.3d 882, 890 (6th Cir. 2020)); *see also MSP Recovery Claims, Series LLS v. Metro. Gen. Ins. Co.*, 40 F.4th 1295, 1300–1303 (11th Cir. 2022) (holding that district court erred in the Civil Rule 12(b)(6) context by failing to consider "sample list" of claims attached to complaint); *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

Even if an exhibit is not a "written instrument" so that its inclusion in the pleading for all purposes under Civil Rule 10(c) is *required* when applying Civil Rule 12(b)(6), courts still "'*may* consider the Complaint and any exhibits attached thereto . . . so long as they are referred to in the Complaint and are central to the claims contained therein' without converting to a summary-judgment motion." *Hodges v. City of Grand Rapids*, 139 F.4th 495, 510 (6th Cir. 2025) (quoting *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (emphasis added)); *see also Mateo v. Westchester Cnty.*, No. 18-CV-03499 (NSR), 2020 WL 5802838, at *3 (S.D.N.Y. Sept. 29, 2020) (holding that deposition testimony attached to a complaint was properly considered by the court in its ruling on a motion to dismiss for failure to state a claim). Accordingly, for purposes of this decision, the Court deems the exhibits to be part of the Amended Complaint and considers them without converting the Dismissal Motion to a summary judgment motion.

B. Alleged Facts

The following is a summary of the salient facts alleged in the Amended Complaint: At all relevant times, Mr. Bazell was the sole shareholder of Bazell Enterprises, which in turn, was the sole shareholder of Bazell Oil Co., Inc. ("Bazell Oil"). Am. Compl. ¶ 6. In 2018, Bazell Oil entered

into a Dealer Sales Agreement ("Agreement"). *Id.*, Ex. A. The Agreement defines Go-Mart as the "BUYER" of all its fuel requirements exclusively from Bazell Oil, the "SELLER." *Id.*

From January through March 2023, Bazell Oil collected over $915,000 in credit card receipts from Store # 133 and invoiced Go-Mart for approximately $300,000 in fuel pumped at the store. *Id.* ¶¶ 9–10. Bazell Oil owed Go-Mart the difference, approximately $614,843.00 ("Overage"). *Id.* ¶ 11.[1] Go-Mart says that the Overage "was held in trust by Bazell Oil" for Go-Mart. *Id.* ¶ 11. In its legal analysis below, the Court explains that the alleged "trust" is a legal conclusion that the Court is not required to accept as true. It is accepted as true, however, that Bazell Oil owed the Overage to Go-Mart. Am. Compl. ¶ 11.

Bazell Oil and Mr. Bazell did not remit the Overage to Go-Mart. Instead, they used the funds for other purposes, "including payment of other creditors and maintenance of operations." *Id.* ¶ 12. Mr. Bazell testified during a deposition conducted in connection with the state court lawsuit that he knew the Overage was Go-Mart's revenue. Am. Compl, Ex. C at 46. In the same deposition, however, Mr. Bazell also testified that in January 2023, he spoke with the president of Go-Mart, Phil Shuman, and that Mr. Shuman said "it's okay, I can catch up later" and that "I was okay to be farther behind than usual. He said he knew I'd get caught up." *Id.* at 47.

Prior to this bankruptcy case, Go-Mart initiated a lawsuit in state court against both Bazell Oil and Mr. Bazell, asserting claims for breach of contract, constructive trust, and conversion. Go-

[1] The Agreement itself refutes this allegation because it provides for excess funds to be paid to Bazell Oil, not Go-Mart. Specifically, under the Agreement, [Bazell Oil]/Seller agreed to "accept for collection purposes, card sales for authorized products from [its] retail business," with [Bazell Oil]/Seller "apply[ing] the 'net' amount from credit card sales, . . . to open invoices as they [are] due and apply[ing] credits to drafts . . . as they are due." *Id.*, Am. Compl. Ex. A. The Agreement then provides that "if [Go-Mart]/BUYER's credit card proceeds are greater than fuel purchases, [Bazell Oil]/SELLER agrees to review on the 15th of each month and process payment of excess funds *to [Bazell Oil/]SELLER* as needed." *Id.*, Ex. A (emphasis added). While this may be a scrivener's error in the Agreement, such is not alleged in the Amended Complaint. It has been cautioned that "there are occasions when an exhibit works against the pleader who has adopted it." 2 *Moore's Fed. Prac.* § 10.05[5] (2026) (quoting *Gill v. Judd*, 941 F.3d 504, 511–13 (11th Cir. 2019). Because the Motion is granted due to separate pleading deficiencies, for purposes of this decision, the Court will accept Go-Mart's allegation as true despite the Agreement's contrary provision.

Mart obtained a default judgment solely against Bazell Oil, a copy of which is attached as an exhibit to the Amended Complaint. *See* Am. Compl., Ex. E. The default judgment does not indicate that Go-Mart submitted any evidence in connection with its request for default judgment and does not include any findings of fact. *Id.*

C. Whether Mr. Bazell Owes Go-Mart a Debt

Go-Mart seeks two things: (1) a judgment that Mr. Bazell's debt to it is nondischargeable as a debt for fraud and defalcation under § 523(a)(4) of the Bankruptcy Code; and (2) a judgment that the debt is nondischargeable as a debt for willful and malicious injury to its property under § 523(a)(6). Mr. Bazell challenges both claims, and the Court will take each in turn. But first it must determine whether Go-Mart has adequately pleaded facts that, if true, would establish that Mr. Bazell owes it a debt, which is a required element for both causes of action. *See Feldman v. Pearl (In re Pearl*), 577 B.R. 513, 529 (Bankr. E.D. Ky. 2017) ("A claim under § 523(a)(4) has the same fundamental prerequisite as a claim under § 523(a)(2)(A): the existence of a debt."); *Le Van-Voegler v. Myrtle (In re Myrtle)*, No. 12-51281, 2013 WL 6670548, at *9 (Bankr. W.D. Va. Dec. 17, 2013) ("[B]efore the Court can determine whether the alleged debt owed Plaintiffs is non-dischargeable, Plaintiffs must establish the existence of a debt under applicable state law[.]"); *Staffer v. Predovich (In re Staffer)*, No. ADV. LA 03-01042 TD, 2009 WL 1444758, at *3 (C.D. Cal. May 20, 2009) ("[A] holding of nondischargeability includes a threshold determination that the debtor actually owes a debt to the creditor."); *Purviance v. Region 1 Self Reliance Program (In re Purviance)*, No. 04-6153-TLM, 2005 WL 2178802, at *3 (Bankr. D. Id. June 9, 2005) ("[B]efore the Court can consider whether a debt should be excepted from discharge under one of the subsections of § 523(a), the creditor must prove that the debtor is indebted to it.").

It is accepted as true that the Agreement is between Go-Mart and Bazell Oil, which gives rise to a contractual debt owed by Bazell Oil, not by Mr. Bazell. But Go-Mart is not asserting a breach of contract claim. Instead, it asserts that Mr. Bazell "personally directed the misappropriation" of the Overage, Am. Compl. ¶ 6, and "converted" it "to other uses," *id.* ¶ 12. It also accuses him of "converting, stealing, embezzling, and/or misappropriating" the Overage. *Id.* ¶¶ 23–24.

For a shareholder to be held personally liable for a corporate debt (such as the corporate debt of Bazell Oil here), Ohio law has established a three-pronged test to disregard the corporate form and hold individual shareholders liable:

> the corporate form may be disregarded and individual shareholders held liable for corporate misdeeds when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Belvedere Condo. Unit Owners' Ass'n v. R.E. Roark Cos., Inc., 617 N.E.2d 1075, 1086 (Ohio 1993); *see also Dombroski v. WellPoint, Inc.*, 895 N.E.2d 538, 545 (Ohio 2008) (modifying the second prong of the *Belvedere* test to require the shareholder to have exercised control over the corporation in such a manner as to commit "fraud, an illegal act or a similarly unlawful act" and declining to extend its application to unjust or inequitable acts). This "piercing the corporate veil" test "strikes the correct balance between the principle of limited shareholder liability and the reality that the corporate fiction is sometimes used by shareholders to protect themselves from liability for their own misdeeds." *Belvedere*, 617 N.E.2d at 1086.

Here, the Amended Complaint fails to allege sufficient facts to support veil piercing. First, the Amended Complaint alleges that Bazell Enterprises, not Mr. Bazell, is the sole shareholder of Bazell Oil. Even were one to assume, *arguendo*, that the allegation is that the veil piercing should occur as to both Bazell Oil and Bazell Enterprises (neither of which is alleged), Go-Mart further fails to allege that Mr. Bazell exercised such complete control over Bazell Oil that Bazell Oil had no separate mind, will or existence of its own or that such control was exercised in a matter as to commit fraud or similar unlawful act. Lastly, Go-Mart fails to allege that its non-payment resulted from such control or wrong. In short, the Amended Complaint fails to sufficiently plead veil piercing and therefore fails to plead more than a threadbare legal conclusion that Mr. Bazell owed a personal debt on this basis; this is insufficient.

However, Go Mart's deficient veil piercing pleading does not end the inquiry. Courts have clarified that a plaintiff "need not pierce the corporate veil to hold individuals liable who allegedly personally committed fraud." *Yo-Can, Inc. v. Yogurt Exch., Inc.*, 778 N.E.2d 80, 91 (Ohio Ct. App. 2002); *see also Cent. Benefits Mut. Ins. Co. v. RIS Admrs. Agency, Inc*., 638 N.E.2d 1049, 1054 (Ohio Ct. App. 1994) (holding that a corporate officer is individually liable for any torts he commits in the performance of his duties); *Jadallah v. Carroll (In re Carroll)*, 549 B.R. 375, 381 (Bankr. N.D. Cal. 2016) (holding that "the debtor's liability arising from . . . fraud may still be held nondischargeable under section 523(a) without a finding that the debtor is liable for the underlying debt under an alter ego theory"), *aff'd*, No. 3:14-AP-03099-HLB, 2017 WL 3122613 (B.A.P. 9th Cir. July 21, 2017), *aff'd*, 752 F. App'x 497 (9th Cir. 2019). The Court finds that Go-Mart has adequately pleaded that Mr. Bazell "personally directed" the alleged misappropriation, conversion, theft and/or embezzlement of the Overage. Am. Compl. ¶¶ 6, 12, 23–24. In turn, if Go-Mart were to properly plead such underlying misappropriation, conversion, theft and/or

embezzlement—which as discussed below it does not—then it would sufficiently plead that Mr. Bazell owes it a debt that could be nondischargeable under § 523(a)(4) and/or § 523(a)(6) of the Bankruptcy Code. Without a properly pleaded predicate bad act that was "personally directed," the Amended Complaint solely contains a bare legal conclusion of the existence of a debt without more, which is insufficient.

D. Section 523(a)(4)

Section 523(a)(4) of the Bankruptcy Code provides that a bankruptcy discharge "does not discharge an individual debtor from any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny[.]" 11 U.S.C. § 523(a)(4). This discharge exception is not automatic. It applies only if a creditor timely requests a determination of nondischargeability under § 523(a)(4), and the Court determines that the debt owes the creditor is nondischargeable under that section. *See* 11 U.S.C. § 523(c)(1); Fed. R. Bankr. P. 4007(c). Go-Mart seeks this determination here.

"Under § 523(a)(4), three separate types of misfeasance may give rise to a nondischargeable debt: (1) debts for fraud or defalcation while acting in a fiduciary capacity; (2) debts for embezzlement; and (3) debts for larceny." *Ronk v. Maresh (In re Maresh)*, 277 B.R. 339, 347 (Bankr. N.D. Ohio 2001). Go-Mart asserts all three types. First, it alleges that Mr. Bazell engaged in fraud or defalcation while acting in a fiduciary capacity. "'Fraud' under § 523(a)(4) means actual fraud." *Honkanen v. Hopper In re Honkanen*, 446 B.R. 373, 382 (B.A.P. 9th Cir. 2011). "[A]nything that counts as 'fraud' and is done with wrongful intent is 'actual fraud,' and 'fraud' connotes deception or trickery generally." *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 355, 360 (2016). As for defalcation, the Sixth Circuit has "broadly defined [it] to encompass embezzlement and misappropriation [of funds] by a fiduciary, as well as the 'failure to properly

account for such funds.'" *Kriegish v. Lipan (In re Kriegish)*, No. 02–1610, 97 F. App'x 4, 6 (6th Cir. 2004) (quoting *In re Interstate Agency, Inc.*, 760 F.2d 121, 125 (6th Cir. 1985)).

The other component of the fraud or defalcation prong of § 523(a)(4) is the debtor's engagement in fraud or defalcation while acting in a fiduciary capacity. For nondischargeability purposes, the Sixth Circuit "construes the term 'fiduciary capacity' . . . more narrowly than the term is used in other circumstances." *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 391 (6th Cir. 2005). A fiduciary capacity exists where there is an express or technical trust, but not where the trust is an implied trust imposed by operation of law as a matter of equity, *In re Bucci*, 493 F.3d 635, 639 (6th Cir. 2007), and not where the trust is a constructive trust that arises by virtue of alleged wrongdoing, *Patel v. Shamrock Floorcovering Servs., Inc. (In re Patel)*, 565 F.3d 963, 968 (6th Cir. 2009).[2] Also, a common law fiduciary relationship does not give rise to a fiduciary capacity for purposes of § 523(a)(4). *See Blaszak*, 397 F.3d at 391 ([Section] 523(a)(4) applie[s] to trustees who misappropriate funds held in trust, and not to those who fail to meet an obligation under a common law fiduciary relationship.").

Given all this, a fiduciary capacity exists under § 523(a)(4) only if there is an express or technical trust. *See R.E. Am., Inc. v. Garver (In re Garver)*, 116 F.3d 176, 179 (6th Cir. 1997) (holding that "the nature of the fiduciary relationship required under the defalcation provision of § 523(a)(4) . . . necessarily implies the existence of an express or technical trust relationship."). "Establishing an 'express' trust is straightforward. The creditor must demonstrate: '(1) an intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary.'" *Patel*, 565 F.3d at 968. "A technical trust is a type of trust arising out of a specific statute or common law." *Herbert v. Hesse (In re Hesse)*, 516 B.R. 491, 495 (Bankr. S.D. Ohio 2014). Go-Mart does not even recite

[2] As discussed *infra* at III.E., the default judgment does not have preclusive effect as to Mr. Bazell. Even so, a finding of constructive fraud is insufficient to satisfy Section 523(a)(4).

the elements of an express or technical trust; instead, it says only that the Overage "was held in trust by Bazell Oil" for Go-Mart. Am. Compl. ¶ 11. This is conclusory, which is insufficient. *See Gustafson v. BAC Home Loans Servicing, LP*, No. SACV 11-915-JST ANX, 2012 WL 7051318, at *8 (C.D. Cal. Dec. 20, 2012) ("The contention that the funds were held in trust is a legal conclusion which the Court need not accept."). Additionally, nothing in the Amended Complaint would allow the Court to plausibly infer that Mr. Bazell and Go-Mart were parties to an express or technical trust. In fact, the attached Agreement directly refutes Go-Mart's allegation that excess funds were held in trust by Bazell Oil. The Agreement does not include any provision creating a trust or otherwise support the finding of a trust relationship; to the contrary, the Agreement instead expressly states that the relationship of the parties is that of independent contractor. Am. Compl., Ex. A. Indeed, not only is the Agreement silent as to an express trust, it has no provision for the escrowing or segregation of funds. *Id.*

Although Go-Mart alleges that Mr. Bazell was its fiduciary, it does so only in conclusory fashion, which is insufficient to survive a motion to dismiss. *See Gillespie v. Gillespie (In re Gillespie)*, No. 3:16-AP-03011, 2017 WL 3175900, at *4 (Bankr. S.D.W. Va. July 25, 2017) (granting motion to dismiss § 523(a)(4) claim where the conclusory allegation that a court order placed the defendant in a fiduciary capacity "does not approach the supporting factual allegations necessary to state a § 523(a)(4) claim"); *Symonies v. Sobol (In re Sobol)*, 545 B.R. 477, 494 (Bankr. M.D. Pa. 2016) ("Whether or not Sobol is acting in a fiduciary capacity is a legal conclusion."). So too is Go-Mart's allegation that Mr. Bazell engaged in fraud or defalcation. All the Amended Complaint says about it is that "Bazell's actions in converting, stealing, embezzling, and/or misappropriating funds of Plaintiff constitute fraud and/or defalcation under 11 U.S.C. § 523(a)(4)." Am. Compl. ¶ 23. Other courts have found such allegations to be conclusory. *See*

Metro.Steel, Inc. v. Halversen (In re Halversen), 330 B.R. 291, 301 (Bankr. M.D. Fla. 2005) ("Although the Complaint contains conclusory allegations that the Debtors acted 'fraudulently' and in 'bad faith' by failing to remit the funds, the allegations are not supported by specific facts or representations showing that the failure was actually fraudulent.").

Go-Mart alleges in conclusory fashion that Mr. Bazell's "actions were intentional and he intended to deceive" it. Such conclusory allegations of fraud are insufficient to survive a motion to dismiss brought under Civil Rule 12(b)(6). *See Thorsted v. Chase Home Mortg*., No. 3:16-CV-00025, 2016 WL 2595118, at *2 (W.D. Va. May 5, 2016) (dismissing actual fraud claim where the plaintiff alleged only "conclusory statements [that] are insufficient to state a claim for which relief could be granted").

Go-Mart next alleges embezzlement on the part of Mr. Bazell. *See* Am. Compl. ¶ 21. "A creditor must prove three elements to establish embezzlement: (1) that he entrusted his property to the debtor, (2) that the debtor appropriated the property for a use other than that for which it was entrusted, and (3) that the circumstances indicate fraud." *Cash Am. Fin. Servs., Inc. v. Fox* (*In re Fox),* 370 B.R. 104, 115–16 (B.A.P. 6th Cir. 2007) (cleaned up). Go-Mart's embezzlement allegation is conclusory. *See Fed. Ins. Co. v. Sorge (In re Sorge)*, 566 B.R. 369, 381 (Bankr. E.D.N.C. 2017) ("The Amended Complaint does not allege specific facts sufficient to establish the essential elements of embezzlement. Instead, it simply makes the conclusory statement that Mr. Sorge's acts constitute embezzlement.").

Also conclusory is Go-Mart's allegation of larceny. "Under federal common law, larceny is defined as the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner." *Greer v. Bruce (In re Bruce)*, 593 B.R. 765, 773 (Bankr. S.D. Ohio 2018). "[L]arceny requires that the original

taking of the property be unlawful. Consequently, when property converted by the debtor originally comes into the debtor's possession with the express consent or authorization of the creditor . . . the debtor does not commit larceny." *Id.* The Overage came into Bazell Oil's possession with the authorization of Go-Mart. And like its other allegation, Go-Mart's allegation that Mr. Bazell committed larceny is conclusory. *See Michael Elec. Supply Corp. v. Castagnola (In re Castagnola)*, No. 14-75123-LAS, 2017 WL 1337176, at *6 (Bankr. E.D.N.Y. Apr. 11, 2017) ("A broad, unsupported, and conclusory statement that defendant committed larceny is not sufficient. It is precisely the type of 'naked assertion' that does not survive a motion to dismiss.").

In short, it all comes down to this: "Conclusory allegations are entitled to no weight in deciding a motion to dismiss." *Weber v. Erie Cnty.*, No. 1:19-00124, 2019 WL 5746204, at *5 (W.D. Pa. Nov. 5, 2019). That is, "a legal conclusion couched as a factual allegation need not be accepted at true on a motion to dismiss." *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 614 (6th Cir. 2012) (cleaned up); *Breckenridge Enters., Inc. v. Avio Alts., LLC*, No. 3:08-CV-1782-M, 2009 WL 1469808, at *8 (N.D. Tex. May 27, 2009) ("When considering a motion to dismiss, courts are not bound to accept as true a legal conclusion couched as a factual allegation."); *Sorge*, 566 B.R. at 381 ("The court does not have to accept conclusions as true for purposes of Rule 12(b)(6)."). For this reason, the Court will dismiss Go-Mart's § 523(a)(4) claim without prejudice under Civil Rule 12(b)(6).[3]

[3] Mr. Bazell also has moved to dismiss Go-Mart's § 523(a)(4) claim under Civil Rule 9(b) for the failure to state with particularity the circumstances constituting fraud. Because it is dismissing the § 523(a)(4) claim under Civil Rule 12(b)(6), the Court "need not address whether the allegations of [the Amended Complaint] satisfy the particularity requirement of Fed. R. Civ. P. 9(b)." *Lefkowitz v. Smith Barney, Harris Upham & Co.*, 804 F.2d 154, 157 (1st Cir. 1986); *see also Rudd v. KeyBank, N.A.*, No. C2-05-CV-0523, 2006 WL 212096, at *1 n.1 (S.D. Ohio Jan. 25, 2006) ("Because this Court disposes of Plaintiff's Complaint on 12(b)(6) grounds, it need not discuss the merits of Defendants' other Motions to Dismiss based on Rules 9(b) and 12(b)(1).").

E. Section 523(a)(6)

An individual debtor also may be denied a discharge from any 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). Like the discharge exception set forth in § 523(a)(4), the § 523(a)(6) discharge exception comes into play only if a creditor timely requests a determination of nondischargeability, which again is what has happened here.

A debtor "willfully and maliciously injures a creditor if, acting without just cause or excuse, he knows or is substantially certain that his actions will cause injury." *MarketGraphics Rsch. Grp., Inc. v. Berge (In re Berge)*, 953 F.3d 907, 914 (6th Cir. 2020) (quoting *Doe v. Boland (In re Boland)*, 946 F.3d 335, 338 (6th Cir. 2020)). The willful and the malicious elements of § 523(a)(6) are separate. *Id.* Go-Mart has not adequately pleaded either.

The willfulness element requires some unpacking. As the Supreme Court has held, it "takes a deliberate or intentional *injury*, not merely . . . a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). Given this, a debtor acts willfully "only if the debtor intended to cause harm or knew that harm was a substantially certain consequence of his or her behavior." *Berge*, 953 F.3d at 915.

Here, the Amended Complaint alleges an intentional act—the nonpayment of the Overage to Go-Mart—but that is insufficient to state a claim under § 523(a)(6). Go-Mart alleges only in conclusory fashion that Mr. Bazell "intentionally caused injury" to it. Am. Compl. ¶ 32. Yet, the Amended Complaint alleges that Mr. Bazell used the Overage for the "payment of other creditors and maintenance of operations." *Id.* ¶ 12. Under similar circumstances, the Bankruptcy Appellate Panel for the Sixth Circuit held that a debtor's use of a creditor's funds to pay other business

expenses was not willful for purposes of § 523(a)(6). *See Cash Am. Fin. Servs., Inc. v. Fox (In re Fox)*, 370 B.R. 104, 119 (B.A.P. 6th Cir. 2007).

In *Fox*, the debtor and his wife were the only directors and owners of R.R. Fox, Inc. ("R.R. Fox"), a debt collection agency; the debtor also served as R.R. Fox's president and chief operating officer; and he was the one who made financial decisions on R.R. Fox's behalf. Cash America Financial Services, Inc. ("Cash America") was a "pay day" lender that assigned past due accounts to third party debt collection agencies, including R.R. Fox. Under its agreement with Cash America, R.R. Fox was entitled to a percentage of the total amount it collected. The agreement also required R.R. Fox to make a monthly payment to Cash America equal to the sums it collected minus its percentage fee. R.R. Fox was required to hold all sums it collected in a trust account separate from its general operating funds until the monthly payment was made to Cash America. The debtor, however, did not establish a separate trust account, and Cash America knew that he had failed to do so. Despite this knowledge, Cash America continued to send accounts to R.R. Fox for collection. R.R. Fox failed to remit payments to Cash America, and Cash America eventually stopped sending new accounts to R.R. Fox. During this time, R.R. Fox was incurring substantial overhead costs resulting from the recruitment of new employees. According to the debtor, these overhead costs and Cash America's decision not to send it new accounts led R.R. Fox into bankruptcy.

As the result of R.R. Fox's failure to establish a trust account, the proceeds of its collection activities on behalf of Cash America were, at the debtor's direction, deposited into R.R. Fox's general operating account. While those funds were in the general operating account, the debtor received payments from the account for his own benefit. As the result of R.R. Fox's collection

efforts for one half of a year, a net total due of more than $350,000 was owed to Cash America, and R.R. Fox paid it less than $90,000, leave an outstanding balance of more than $260,000.

Cash America commenced an adversary proceeding against the debtor, alleging that, as President of R.R. Fox, he should be held personally liable for R.R. Fox's debt to it. Cash America alleged that the debtor's misappropriation of funds owed to it constituted a willful and malicious injury to Cash America's property under § 523(a)(6). The bankruptcy court held that the evidence did not support a finding that the debtor "willfully" converted the proceeds from the accounts with the intent to cause injury under § 523(a)(6). On appeal, the Bankruptcy Appellate Panel held that the debtor's use of the funds owed to Cash America, which the BAP assumed for the sake of argument was a conversion, was not "willful" for purposes of § 523(a)(6), where most of the funds were spent by the debtor in an effort to keep his company in business: "The Debtor's attempts to keep R.R. Fox in business and expand its operations suggest he intended to benefit, rather than harm, [Cash America] by continuing to collect on its Accounts." *Id.* at 119. Also, Cash America continued to send accounts to R.R. Fox despite being aware that the trust account had not been established. The BAP agreed with the bankruptcy court's conclusion that, "at most, the debtor was negligent in the way he conducted business at R.R. Fox." *Id.* "Mere negligence is not sufficient to except a debt from discharge under § 523(a)(6). And "[b]ecause [Cash America] did not establish that the Debtor converted its funds with the intent to harm [it], or with the requisite certainty that such harm was likely to occur, the bankruptcy court properly rejected the [Cash America's] willful and malicious injury claim." *Id.* at 119; *see also In re Tomlinson*, 220 B.R. 134, 137 (M.D. Fla. 1998) (holding a debtor's failure to turn over inventory sale proceeds pledged to a secured creditor to keep the business operative was not 'willful and malicious' within the meaning of the § 523(a)(6) discharge exception").

Just so here. As Go-Mart alleges, Mr. Bazell "confirmed that Bazell Oil used Go-Mart's money to pay other debts, including creditors [of Bazell Oil] unrelated to Go-Mart," Am. Compl. ¶ 13, which, as in *Fox*, similarly suggests an intent to keep Bazell Oil in business to benefit, rather than harm, creditors (or alternatively, supports an inference of negligence rather than willful and malicious injury). Given this, Go-Mart has not made out a claim for willful injury.

Go-Mart also has failed to adequately plead the requirement of maliciousness. An act is malicious if it is undertaken without just cause or excuse. *Berge*, 953 F.3d at 915. But a creditor's knowledge of, and consent to, the debtor's conduct provides the debtor with the just cause or excuse needed to render the conduct non-malicious. *See Shelbina Mercantile Bank v. Durbin (In re Durbin)*, 58 B.R. 259, 263 (Bankr. E.D. Mo. 1986) (holding that the debtors' conduct was not malicious where it was undertaken either with the creditor's "consent or made in the course of the debtors' business according to established practices between the parties."); *Sec. Bank of Nev. v. Singleton (In re Singleton),* 37 B.R. 787, 792 (Bankr. D. Nev. 1984) ("In order for the conversion of another's property to be characterized as willful and malicious, it must have been 'without his knowledge or consent[.]'"). Reading the Amended Complaint in the context of the deposition that Go-Mart itself attached to it, that is what we have here: Go-Mart's knowledge and consent. The deposition reveals that Go-Mart allowed Bazell Oil to continue to collect credit card proceeds, despite knowing that Bazell Oil was not remitting the Overage to Go-Mart; Go-Mart's president was told how far behind Bazell Oil and said, "it was okay to be farther behind than usual" allowing Bazell Oil to "catch up later." Am. Compl., Ex. C at 46. Under these facts, where the nonpayment of the Overage was done with Go-Mart's knowledge and consent, Go-Mart has not made out a claim for malicious injury.

F. The Bazell Oil Default Judgment

The Court accepts as true that a default judgment was entered solely as to nondebtor Bazell Oil in the prepetition state court litigation in which Go-Mart asserted breach of contract, constructive trust and conversion claims. *See* Am. Compl.¶¶ 15–18. The default judgment was not taken against the defendant here, Mr. Bazell. On this basis alone, the default judgment is not entitled to issue preclusive effect.[4] And "claim preclusion does not apply to nondischargeability claims asserted in bankruptcy cases because nondischargeability claims can only be asserted in connection with a bankruptcy case; consequently, the 'same claim' requirement for application of claim preclusion cannot be satisfied." *Pidcock v. McCune (In re McCune),* No. 21-1013-j, 2023 WL 2879278, at *7 (Bankr. D.N.M. Apr. 10, 2023) (cleaned up). The Bazell Oil default judgment therefore in no way affects the Court's conclusion that Go-Mart's allegations fail to state claims for fraud and defalcation, embezzlement or larceny or for willful and malicious injury.

[4] Had the default judgment been entered against Mr. Bazell individually, the doctrine of issue preclusion might apply if there were an "express adjudication" of the issue by the state court." *Dardinger v. Dardinger (In re Dardinger)*, 566 B.R. 481, 495 (Bankr. S.D. Ohio 2017). The Bankruptcy Appellate Panel for the Sixth Circuit has held that a default judgment in Ohio is "expressly adjudicated" for issue preclusion purposes if two prerequisites are met:

> First, the plaintiff must actually submit to the state court admissible evidence apart from his pleadings. In other words, a plaintiff's complaint, standing alone, can never provide a sufficient basis for the application of the [issue preclusion] doctrine. Second, the state court, from the evidence submitted, *must actually make findings of fact and conclusions of law* which are sufficiently detailed to support the application of the [issue preclusion] doctrine in the subsequent proceeding.

Dardinger, 566 B.R. at 495 (quoting *Sill v. Sweeney (In re Sweeney*), 276 B.R. 186, 189 (B.A.P. 6th Cir. 2002)). As already noted, the default judgment does not indicate that Go-Mart submitted any evidence in connection with its request for default judgment and does not include any findings of fact.

IV. Conclusion

The Dismissal Motion is **GRANTED**, and the Amended Complaint is **DISMISSED** with leave to amend within thirty days of this Opinion and Order, as permitted under Civil Rule 15(a)(2). The Court will enter a separate judgment entry dismissing the Amended Complaint with leave to amend.

IT IS SO ORDERED.

Copies to:

Angela Beblo and Clay Kenneth Keller, Attorneys for Plaintiff
John W. Kennedy and Myron N. Terlecky, Attorneys for Defendant