IT IS ORDERED as set forth below:

Date: February 5, 2015

C. Ray Mullins

C. Ray Mullins
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: ANTHONY BRACKETT SANDBERG and VERONICA JEAN SANDBERG, Debtors.	CASE NO. 12-78596-crm CHAPTER 7
WILBUR FREEMAN BRUCE and BERTHA FREEMAN BRUCE and KAREN ANN WALLA, Plaintiffs, v. ANTHONY BRACKETT SANDBERG and VERONICA JEAN SANDBERG, Defendants.	ADVERSARY PROCEEDING NOS. 13-05050-crm, 13-05051-crm

ORDER

THIS MATTER is before the Court on the Motion to Dismiss (the "Motion"). Wilbur Freeman Bruce and Bertha Freeman Bruce (the "Bruces") and Ms. Karen Ann Walla (together, the "Plaintiffs") initiated nearly identical adversary proceedings seeking determinations that certain debts owed by debtor Anthony Sandberg are nondischargeable pursuant to sections 523(a)(2(A), 523(a)(2)(B), and 523(a)(6) of the Bankruptcy Code. Plaintiffs also seek punitive and actual damages pursuant to section 526(c)(2). Additionally, the Plaintiffs seek a denial of Sandberg's discharge pursuant to section 727 of the Bankruptcy Code. These matters are core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and the Court has jurisdiction pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must determine whether the Plaintiffs have stated claims upon which relief can be granted. For the reasons stated below, the Court grants the Motion.

I. BACKGROUND

Sandberg was the principal of the Sandberg Law Firm ("SLF"). On November 9, 2012, SLF filed its Omnibus Motion for Substitution of Counsel and Request for expedited Hearing ("Omnibus Substitution Motion") (Case No. 12-00508-WLH). The Omnibus Substitution Motion explained that, due to financial issues and the health of the Defendant, SLF decided to cease operating and transfer its cases to the New Freedom Law Group. Omnibus Substitution Motion, pp. 1-2, paras. 3-4. Judge Wendy Hagenau issued an Order that Defendant and SLF be removed from all pending chapter 7 cases. Judge Hagenau also ordered Defendant and SLF removed from all pending chapter 13 cases. Docket (Case No. 12-00508-WLH) nos. 31 and 39. Many of SLF's clients continued their cases on a pro se basis, while some retained new counsel.

Subsequently, Sandberg and his wife, Veronica Jean Sandberg, filed their individual chapter 7 bankruptcy case, and shortly thereafter, SLF filed its chapter 7 bankruptcy case (Case No. 12-81732-CRM).

Prior to its bankruptcy, SLF had agreed to represent the Bruces and Ms. Karen Ann Walla. The Bruces filed a chapter 7 case and after receiving a discharge, their case was closed on December 23, 2009. The Bruces, now represented by attorney Terry Haygood, filed a motion to reopen their case for the purpose of filing an adversary complaint against Sandberg and SLF on the grounds that Sandberg and SLF continued to collect attorneys fees from the Bruces post-petition, in violation of both the automatic stay and the discharge injunction. The Court entered an order reopening their case.

Once the Bruce's case was reopened, they filed an adversary proceeding against SLF and Sandberg in his individual capacity (Adversary Proceeding No. 12-04037-PWB) (the "Bruce Complaint"). The Bruces seek actual and punitive damages pursuant to sections 362, 524, 329, and 105 of the Bankruptcy Code, and Rule 2016 of the Federal Rules of Bankruptcy Procedure. The Bruces state four claims for relief. The first is that SLF and Anthony Sandberg violated the automatic stay by accepting post-dated checks for payment of their attorneys' fees and cashing those checks post-petition. The second claim accuses SLF and Sandberg of improperly collecting a dischargeable debt (by accepting payment for pre-petition legal services). The third claim is that SLF and Sandberg violated restrictions placed upon Debt Relief Agencies and made false and misleading statements when they failed to list themselves as unsecured creditors on the Bruce's Schedule F. Finally, the Bruces claim that SLF and Sandberg violated Georgia Rules of Professional Conduct Nos. 1.7 and 8.4 governing disclosures and attorney-client fee

arrangements. Specifically, the Bruces note that SLF and Sandberg did not disclose that they accepted post-dated checks for payment of attorneys' fees.

SLF and Sandberg filed a motion to dismiss the Bruce Complaint, which was denied. The Bruces filed a joint statement of undisputed facts on August 21, 2012, to which there were no objections filed. The Bruces filed a motion for summary judgment. Before the court could hear the summary judgment motion, SLF and Sandberg in his individual capacity both filed their bankruptcy cases. Judge Bonapfel stayed proceedings related to the Bruce Complaint pending resolution of the Sandberg and SLF bankruptcy cases.

Karen Ann Walla filed her chapter 7 case and received a discharge. Ms. Walla filed a motion to reopen her case to file an adversary proceeding against Sandberg and SLF alleging that Sandberg and SLF continued to collect attorneys' fees from Ms. Walla post-petition, in violation of both the automatic stay and the discharge injunction. The Court entered an order reopening her case. However, Ms. Walla has yet to file an adversary proceeding.

Ms. Walla filed a case against SLF in the U.S. District Court for the Northern District of Georgia on October 17, 2011 (4:11-cv-00258-HLM). She amended the complaint,[1] alleging violations of both the Federal RICO Act and Georgia RICO statute, and of the Bankruptcy Rules and Bankruptcy Code provisions regarding attorney fee arrangements. She also sought a declaratory judgment that SLF violated the discharge injunction, the automatic stay, and the Georgia Rules of Professional Responsibility and Georgia Code regarding prohibited conflicts. SLF filed a motion to dismiss the amended complaint and the District Court granted the motion and dismissed the complaint in its entirety. The District Court noted that Ms. Walla had already

[1] Ms. Walla also attempted to certify a class in her Amended Complaint. She filed a Motion to Certify Class on February 17, 2012 and amended the motion on March 3, 2012. The Motion to Certify Class was denied on March 5, 2012, and the Amended Motion to Certify Class was denied as moot on March 27, 2012.

had an opportunity to restate her federal and Georgia RICO claims,[2] and she did not appear to be able to amend her pleadings to state viable claims under those statutes. Those claims for relief were dismissed with prejudice, but the remaining claims were dismissed without prejudice to allow Ms. Walla to file an adversary proceeding in bankruptcy court. Ms. Walla filed an appeal to the 11th Circuit Court of Appeals, which was dismissed because it was not timely filed.

The Bruces and Ms. Walla have filed adversary proceedings in the SLF bankruptcy case and in Sandberg's individual chapter 7 case (Nos. 13-05050-CRM and 13-05051-CRM, respectively) (the "Bruce Complaint" and the "Walla Complaint", respectively). It is the adversary proceedings filed against Mr. Sandberg individually that this order addresses. The allegations of wrongdoing and claims for relief in both adversary proceedings are identical. The factual recitations are also very similar, but do contain minor differences.

Sandberg filed motions to dismiss both adversary proceedings ("Sandberg Motion to Dismiss"). The Bruces and Ms. Walla filed their responses to the Sandberg Motions to Dismiss (Docs. 13 and 13, respectively). The Court must now determine whether the Plaintiffs have stated claims upon which relief can be granted. The Court finds that they have not, and that Sandberg is entitled to a dismissal of both adversary proceedings.

II. FACTS

A. The Bruce Adversary

The Bruces filed their bankruptcy case on August 27, 2009. Bruce Complaint, p.3, para. 7. Sandberg signed the petition and schedules as the attorney of record on behalf of SLF. Id. The

[2] Referring to Ms. Walla's original state court complaint and her amended state court complaint.

Bruces never signed an engagement letter or contract with SLF.[3] Id. at p. 4, para. 9. However, they agreed to pay SLF $1,200, plus costs associated with their case.[4] Id. at para. 11. The Bruces claim they were told that, if they desired to file their chapter 7 case immediately, they would have to compensate SLF through a number of post-dated checks that would be cashed at a later time. Id. at para. 12. These checks would "protect[] Sandberg and the Firm by assuring payment for work done at a later time." Id. The Bruces provided SLF with post-dated checks to be cashed, one per month, from September of 2009, through February of 2010. Id.

The Bruce schedules did not list SLF as a creditor. Id. at p. 5, para. 17. The Bruces were not told that the debt to SLF that arose prior to filing may have been dischargeable in their case, because Sandberg and SLF became creditors at the time of filing.[5] Id. at para. 15. Neither Sandberg nor SLF informed this Court that they had accepted post-dated checks in return for their services, and they were not listed on the Bruce's schedules. Id. at para. 17-18. However, in the Bankruptcy Rule 2016(b) Disclosure of Compensation in the Bruce's schedules, the Bruces indicated that they had paid Sandberg and SLF $299 of the filing fee, but they had yet to pay any of the $1,200 owed for legal services. Id. at Exh. D., p. 6, para. 26.

SLF cashed five (5) of The Bruce's post-dated checks post-petition without prior authorization from the Court.[6] Id. at p. 5-6, paras. 19, 23. The Bruces did not reaffirm the debt to Sandberg. Id. at p. 6, para. 20. SLF attempted to cash the last check, no. 515, but it was denied for insufficient funds. Id. at para. 24. SLF attempted three more times to cash the check,

---

[3] In fact, Defendant Sandberg and SLF did not require the use of written contracts or disclosure statements. Bruce Complaint, p. 7, para. 33.

[4] The other costs involve the costs of filing, consumer credit counseling, and the consumer education course.

[5] The Bruce Complaint claims that the Bruces were not told this, nor was it mentioned in the contracts and disclosure forms they signed. Bruce Complaint, p. 5, paras. 15-16.

[6] SLF cashed check nos. 508, 509, 510, 511, and 514 for a total of $1,000. Bruce Complaint, p. 6, para. 23.

failing each time due to insufficient funds.[7] Id. The Bruces received their discharge and their case was closed.

The Bruces reopened their case and filed their adversary proceeding. Id. at p. 7, para. 27. After Sandberg and SLF filed their bankruptcy petitions,[8] the Bruces filed their complaint in the Sandberg case.

B. The Walla Adversary

Karen Ann Walla filed her bankruptcy case on March 9, 2010. Walla Complaint, p.5, para. 15. Sandberg signed the petition and schedules as the attorney of record on behalf of SLF. Id. at p. 6, para. 16. Ms. Walla never signed an engagement letter or contract with SLF.[9] Id. at p. 4, para. 9. However, she agreed to pay SLF $1,000, plus costs associated with her case.[10] Id. at para. 19.

Prior to filing her case, Ms. Walla met with SLF attorney Stanley Kakol, who informed her that the fee for her case would be $1,000 and that she may be allowed to use a payment plan that would include payments to SLF during and after the case. Id. at p. 4, para. 8. Ms. Walla claims that Kakol informed her that her participation in the payment plan depended on Anthony Sandberg's approval. Id. Ms. Walla also notes in her complaint that she "felt pressured to make a quick decision" and "was not informed by Kakol that any fees paid through pre-authorized post-dated debit transactions or post-dated checks represented debt subject to discharge." Id. at para. 9.

[7] This caused a buildup of $35 for each attempt on the Bruce's account. Id. at para. 24.
[8] Anthony Sandberg listed the Bruces on his individual schedules as unsecured, unliquidated legal malpractice claims worth an unknown amount. Id. at p. 7, para. 31.
[9] Prior to engaging SLF, Ms. Walla went to SLF's website and "chatted" with a representative of SLF who told her the fee for a Chapter 7 case would be $1,000. Walla Complaint, p. 3, para. 7.
[10] The other costs involve the costs of filing, consumer credit counseling, and the consumer education course.

After meeting with Kakol, Ms. Walla met with Sandberg, and she asked him if she could indeed pay her legal fees through a payment plan. Id. at para. 10. Ms. Walla claims that Sandberg responded, "everyone wants to play with my money." Id. Ms.Walla describes feeling intimidated while meeting with the SLF attorneys and does not recall being told that any payments she made to SLF after she filed her petition would potentially be dischargeable. Id. at p. 4, para. 11. Ms. Walla alleges that she was then taken to meet with another employee of SLF, who told her that accepting post-dated checks for payment was "illegal." Id. at p. 5, para. 12. The same employee outlined Ms. Walla's payment schedule to her and had her sign various forms that confirmed SLF's representation and payment to SLF through post-dated debit transactions. Id. at para. 13. Ms. Walla alleges that this female employee told her that "'the debits must be paid or we will sue you,'" in response to Ms. Walla's worry that she wouldn't have the required funds in her account over the ten month debit period. Id.

Ms. Walla filed her chapter 7 case on March 9, 2010. Pursuant to the attorney disclosure statement, Ms. Walla agreed to pay SLF $1,000, none of which was paid prior to filing. Id. at p. 6, para. 20. The disclosure did not mention Sandberg and SLF's practice of taking post-dated checks as payment or their policy of late fee charges for late debit transactions. Id. Neither Sandberg nor SLF was listed on Ms. Walla's schedules as a creditor. Id. at p. 11, para. 38. Ms. Walla did not reaffirm her debt to SLF or Sandberg. Id. at p. 11, para. 41.

During her case, SLF executed at least one of the pre-authorized debit transactions without Court authorization. Id. at p. 7, para. 22; p. 11, para. 40. After that, SLF attempted to complete several other post-dated debit transactions. Id. at para. 23. When those attempts were unsuccessful, SLF sent Ms. Walla a collection letter and contacted her via telephone to schedule additional debit transactions. Id. at para. 24-25. Ms.Walla claims that she felt pressured during

the telephone conversations and recalled being threatened with discontinuation of her chapter 7 case. Id. at para. 25. Ms. Walla agreed to authorize other debit transactions, which SLF and Sandberg completed prior to Ms. Walla's discharge. Id. at p. 8, para. 26.

SLF attempted to complete debit transactions authorized pre-petition after Ms. Walla received her discharge, and some were successful, while others were not. Id. at p. 8, para. 29-30. After her case was closed, representatives of SLF again contacted Ms. Walla and informed her of the unsuccessful debits and she agreed to more post-dated debit transactions.[11] Id. at p. 8-9. Because of these transactions, she was unable to make other payments, such as her home mortgage. Id. at para. 32.

Ms. Walla received a discharge on July 2, 2010, and her case was closed thereafter. On June 6, 2012, she moved to reopen her case to institute an adversary proceeding against Sandberg and SLF. She has yet to file an adversary proceeding in her own bankruptcy case. Ms. Walla has since filed an adversary proceeding in the Sandberg and SLF bankruptcy cases.

III. MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 12(b), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b), governs motions to dismiss. Pursuant to rule 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." The party moving for dismissal has the burden of showing that no claim has been stated. 2-12 James Wm. Moore et al., *Moore's Federal Practice* § 12.34 (3d ed. 1999).

A motion to dismiss for failure to state a claim is judged according to the "plausibility" standard set out in the Supreme Court decision *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

[11] Ms. Walla claims again that she felt "very pressured" during these phone calls with SLF's employees. Walla Complaint, p. 9, para. 31.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint is plausible on its face when it pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Twombly*, 550 U.S. at 556. The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'shown'-'that the pleader is entitled to relief.'" *Iqbal* at 679 (quoting Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim *showing* that the pleader is entitled to relief." (emphasis added))).

While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. *Iqbal*, 556 U.S. at 679. The plaintiff need not include evidentiary detail, but must allege a factual predicate concrete enough to warrant further proceedings. *Mun. Utils. Bd. v. Alabama Power Co.*, 925 F.2d 1385, 1390 (11th Cir. 1991), *superseded,* 934 F.2d 1493 (1991) ("the alleged facts need not be spelled out with exactitude"). The pleading must at least set forth sufficient information for the court to determine whether some recognized legal theory exists on which relief could be accorded the pleader. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Iqbal,* 556 U.S. at 678; *see also Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007); *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) (stating that "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal"). Context determines the level of detail required in a pleading. *Moore's Federal Practice* at § 8.04.

For Rule 12(b)(6) purposes, the court must accept the plaintiff's factual allegations as true. While facts must be accepted as alleged, conclusory allegations or legal conclusions are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 678 ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). A "formulaic recitation of the elements" of a claim amounts to no more than "conclusory" allegations. *Id*. at 681; *Speaker v. United States Dep't of Health & Human Servs.*, 623 F.3d 1371, 1381, 1384 (11th Cir. 2010) (plaintiff must proffer enough factual content to raise right to relief above speculative level, not merely recite statutory elements in conclusory fashion). A court considering a motion to dismiss can disregard these conclusory allegations and judge the complaint only on well-pleaded factual allegations. *Iqbal*, 556 U.S. at 663; *see also Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266 (11th Cir. 2009) (conclusory allegation that paramilitary security forces acted under color of law was not entitled to be assumed true and was insufficient to allege state-sponsored action).

In deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice. A "12(b)(6) motion to dismiss is limited primarily to the face of the complaint and attachments thereto." *See* Fed. R. Civ. P. 10(c) (documents attached to pleadings are part of pleadings); *Taylor v. Appleton*, 30 F.3d 1365, 1370 (11th Cir. 1994) (reliance on document attached to pleadings did not convert motion to dismiss to motion for summary judgment); *Allen v. Newsome*, 795 F.2d 934, 938 (11th Cir. 1986) (report attached to complaint considered part of pleadings for all purposes, including Fed. R. Civ. P. 12(b)(6) motion). A court may also consider documents attached to a motion to dismiss if the document is undisputed and alleged or referenced in the complaint. *Speaker*, 623 F.3d at 1379

(11th Cir. 2010) (court could properly rely on supporting exhibits in deciding Fed. R. Civ. P. 12(b)(6) motion when there was no dispute as to authenticity and material was central to plaintiff's claim). A document is undisputed if its authenticity is not challenged. *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) (citing *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (additional citations omitted).

IV. DISCUSSION

Before addressing the bulk of the Plaintiffs' arguments, this Court must review the order dismissing Ms. Walla's district court complaint to ensure that she has private rights of action to assert her claims. The District Court dismissed Ms. Walla's federal and state RICO claims with prejudice. Walla District Court Complaint Order, p. 68. The District Court also held that although she could pursue her other allegations in bankruptcy court, she lacked a private right of action to bring several of her claims. Walla District Court Complaint Order, pp. 54, 63. Specifically, Ms. Walla has no private rights of action under sections 105 and 524 of the Bankruptcy Code, and Georgia Rules of Professional Conduct 1.7 and 1.8. Id. Therefore, Ms. Walla may not bring these claims against SLF or Anthony Sandberg. However, her complaint in the instant case seeks relief under sections 523(a)(2), (a)(6), 526(c)(2) and § 727, Thus she is not precluded from litigating these issues.

Sandberg contends that the Plaintiffs do not have meritorious causes of action against him individually, and that any liability for claims related to SLF's representation of the Plaintiffs rests solely on SLF. Bruce Motion to Dismiss, p. 3; Walla Motion to Dismiss, pp. 3-4. Specifically, he claims that the Plaintiffs have not outlined behavior sufficient to pierce the corporate veil. Bruce Motion to Dismiss, p. 6; Walla Motion to Dismiss, pp. 5-6. The Court will

address Sandberg's personal liability later in the Opinion. Putting the veil-piercing issues aside, the Court will address the Plaintiffs' claims in order.

A. Nondischargeability: 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B)(i), (a)(6)

The Plaintiffs claim that the debts owed to them by Sandberg are nondischargeable pursuant to sections 523(a)(2)(A), 523(a)(2)(B)(i), and 523(a)(6) of the Bankruptcy Code. They contend that SLF's method of receiving payment for legal services through post-dated checks or post-dated debit transactions and SLF's failure to notify the Plaintiffs that such obligations were improper. Sandberg argues that the Ninth Circuit has blessed such fee arrangements, and thus they cannot be considered fraudulent.

A presumption exists that all debts owed by the debtor are dischargeable unless a party contending otherwise proves non-dischargeability. 11 U.S.C. § 727(b). The presumption supports the "fresh start," which protects the "honest but unfortunate" debtors. *United States v. Fretz* (*In re Fretz*), 244 F.3d 1323, 1326 (11th Cir. 2001). The burden is on the creditor to prove an exception to discharge by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 287-88 (1991); *St. Laurent v. Ambrose* (*In re St. Laurent*), 991 F.2d 672, 680 (11th Cir. 1993). Courts should narrowly construe exceptions to discharge against the creditor and in favor of the debtor. *Equitable Bank v. Miller* (*In re Miller*), 39 F.3d 301 (11th Cir. 1994); *St. Laurent*, 991 F.2d at 680.

1. 11 U.S.C. 523(a)(2)(A)

Plaintiffs seek a determination that the debts are nondischargeable pursuant to section 523(a)(2), which excepts from discharge debts that are obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). To make out a claim for false pretenses or false

representations, a plaintiff must establish that: (1) that the debtor made a false statement with the purpose and intention of deceiving the creditor; (2) that the creditor relied on such false statement; (3) that the creditor's reliance on the false statement was justifiably founded; and (4) the creditor sustained damage as a result of the false statement. *Fuller v. Johannessen (In re Johannessen)*, 76 F.3d 347, 350 (11th Cir. 1996); *Huntington Nat'l Bank v. Cho (In re Cho)*, Adv. No. 05-6139, 2007 Bankr. LEXIS 1599, *4-5 (Bankr. N.D. Ga. Mar. 21, 2007) (Mullins, J.). The Plaintiffs have the burden of proving all the elements of 523(a)(2)(A) by a preponderance of the evidence. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994) (citing *Grogan v. Garner*, 498 U.S. 279, 291 (1991)).

An allegation of "false pretenses or false representation" requires an "express, affirmative representation." *FDS Nat'l Bank v. Alam*, 314 B.R. 834, 838-42 (Bankr. N.D. Ga. 2004) (Bonapfel, J.). Plaintiffs do not assert that Sandberg made any express representations at all. Plaintiffs simply assert in their factual recitations that: Sandberg accepted post-dated checks and debit transactions as payment; did not list himself as a creditor on Plaintiffs' schedules; did not tell the Plaintiffs that their debts may be dischargeable in bankruptcy; and did not specifically explain that SLF was receiving post-dated checks and debit transactions as payment on the attorney disclosure statement. (Bruce Complaint, p. 8-11, paras. 35-37).

Further, a debt is nondischargeable pursuant to section 523(a)(2)(A) only if the representation was knowingly false. *Alam*, 314 B.R. at 839. To establish this element, a creditor must show "actual, subjective fraudulent intent." *Id.* The Bruces do not provide any allegations of Sandberg's subjective intent but merely state that "Defendant obtained money by false pretenses and/or by intentionally making the Plaintiffs believe they owed a debt to Defendant they did not owe" and that "Defendant further failed to comply with 11 U.S.C. [] *et*

seq. . . .". Bruce Complaint, p. 12, paras. 39, 41. The Bruces also allege in their fact sections, generally, that they were never told that their debt to SLF would be dischargeable in bankruptcy. Bruce Complaint, pp. 4-7. Ms. Walla, similarly, alleges only that "Defendant obtained money by false pretenses and/or by intentionally making the Plaintiff believe she owed a debt to Defendant she did not owe" and "Defendant further failed to comply with 11 U.S.C. [] 526 *et seq.*". Walla Complaint, p. 17, paras. 54, 56. In her factual recitation, Ms. Walla claims several times that she was never told that the legal fees she owed to SLF were dischargeable in her bankruptcy. Walla Complaint, pp. 3-11. Other than these conclusory statements and weak factual allegations, there is nothing to support a finding of actual, subjective fraudulent intent.

Section 523(a)(2)(A) is not limited to fraudulent misrepresentations but also covers actual fraud. Actual fraud is defined broadly as "any deceit, artifice, trick or design involving a direct and active operation of the mind, used to circumvent and cheat another — something said, done or omitted with the design of perpetrating a cheat or deception." *Recoveredge, L.P. v. Pentecost*, 44 F.3d 1284, 1293(5th Cir. 1995) (citing 4 Alan N. Resnik & Henry J. Sommer, *Collier on Bankruptcy* ¶ 523.08 (16th ed. 2009)). "Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. . . . it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) (citations omitted). The fraud exception to dischargeability does not reach constructive frauds. *Id.* at 894. The question of whether a debtor commits actual fraud for purposes of section 523(a)(2)(A) thus turns on whether the debtor had the subjective intent to commit the fraud. Again, other than Plaintiffs' conclusory statements, there are no factual allegations that prove Defendant's subjective intent.

Plaintiffs claim that Sandberg violated section 526, et seq., and that this violation constituted fraud necessary to declare the debt nondischargeable under § 523(a)(2)(A). Plaintiffs assert that SLF and Sandberg did not list themselves on the Bruce's or Ms. Walla's Schedule F as unsecured creditors, SLF and Sandberg did not make it clear to the Plaintiffs that their attorneys' fees would be dischargeable in the bankruptcies as pre-petition unsecured debts, and SLF and Sandberg filed a disclosure statement which notified the Court that they were due attorneys fees, none of which had been paid at the time of filing. Bruce Complaint, pp. 4-7; Walla Complaint, pp. 3-11. However, none of these facts is sufficient to infer subjective fraudulent intent from Sandberg's behavior. Additionally, there is nothing in the Complaints to show this Court that the Plaintiffs justifiably relied on any false statement to their detriment. The Plaintiffs contracted with SLF for legal services, agreed to pay SLF for their time and effort, received discharges in their cases, and eventually paid SLF the fees owed to them. Thus, the Complaint fails to state facts sufficient to make a viable claim under section 523(a)(2)(A).

2. 11 U.S.C. § 523(a)(2)(B)

Plaintiffs further state that Sandberg's debt should be excepted from discharge pursuant to section 523(a)(2)(B)(i) of the Bankruptcy Code. However, section 523(a)(2)(B) must be read in its entirety, and all the elements must be present. Section 523(a)(2)(B) excepts from discharge debts that are obtained by:

> (B) use of a statement in writing–
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for money, property, services or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive.

11 U.S.C. § 523(a)(2)(B). Each of these elements must be proved by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 287 (1991). The Complaints fail to include even threadbare recitals of these elements.

To satisfy section 523(a)(2)(B), there must be a statement "in writing." The requirement of a writing is a basic precondition to nondischargeability under section 523(a)(2)(B). Although it is unclear, Plaintiffs seem to state that Sandberg made false statements in writing by submitting statements of compensation to the Court that failed to report receipt of post-dated checks and by having Plaintiffs sign disclosure forms that did not explain the dischargeability of their legal fees in bankruptcy. Bruce Complaint, pp. 8-11, paras. 35-37; Walla Complaint, pp. 10-12, paras. 37-44. The compensation statement in the Bruce case provided, "[f]or legal services, I have agreed to accept $1,200. Prior to the filing of this statement I have received $0.00. Balance due $1,200." Bruce Complaint, Exh. D. The compensation statement filed in Ms. Walla's case similarly said, "[f]or legal services, I have agreed to accept $1,200. Prior to the filing of this statement I have received $0.00. Balance due $1,200." Walla Complaint, Exh. C. Plaintiffs seem to claim that the statement is false in that it fails to report that Sandberg received post-dated checks and does not report the source of the compensation. Bruce Complaint, p. 10-11, para. 37; Walla Complaint pp. 14-15, para. 52. These factual allegations do not rise to the level of a materially false written statement. Sandberg and SLF filed disclosure statements with the Court that accurately reflected their fees in the Bruce and Walla cases. The Plaintiffs evidently signed paperwork that did not tell them their debts to SLF were dischargeable.

However, even if these "statements" were to constitute materially false written statements, the other requirements of section 523(a)(2)(B) are not met. Plaintiffs make no effort to show that the statement is about the Sandberg's or an insider's financial condition, that

Plaintiffs reasonably relied on the writing, or that Sandberg published any statements with intent to deceive. Bare conclusory statements of legal violations and minimal facts are not sufficient to survive a motion to dismiss.

3. Receipt of Post-Dated Checks as Payment for Legal Fees

Plaintiffs' arguments with respect to Sandberg's conduct all seem to stem from his acceptance of post-dated checks, post-petition, for payment of legal services. Bruce Complaint p. 7, para. 32; Walla Complaint para. 52. Plaintiffs argue that this practice is fraudulent and deceptive and that Sandberg's failure to fully disclose his participation in this activity requires a determination of nondischargeability. Bruce Complaint, pp. 12-13, paras. 38-43; Walla Complaint, pp. 16-17, paras. 53-58. However, Sandberg accurately explains in his Brief accompanying his Motion to Dismiss that the practice of accepted post-dated checks has been accepted by a U.S. Circuit Court of Appeals and cannot be considered fraudulent.

The practice of accepting post-dated checks or post-dated debit transactions is one that has caused disagreement among the courts for some time. Circuits are split on the issue, with most courts either following the Ninth Circuit or the Seventh Circuit. *In re Shell*, 312 B.R. 431, 435-36 (Bankr. M.D. Ala. 2004). The majority, led by the Seventh Circuit, has consistently held that using post-dated checks are for payment for legal services in bankruptcy violates the discharge injunction, the automatic stay, and Federal Rule of Bankruptcy Procedure 2016(b). *Id.* The minority, which follows the Ninth Circuit's reasoning, holds that post-dated checks and debit transactions are the only plausible way that many Debtors, especially those filing chapter 7 cases, can afford to pay their attorneys. *Id.* at 435 (citing *Gordon v. Hines (In re Hines)*, 147 F.3d 1185 (9th Cir. 1998)) ("the Ninth Circuit found that the bankruptcy system would break down it lawyers could not accept post-dated checks for their fees.").

The Seventh Circuit's position is articulated in *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125 (7th Cir. 2003). *Bethea* involved three plaintiffs who retained legal counsel prior to filing bankruptcy petitions. *Id.* at 1126. They each agreed to pay their counsel a retainer which would cover both filing preparation and prosecution of their cases. *Id.* However, the retainer was to be paid in installments throughout the life of the case, both pre- and post-petition. *Id.* In all three cases, the debtors received discharges, their cases were closed, and their attorneys continued to collect on the retainers after the discharges. *Id.* The debtors all retained new counsel and sued their bankruptcy attorneys for violating the discharge injunction by continuing to collect their fees. *Id.*

The Seventh Circuit addressed the issue by considering sections 727(b), 523, and 329. *Id.* at 1126-27. The Court looked to section 727(b), which provides that debtors are discharged from all debts that "'arose before the date of the order for relief'" and "'any liability on a claim that is determined under section 502'", save for those exceptions provided in section 523. *Id.* (quoting 11 U.S.C. § 727(b) (2012)). Attorneys' fees are not contained in section 523 as exceptions from discharge. *Id.* at 1127. The Court found the retainers to be pre-petition, liquidated debts that were discharged in the Debtors' bankruptcy cases. *Id.*

The Seventh Circuit went on to discuss the possibility that section 329(a) created an "unenumerated" exception to discharge under section 727(b), and held that it does not. *Id.* Section 329(a) requires all attorneys to file compensation disclosure statements, which enable the court to determine whether a payment is a preference. *Id.* Section 329(b) mandates that bankruptcy courts must determine the reasonableness of the fees disclosed under § 329(a). *Id.* In deciding the attorneys' fees were nondischargeable, the lower courts had decided that § 329(b) superseded section 727 and was "exclusive of discharge under § 727", or else it would be

inapplicable to chapter 7 cases. *Id.* The Seventh Circuit disagreed, finding that section 329 did not qualify as an exception to section 727 because it was applicable even in situations where attorneys' fees were dischargeable.[12] *Id.*

The defendant attorneys argued that a decision holding their fees dischargeable would render destitute debtors completely helpless, since any legal counsel they hired could neither be collected before filing, nor after. *Id.* The Seventh Circuit responded, explaining that such policy concerns were under the purview of Congress, not the judiciary. *Id.* at 1127-28. The Court also suggested that destitute debtors would be able to pay a small retainer up front for pre-petition work and later hire their attorneys once they filed their petitions.[13] *Id.* at 1128.

The Seventh Circuit held that pre-petition debts for legal fees are subject to discharge pursuant to section 727. *Id.* In doing so, it rejected the Ninth Circuit's decision in *Gordon v. Hines (In re Hines)*, 147 F.3d 1185 (9th cir. 1998), deciding that *Hines*' "middle ground" decision was incorrect, and that pre- and post-petition work cannot be partitioned into separate claims. *Id.* The bankruptcy attorneys were ordered to repay all fees collected after discharge and after imposition of the automatic stay. *Id.*

Gordon v. Hines (In re Hines), 147 F.3d 1185 (9th Cir. 1998) is followed by a minority of courts. Ms. Hines filed a chapter 13 case.[14] *Hines*, 147 F.3d at 1187. She changed counsel and retained Mr. Gordon and converted her case to chapter 7. *Id.* Mr. Gordon charged Ms. Hines an $875 fee, which she could not pay in advance. *Id.* She instead agreed to pay her legal

---

[12] For example, the Court reasoned that unreasonable pre-paid fees under § 329(b) must be recouped for creditors' benefit. Bethea, 352 F.3d at 1127. Also, the bankruptcy court is required to monitor fees throughout the case, especially if the debt is reaffirmed during the life of the case. Id. Finally, Debtors can repudiate the executory portions of their fee agreements and re-hire their attorneys, and the court must once again review the fees for reasonableness. Id.

[13] Such legal fees would then receive administrative priority. Id. at 1128.

[14] She was represented at the time by an attorney named Harold Shilberg. Hines, 147 F.3d at 1187.

expenses in monthly installments and signed a promissory note and provided Gordon with seven post-dated checks, most of which were to be cashed post-petition. *Id.* Gordon disclosed his fee arrangement to the court in conjunction with the conversion to chapter 7, and while he acted on behalf of Ms. Hines post-petition, he cashed two of her post-dated checks. *Id.*

Ms. Hines had a change of heart and retained her former attorney, Shilberg, to continue through her bankruptcy with her. *Id.* Shilberg informed Ms. Hines that her debts owed to Gordon were dischargeable and she stopped payment on her remaining post-dated checks. *Id.* Gordon attempted to collect his unpaid attorneys' fees, and when he contacted Ms. Hines, she filed a motion for contempt for violation of the automatic stay. *Id.*

The Ninth Circuit noted that Gordon was attempting to collect fees for his provision of post-petition services, as he had already collected $375, which covered his pre-petition work. *Id.* at 1188. The Court noted its previous decision in *Hessinger & Assocs. V. U.S. Trustee (In re Biggar)*, 110 F.3d 685 (9th Cir. 1997), which held that "'debts arising from the provision of pre-petition legal services – are dischargeable in a bankruptcy proceeding.'" *Id.*

The Ninth Circuit addressed the issue of whether "the postpetition rendition of legal services bargained for pursuant to a prefiling fee agreement entitles Gordon to recover the fees for those later services . . . directly from Hines herself." *Id.* at 1189. Like the Seventh Circuit in *Bethea*, the Court lamented Congress' inaction on the issue of advance payment for legal services in bankruptcy. *Id.* The Court listed several types of fee arrangements typically used at the time,[15] and also suggested approaches which might fit within the confines of the Bankruptcy

[15] Two arrangements seemed to dominate at that time. Id. at 1189. The first was essentially full payment of all anticipated work to be done in the bankruptcy case. Id. Under that approach, however, the Trustee would be able to liquidate the estate's right to legal services by rejecting the contract with the attorney and demanding a refund. Id.

Code as written.[16] However, the Ninth Circuit came to the conclusion that, "regardless of how the fees are handled . . . the arrangement potentially runs afoul of one Code provision or another. . . . we are compelled to consider an appropriate judicial response – one that recognizes that the very administration of the bankruptcy system requires that attorneys for chapter 7 debtors must have an enforceable right for their postpetition services that were contracted for before filing of the petition." *Id.* at 1190-91.

Thus, the court held that "all claims for lawyers' compensation stemming from such postpetition services actually provided to the debtor really do not fall within the automatic stay provisions . . . or the discharge provisions." *Id.* at 1191. The Ninth Circuit also addressed the notion that, under section 362(a)(6), a violation of the automatic stay would arise when an attorney acts on behalf of a client post-petition and seeks payment for those services. *Id.* Gordon was able to make a claim for any unpaid fees he had earned in excess of what he had already received in payment. *Id.* In allowing him to do so, the Ninth Circuit essentially blessed the use of post-dated checks cashed post-petition to reimburse bankruptcy attorneys for their services.

This Court accepts the reasoning and logic of the Ninth Circuit's opinion in *Hines*. Debtors come in various forms, with various attendant circumstances. In a perfect world, any individual suffering financial hardship would have the means to compensate their attorneys prior to filing. That is often not the case, especially when dealing with chapter 7 debtors. Following

---

The second approach involved a minimal advance payment, plus a fee agreement under which the Debtor will pay the rest of the fees from his or her post-filing earnings. Id.

[16] First, the Court suggested that chapter 7 attorneys only accept pre-petition payment for pre-petition services. Id. Attorneys would then have to enter into an additional post-petition agreement in order to provide post-petition services. Id. The Court described this approach as having "patent artificiality" and worried about the ethical repercussions of attempting to withdraw from representation without leave of court. Id. Additionally, the Ninth Circuit suggested post-filing reaffirmation of the fee agreement. Id. However, § 524(c) requires an affidavit from the debtor's attorney confirming the voluntary nature of the reaffirmation, which would create a fairly obvious conflict of interest. Id.

the decision in *Bethea* would likely force attorneys to either take on chapter 7 clients on a pro bono basis or to commit fraud by encouraging their clients to file chapter 13 petitions just so they can be paid, even if those clients should rightfully be filing under chapter 7.[17] If courts were to prohibit the use of post-dated checks in chapter 7 bankruptcies, it would defeat the very purpose of chapter 7 filings[18] and would deter many attorneys from representing chapter 7 debtors.[19]

It is true that collecting post-petition on pre-petition debts goes against the very fiber of the bankruptcy code and its undeniably important automatic stay.[20] However, collecting attorneys' fees that are contracted pre-petition for work performed post-petition, is entirely different from protecting the estates of newly filed debtors from looting creditors. The Seventh Circuit concluded that Congress must have intentionally left attorneys' fees out when they enumerated the exceptions to discharge in section 523.[21] However, is it logical that Congress did not intend for attorneys representing destitute chapter 7 debtors to be paid? Some attorneys can afford the luxury of turning away clients who cannot pay in full before filing, and some attorneys cannot. The bankruptcy system is a complicated one in which pro se prosecution is extremely

---

[17] "If the client cannot afford to pay the Chapter 7 filing fee and his attorney's fees in full prior to the time the petition is filed, his only alternatives are: (1) a Chapter 13 filing . . . or (2) not filing at all." In re Shell, 312 B.R. 431, 436 n.3 (Bankr. M.D. Ala. 2004) (discussing the dischargeability of attorneys' fees in chapter 7 cases).

[18] "[T]he very administration of the bankruptcy system requires that attorneys for Chapter 7 debtors must have a legally enforceable right for their postpetition services that were contracted for before filing of the petition. If the absence of such a right were to become the law, it does not require much thought to recognize that the entire system would suffer a massive breakdown." *Hines*, 147 F.3d at 1191.

[19] *See id.* at 1190 ("regardless of how the fees are handled (whether by payment in advance or deferred payment) the arrangement potentially runs afoul of one Code provision or another. And because no existing solution is totally satisfactory, it is only the rarity of litigated disputes in this area (as a practical matter) that avoids a real chilling of competent counsel's willingness to represent Chapter 7 debtors."

[20] The power to enjoin creditor action was solidified in *Ex Parte Christy*, which interpreted the Bankruptcy Act of 1841 and found that the bankruptcy system could not function, should the bankruptcy courts not have that power. 4 Alan N. Resnik & Henry J. Sommer, *Collier on Bankruptcy* ¶ 362.LH (16th ed. 2009). *Christy* thus outlined "one of the fundamentals of bankruptcy law: the bankruptcy court, as a court of equity exercising *in rem* jurisdiction over assets in its custody and control, can protect its jurisdiction by injunction . . ." *Id.*

[21] *Bethea*, 352 F.3d at 1127.

difficult. To deprive struggling debtors of willing counsel in such a time of need is markedly opposite of the intentions of the Bankruptcy Code.[22]

Participation in a practice that is "blessed by" another United States Court of Appeals, especially when one's own circuit, the Eleventh Circuit here, has not issued a guiding opinion,[23] cannot logically be considered fraudulent. There have been several bankruptcy court opinions from Florida,[24] Alabama,[25] and Georgia[26] that have followed or cited *Bethea*, but none are binding on this Court. Thus this Court finds that Defendant did not engage in fraudulent behavior by accepting post-dated checks as payment for legal fees, nor did he violate the automatic stay or discharge injunctions. Plaintiffs have failed to allege facts to state a claim under 11 U.S.C. §§ 523(a)(2)(A)-(B).

4. 11 U.S.C. § 523(a)(6)

Plaintiffs also allege that Defendant's debt should be excepted from discharge under section 523(a)(6) of the Bankruptcy Code. However, Plaintiffs make no allegations that

---

[22] "For Debtors who are individuals, this Code provides the possibility of a fresh start through the bankruptcy discharge, as well as a[n] ability to restructure their debts in certain circumstances." 4 Alan N. Resnik & Henry J. Sommer, *Collier on Bankruptcy* ¶ P. 1.01 (16th ed. 2009). However, for debtors who are forced to "go it alone", the bankruptcy process can be daunting. "While individuals can file a bankruptcy case without an attorney, or 'pro se,' it is extremely difficult to do so successfully. It is very important that a bankruptcy case be filed and handled correctly. The rules are very technical, and a misstep may affect a debtor's rights." UNITED STATES COURTS, *Filing for Bankruptcy Without an Attorney* (last visited Jan. 14, 2014), http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources/FilingBankruptcyWithoutAttorney.aspx.

[23] In re Shell, 312 B.R. 431, 436 (Bankr. M.D. Ala. 2004) (noting that "there was no controlling authority in this Circuit on this question" with regards to dischargeability of attorneys' fees in chapter 7 cases).

[24] *See, e.g.*, Walton v. Clark & Washington, P.C. (In re Walton), 454 B.R. 537 (Bankr. M.D. Fla. 2011) (holding that attempts to collect on post-dated checks after Debtor's filing and discharge is a violation of the automatic stay and the discharge injunction, and that postdated checks are pre-petition claims).

[25] In re Shell, 312 B.R. 431 (Bankr. M.D. Ala. 2004) (holding that post-dated checks are inappropriate for attorney fee payment, since the Debtor's pre-petition obligation to pay attorneys's fees is a claim that is discharged in chapter 7 bankruptcy).

[26] McTyeire v. Hunt (In re McTyeire), 357 B.R. 898 (Bankr. M.D. Ga. 2006) (Walker, J.) (holding that collecting pre-petition fees through contract action violates the discharge injunction, since a majority of courts have held that the fees are discharged in bankruptcy).

Defendant had the subjective intent necessary to satisfy the willful and malicious standard of 523(a)(6).

Section 523(a)(6) prevents discharge of an individual's debts incurred by "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). Section 523(a)(6) essentially relates to torts and "may apply to a broad range of conduct causing harm to people . . . subject to the limitation that the injury be 'willful and malicious.'" *Kasper v. Turnage (In re Turnage)*, 460 B.R. 341, 346 (Bankr. N.D. Ga. 2011) (Mullins, J.) (citing 4 Alan N. Resnik & Henry J. Sommer, *Collier on Bankruptcy* ¶ 523.12 (16th ed. 2009)). According to legislative history, in this section, "willful" acts are those that are "deliberate or intentional." S. Rep. No. 95-989, at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865; H.R. Rep. No. 95-595, at 365 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320. Plaintiffs must show more than recklessness, as it does not rise to the level of willfulness. *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998). The word "malicious" in section refers to acts that are "wrongful and without just cause or excessive even in the absence of personal hatred, spite, or ill will." *Fincher v. Holt (In re Holt)*, 173 B.R. 806, 812 (Bankr. M.D. Ga. 1994). "Courts have held that a wrongful act done intentionally, which necessarily produces harm or which has a substantial certainty of causing harm and is without just cause or excuse, is 'willful and malicious' within the meaning of section 523(a)(6)." *Kasper*, 460 B.R. at 346 (citing *In re Walker*, 48 F.3d 1161, 1164 (11th Cir. 1995); *Printy v. Dean Witter Reynolds, Inc.*, 110 F.3d 853 (1st Cir. 1997) (collecting cases)).

"To establish a willful injury, the plaintiff must show that the debtor defendant had a subjective motive to inflict injury or believed his conduct was substantially certain to cause injury." *Lewis v. Lowery (In re Lowery)*, 440 B.R. 914, 928 (Bankr. N.D. Ga. 2010) (Hagenau,

J).; *see also Britt's Home Furnishing, Inc. v. Hollowell (In re Hollowell)*, 242 B.R. 541, 545 (Bankr. N.D. Ga. 1999) (Murphy, J.). For example, in *Burke v. Riddle (In re Burke)*, Adversary Proceeding No. 10-4088, 2011 Bankr. LEXIS 2226 (Bankr. N.D. Ga. 2011) (Bonapfel, J.), the plaintiff creditor alleged conversion, claiming that the Debtor sold the vehicle collateral and, instead of paying off the lien as promised, used the money for personal use. *Id.* at *13. The court found that the plaintiff alleged insufficient facts to support a claim of willful and malicious injury. Without deciding the issue of whether such facts constitute a "conversion" for purpose of Georgia law, the Court concluded that the complaint did not state a claim for relief under § 523(a)(6) because the plaintiff "failed to state facts which demonstrate 'the debtor's subjective motive to cause injury' or facts showing 'an objective substantial certainty that the conduct would cause injury.'" *Id.* at *13-14 (quoting *Britt's Home Furnishing, Inc.*, 242 B.R. at 546). The Court granted the defendant's motion to dismiss and dismissed the section 523(a)(6) claim.

Here, there is no evidence that Sandberg had the subjective intent necessary to satisfy the willful and malicious standard of section 523(a)(6). Plaintiffs state that Sandberg failed to comply with section 526 of the Code but do not explain how such activity is either willful or malicious. Bruce Complaint, pp. 8-9, para. 35; Walla Complaint, pp. 12-13, para. 50. Plaintiffs do not allege any facts to suggest that Sandberg intended to inflict injury or that he believed his conduct was substantially certain to cause injury; Plaintiffs have therefore failed to demonstrate that Sandberg acted willfully.

Plaintiffs have also failed to establish that Sandberg's conduct was malicious, i.e., wrongful and without just cause or excessive even in the absence of personal hatred, spite, or ill will. Again, all Plaintiffs allege is, "[t]he Debtor/Defendant obtained money by false pretenses and/or by intentionally making the Plaintiff[s] believe [they] owed a debt to Defendant that

[they] did not owe." Bruce Complaint, page 12, para. 39; Walla Complaint p. 17, para. 54. Because Plaintiffs have failed to state facts to demonstrate that Sandberg acted willfully and maliciously, they do not state a claim for relief under § 523(a)(6).

B. Denial of Discharge: 11 U.S.C § 727

Next, Plaintiffs contend that, "based on the wrongful misconduct of the Debtor," he should be denied a discharge under section 727(a)(4). Bruce Complaint p. 15, para. 54; Walla Complaint pp. 19-20, para. 69. This provision truly encapsulates the policy that only honest, unfortunate debtors receive a discharge and the benefit of a fresh start – a policy fundamental to the bankruptcy code. *Eastern Diversified Distributors, Inc. v. Matus (In re Matus)*, 303 B.R. 660, 675 (Bankr. N.D. Ga. 2004) (Mullins, J.). While section 727(a)(4) includes three sub-parts, [27] Plaintiffs fail to specify which subpart provides a basis for a denial of discharge. Defendant does not address this claim in the Motion.

Because denying a debtor's discharge is such an extraordinary remedy, statutory exceptions to discharge must be construed liberally in favor of the debtor and strictly against the objecting party. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994) (the denial of a discharge must be predicated on real and substantial evidence, not conjecture); *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 680 (11th Cir. 1993). The party objecting to discharge bears the burden of proof. Fed. R. Bankr. P. 4005. The burden for objections to discharge under 11 U.S.C. § 727 is the preponderance of the evidence standard.

[27] A debtor may be denied a discharge by virtue of section 727(a)(4)(A) of the Code if he or she "knowingly and fraudulently, in or in connection with the case made a false oath or account.". 4 Alan N. Resnik & Henry J. Sommer, *Collier on Bankruptcy* ¶ 727.05 (16th ed. 2009). Section 727(a)(4)(B) prohibits the granting of a discharge to a debtor who "knowingly and fraudulently, in or in connection with the debtor's case, presented or used a false claim." *Id.* Very few cases have been decided under § 727(a)(4)(B). *Id.* A debtor's discharge may be denied under section 727(a)(4)(C) where the debtor "knowingly and fraudulently, in or in connection with the case gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act." 11 U.S.C. § 727(a)(4)(C) (2012).

E. Diversified Distribs., Inc. v. Matus (In re Matus), 303 B.R. 660, 671-672 (Bankr. N.D. Ga. 2004) (explaining that many courts have concluded that the preponderance of the evidence standard announced in *Grogan v. Garner*, 498 U.S. 279, 287 (1991), that applies in section 523(a) dischargeability proceedings, is also appropriate for section 727 actions). "[T]he grounds for denial of discharge must be proven specifically, and the proof must be directed at the transfer or concealment alleged. A debtor should not be denied a discharge on 'general equitable considerations.'" *Hunerwadel v. Dulock (In re Dulock)*, 250 B.R. 147, 153 (Bankr. N.D. Ga. 2000) (citing *Rice v. Matthews*, 342 F.2d 301, 304 (5th Cir. 1965)). "Once the plaintiff meets the initial burden by producing evidence establishing the basis for his objection, the burden shifts to the debtor to satisfactorily explain the loss." *Matus*, 303 B.R. at 672 (citing *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984)).

Section 727(a)(4)(A) provides that: "the Court shall grant the debtor a discharge, unless the debtor knowingly and fraudulently, in or in connection with the case made a false oath or account[.]" 11 U.S.C. § 727(a)(4)(A). To justify denial of discharge, the false oath must be fraudulent and material. *Swicegood v. Ginn*, 924 F.2d 230 (11th Cir. 1991); *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616 (11th Cir. 1984); *E. Diversified Distribs., Inc. v. Matus (In re Matus)*, 303 B.R. 660, 671-72 (Bankr. N.D. Ga. 2004). The false oath or account must be made with the requisite intent, specifically a knowing intent to defraud creditors. *Parnes v. Parnes (In re Parnes)*, 200 B.R. 710, 713-14 (Bankr. N.D. Ga. 1996) (citations omitted). Actual intent may be inferred from circumstantial evidence. *Id.* at 714.

"Deliberate omissions by the debtor may also result in the denial of discharge under § 727(a)(4)(A)." *Swicegood*, 924 F.3d at 232 (quoting *Chalik*, 748 F.2d at 618). As with misrepresentations, section 727 requires that omissions be (i) made knowingly and with

fraudulent intent, and (ii) material to the bankruptcy case at issue. *Matus*, 303 B.R. at 677 (citations omitted). An omission is material if the subject matter either relates to the debtor's personal transactions or if it concerns the discovery of assets, the debtor's business dealings, or the disposition of the debtor's property. *Chalik*, 748 F.2d at 618. For example, "[f]ailure to schedule property belonging to another entity is generally not grounds for denial of discharge." *Advantage Leasing Corp. v. Moss (In re Moss)*, Adv. No. 05-6077-MGD, 2006 Bankr. LEXIS 2324 (Bankr. N.D. Ga. Mar. 30, 2006) (Diehl, J.) (citing *Firstar Bank Iowa, N.A. v. Magnani (In re Magnani)*, 223 B.R. 177, 184 (Bankr. N.D. Iowa 1997).

Here, Plaintiffs contend that Sandberg's discharge should be denied under section 727(a)(4) of the Code. Yet, Plaintiffs fail to provide facts that would give rise to a reasonable inference that Sandberg knowingly and fraudulently failed to disclose information that would be material to his bankruptcy case. Plaintiffs merely state that Sandberg "engaged in 'wrongful misconduct' by engaging "in a pattern and practice of non-compliance with the requirements of 11 U.S.C. §§ 362, 524, and 526[.]" Bruce Complaint p. 14, para. 53; Walla Complaint, p. 19, para. 68. Plaintiffs list conclusions such as, "Defendant . . . admitted to the policy of taking post-dated checks", and "Defendant . . . took post-dated checks from Plaintiffs and concealed the fact that the debt . . . was stayed . . . and discharged by the court". Bruce Complaint, pp. 13-14, paras. 45-52; Walla Complaint, pp. 18-19, paras. 60-67. Plaintiffs do not identify any specific false oaths. In fact, Plaintiffs note that Sandberg "admitted to the policy of taking pre-authorized post-dated debit transactions" and "proudly stated" that the practice was commonplace and routine. Bruce Complaint pp. 13-14, paras. 47, 50; Walla Complaint, pp. 18-19, paras. 62, 65. In these statements, Sandberg was plainly truthful about SLF's practice of accepting post-dated checks for payment.

Plaintiffs also state generally that "Defendant, in his Chapter 7 petition, lists none of the clients from which he took post-dated checks except the two clients who had pending adversaries at the time he filed his Chapter 7 petition." Bruce Complaint, p. 14, para. 52; Walla Complaint, p. 19, para. 67. There is nothing contained in that recital, or the others listed above, that would permit the court to infer more than the mere possibility of misconduct to warrant relief under section 727. Moreover, a denial of a debtor's discharge is a severe remedy and not one to be granted lightly.

Additionally, as addressed previously, Sandberg and SLF were following the guidance of the Ninth Circuit Court of Appeals when they accepted post-dated checks and debit transactions for payment of their attorneys' fees. Sandberg cannot be denied a discharge under section 727 for following a Circuit Court opinion, albeit one that represents a minority of courts. Thus, the Plaintiffs complaint fails to state a claim on this issue as well.

C. Piercing the Corporate Veil

In their responses to the Motions to Dismiss, Plaintiffs state that the corporate veil is not a defense available to attorneys ("Bruce Response" and "Walla Response", respectively). They rely on *First Bank & Co. v. Zagoria*, 302 S.E.2d 674 (Ga. 1983), for this proposition. Bruce Response, p. 11; Walla Response, p. 16. As Sandberg points out, this statement was overruled by a later case, *Henderson v. HSI Fin. Servs.*, 471 S.E.2d 885 (Ga. 1996). Defendant's Reply, p.3. In *Henderson*, the Supreme Court of Georgia explained:

> We granted the writ of certiorari to decide whether we should reconsider the holding in *First Bank & Co. v. Zagoria* that a member of a law firm is personally liable for the professional misconduct of other lawyers in the firm. We overrule that strict liability rule today because the legislature has provided that shareholders of professional corporations are not personally liable for corporate debts except by personal conduct.

Henderson, 471 S.E.2d at 885; *see also Villanueva v. First Am. Title Ins. Co.*, 721 S.E.2d 150, 154 (Ga. App. 2011) (noting that "*Zagoria* was overruled by *Henderson*."). Thus, "lawyers may practice their profession as shareholders in a professional corporation with the same rights and responsibilities as shareholders in other professional corporations." *Henderson*, 471 S.E.2d at 886.

When seeking to hold a corporate debt nondischargeable against an individual, a plaintiff must first pierce the corporate veil in order to reach that individual. It is necessary to first pierce the corporate veil because the concept of limited liability for corporations against creditors is fundamental in corporate law. Indeed, "[a] corporation is a legal entity existing entirely separate and distinct from its shareholders, officers, and directors, who as a general rule are not liable for the corporation's debts and obligations." *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 421 (5th Cir. 1980) (citations omitted). As Justice Douglas stated, "limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott*, 321 U.S. 349, 362 (1944).

While limited liability is the norm, in rare, special circumstances, courts may pierce the corporate veil. *See id.* at 361-62. Attempts to reach the assets of shareholders by piercing this "corporate veil" can succeed only under exceptional circumstances. *See e.g., Baker v. Raymond Int'l, Inc.* 656 F.2d 173, 179 (5th Cir. 1981). "The concept of piercing the corporate veil is applied in Georgia to remedy injustices which arise where a party 'has over extended his privilege in the use of a corporate entity in order to defeat justice, perpetuate fraud or to evade contractual or tort responsibility.'" *Heyde v. Xtraman, Inc.*, 404 S.E.2d 607, 610 (Ga. App. 1991) (citations omitted); *see also Cheney v. Moore*, 387 S.E.2d 575, 576 (Ga. App. 1989). Courts may pierce the corporate veil where it is evident that "shareholders disregarded the

corporate entity and 'made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist.'" *Heyde*, 404 S.E.2d at 610 (citations omitted). Courts have found that "such unity of interest" exists where a defendant commingles on an interchangeable or joint basis "otherwise separate properties, records or control." *Id.* at 610. Where a defendant engages in such practices, the corporate entity may be disregarded for liability purposes. *Baillie Lumber Co. v. Thompson*, 612 S.E.2d 296, 299 (Ga. 2005). A principal found liable under an alter ego theory should be liable for the entirety of the corporation's debt. *Id.* at 301.

Plaintiffs do not even include a veil piercing claim; they merely ask the Court to impose liability on Sandberg. Plaintiffs state in their replies to the motions to dismiss that Sandberg is the sole shareholder and owner of The Sandberg Law Firm, that he set the firm policies and signs every petition, and all SLF employees were under his sole direction. Bruce Response p. 12; Walla Response p. 18. The statement of facts attached to the Bruce Complaint as Exhibit E provides that, while Sandberg had final approval of policies and procedures, he was "one of multiple attorneys at The Sandberg Law Firm that supervised and implemented policies and procedures." Bruce Complaint, Exh. E, p. 4. There are no allegations that the corporation failed to observe corporate formalities. Plaintiffs' hastily conceived response regarding veil piercing is far from enough to impute Sandberg with liability. Thus, the Plaintiffs have failed to meet their burden of proof on this issue.

D. Attorneys' Fees

1. O.C.G.A. § 13-6-11

Plaintiffs claim that they should be awarded attorney's fees pursuant to O.C.G.A. § 13-6-11. While a party may not generally recover attorney's fees, O.C.G.A. § 13-6-1 establishes circumstances in which a plaintiff may recover attorney's fees as separate, special damages

flowing from an underlying tort. *Mills v. Ellerbee (In re Ellerbee)*, 177 B.R. 731, 746 (Bankr. N.D. Ga. 1995) (Massey, J.) (citing *Brown v. Baker*, 398 S.E.2d 797 (Ga. App. 1990)). The statute provides:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

O.C.G.A. § 13-6-11. The section does not create an independent cause of action, but merely establishes circumstances in which a plaintiff, in addition to his damages, may recover the expense of litigation. *Brown*, 398 S.E.2d 797. To recover expenses of litigation under O.C.G.A. §13-6-11, the plaintiff must first prevail in the action and then must prove the defendant has acted improperly in one of the manners described in O.C.G.A. § 13-6-1. *See Magnetic Resonance Plus, Inc. v. Imaging Syss. Int'l*, 543 S.E.2d 32 (Ga. 2001); *see also McClung v. Atlanta Real Estate Acquisitions, LLC*, 639 S.E.2d 331, 335 (Ga. App. 2006) (the fact that a claim fails as a matter of law bars the recovery of attorney fees). An award under O.C.G.A. § 13-6-11 is discretionary. *See Davis v. Walker*, 655 S.E.2d 634 (Ga. App. Nov. 21, 2007).

Attorney fees may be appropriate where the defendant acted in bad faith in the underlying transaction upon which the complaint is based. *Brannon Enter., Inc. v. Deaton,* 285 S.E.2d 58, 60 (Ga. 1981). Bad faith is not simply bad judgment but implies conscious wrongdoing or ill will; mere negligence is not sufficient to establish bad faith. *See e.g., Burlington Air Express v. Ga.-Pac. Corp.*, 457 S.E.2d 219 (Ga. App. 1995). Cases interpreting the section have established that intentional torts invoke a "species of bad faith" that entitles a plaintiff to recover the expenses of litigation, including attorney fees, because having to incur fees to collect the other damages is itself an injury flowing from the tort. *See DeKalb Cnty. v. McFarland*, 203 S.E.2d 495, 497 (Ga. 1974).

Plaintiffs merely state that they "have been caused unnecessary time, trouble, and legal expense, and the Debtor has been acting in bad faith and stubbornly litigious entitling Plaintiffs to attorney's fees for having to sue and collect sums owed to them through an attorney at law." Bruce Complaint, p. 15, para. 56; Walla Complaint, p. 20, para. 71. Plaintiffs do not allege anything beyond these legal conclusions and do not provide any facts to show how Sandberg acted in bad faith or caused Plaintiffs unnecessary trouble and expense. Thus, Plaintiffs fail to plead facts that would support the criteria required by O.C.G.A. § 13-6-1. Moreover, Plaintiffs fail on the underlying action, which is fatal to their requests for attorneys' fees.[28]

2. 11 U.S.C. § 526(c)

Finally, Plaintiffs contend that attorney's fees should be awarded pursuant to section 526(c) of the Bankruptcy Code. Section 526(c)(2)(A) imposes liability on a debt relief agency if the agency intentionally or negligently fails to comply with any provision of sections 526, 527 or 528 in a case or proceeding under the Bankruptcy Code for an assisted person. [29]

Plaintiffs state that they "have been caused unnecessary time, trouble, and legal expense, and the Debtor has been acting in bad faith and stubbornly litigious entitling Plaintiffs to attorney's fees for having to sue and collect sums owed to them through an attorney at law."

---

[28] *See Magnetic Resonance Plus, Inc. v. Imaging Syss. Int'l*, 543 S.E.2d 32 (Ga. 2001); *see also McClung v. Atlanta Real Estate Acquisitions, LLC*, 639 S.E.2d 331, 335 (Ga. App. 2006) (the fact that a claim fails as a matter of law bars the recovery of attorney fees).

[29] 11 U.S.C. § 526(c)(2) provides in relevant part:

> Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have—
>
> > (A) intentionally or negligently failed to comply with any provision of this section, section 527, or section 528 with respect to a case or proceeding under this title for such assisted person[.]

11 U.S.C. § 526(c)(2).

Bruce Compl. pp. 15-16, para. 58; Walla Complaint, p. 20, para. 73. Again, Plaintiffs fail to plead facts that would warrant an award of attorney's fees pursuant to § 526(c).

Plaintiffs have provided only conclusory allegations in support of their contention that Sandberg violated section 526. Plaintiffs broadly state that Sandberg's actions violated section 526 *et seq*. Bruce Complaint, p. 8, para. 35; Walla Complaint, p. 12, para. 50. Plaintiffs then refer to section 526(a)(2), which prohibits a debt relief agency from making an untrue or misleading statement in a document filed under Title 11, and section 526(a)(3), which prohibits a debt relief agency from misrepresenting the services that the agency will provide or benefits and risks associated with filing a bankruptcy case.[30] Plaintiffs state that "Schedule F, as prepared and filed by Defendant[,] . . . constitutes a false and misleading statement in that it fails to identify Defendant as a creditor of Plaintiffs." Bruce Complaint p. 8, para. 35(vi); Walla Complaint, p. 12, para. 50(vi). Sandberg was neither a debt relief agency[31] nor a creditor[32] of Plaintiffs – it was

---

[30] Section 526(a) provides that **a** debt relief agency, as defined in § 101(12)(A), shall not:

> (1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;
> (2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;
> (3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to—
> > (A) the services that such agency will provide to such person; or
> > (B) the benefits and risks that may result if such person becomes a debtor in a case under this title; or
>
> (4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. § 526(a).

[31] As defined in the Code, "debt relief agency" refers to:

> [A]ny person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does *not* include—

SLF that provided bankruptcy assistance to the Debtors and that accepted post-dated personal checks and debit transactions in return for bankruptcy services, not Defendant in his individual capacity. Plaintiffs fail to state how Sandberg's actions violated section 526; consequently, there is no basis to award attorney's fees under section 526(c).

V. CONCLUSION

The Plaintiffs have failed to plead facts sufficient to state a claim upon which relief could be granted. The Complaints are rife with conclusory statements and they lack facts necessary to fulfill elements of the claims they allege. Plaintiffs do not state facts to support that Sandberg made a false oath or submitted a materially false written statement under section 523(a)(2), or that Sandberg possessed the requisite intent to deceive. Additionally, Plaintiffs are unable to allege any sort of fraud under either section 523(a)(2) or (a)(6) when Sandberg's actions regarding collection of post-dated checks post-petition are allowed and considered necessary by the Ninth Circuit Court of Appeals. Plaintiffs fail to allege facts sufficient to deny dischargeability under section 727 because the post-dated check acceptance practice is authorized by the Ninth Circuit, and because they have not alleged facts that would support a finding that Sandberg knowingly and fraudulently supplied materially false information. Moreover, Plaintiffs included no factual information in their Complaints to support piercing the

---

> **(A)** any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer[.]

11 U.S.C. § 101(12A) (emphasis added). Defendant was an officer and employee of The Sandberg Law Firm, LLC (which itself is a "person" under § 101(41) of the Code). By this definition, Defendant is expressly excluded from being a "debt relief agency."

[32] A "creditor" is defined as "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor[.]" 11 U.S.C. § 101(10)(A). As discussed above, in following the Ninth Circuit decision in *Hines*, this Court accepts the notion that SLF and the Defendant did not have a claim against Plaintiffs during their bankruptcies.

corporate veil to hold Sandberg liable. Plaintiffs are likewise not entitled to attorneys' fees in this matter, and the complaints shall be dismissed.

IT IS ORDERED that the Motion be and is hereby **GRANTED**.

The Clerk's Office shall serve a copy of this Order on Plaintiffs, Plaintiffs' counsel, Sandberg, Sandberg's counsel, and the Chapter 7 Trustee.

END OF DOCUMENT