The relief described hereinbelow is SO ORDERED.

SIGNED this 26th day of February, 2014.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

WILLIAM H. MARTIN, JR., **Case No. 12-21938-7**
Debtor.

SINCLAIR OIL CORPORATION,
Plaintiff,

v. **Adv. No. 12-6127**

WILLIAM MARTIN, JR.,
Defendant.

ORDER DENYING IN PART AND GRANTING IN PART
DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on Defendant William Martin, Jr.'s motion to dismiss[1] the adversary complaint filed against him by Plaintiff Sinclair Oil Corporation ("Sinclair Oil"). The adversary complaint seeks the denial of discharge of debt to Sinclair Oil, claiming that Martin is

[1] Doc. 12.

the alter ego of Convenience Express, Inc. (which is itself the general partner of Convenience USA LP), a company in debt to Sinclair Oil for $511,451.56. Plaintiff claims the debt is not dischargeable under 11 U.S.C. § 523(a)(2)(A) and/or (a)(6) and that Martin should be denied a discharge under § 727.[2] Martin has moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(6) and 9(b), arguing that the allegations made are conclusory and do not satisfy minimal pleading standards.

Because the Court finds that Plaintiff has stated just enough facts to support its claims under §§ 523(a)(2)(A) and (a)(6), the Court denies Defendant's motion to dismiss the § 523 claims. Plaintiff has chosen not to pursue its § 727 claim, however, and the Court grants the motion to dismiss that claim, without prejudice.

I. Background and Findings of Fact

Defendant/Debtor Martin filed a chapter 7 bankruptcy petition listing nearly two million dollars of debt or joint debt,[3] and Plaintiff Sinclair Oil filed a proof of claim in that bankruptcy for $511,451.56 for unsecured debt for nonpayment of a purchase. Sinclair Oil then filed this adversary proceeding, generally alleging in its complaint that the debt is the result of fraud, deceit, misrepresentations, and concealment perpetrated by Martin against Sinclair Oil. Specifically, Sinclair Oil claims that between June 4, 2008, and July 8, 2008, ostensibly pursuant to an August 1, 2006, distributor sale contract, Convenience USA LLP ("Convenience USA") acquired motor fuel and other petroleum products from Sinclair Oil. Convenience USA

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[2] All future statutory references are to title 11 of the United States Code, unless otherwise specified.

[3] As discussed below, Martin is a controlling partner in M&W Midwest Properties, LLC, and much of the debt listed in his individual petition is listed as joint debt with that company.

apparently acted through its general partner, Convenience Express, Inc. ("Convenience Express"). Sinclair Oil alleges that Convenience USA had the obligation to pay Sinclair Oil for these products at the time of acquisition, but Convenience USA was insolvent and had no ability to make payment for the product.

Sinclair Oil alleges that Martin knew or should have known that "the product was obtained by fraud, deceit and misrepresentation without the ability to pay and without any reasonable likelihood of having the ability to pay for the product in the foreseeable future."[4] Convenience USA apparently had a $300,000 secured line of credit for product from Sinclair Oil, but at least some portion of the product acquired was distinct from this secured credit line. At some point (again, the exact details are not clear), Sinclair Oil realized the extent of Convenience USA's acquisition of product and made demand for payment, which Convenience USA did not transmit.

Sinclair Oil then alleges that Martin, knowing that Convenience USA "had not paid for the product and could not pay for the product, . . . concealed, transferred, dissipated or absconded with the product," including selling or transferring the product to a third party.[5] Then, in early July 2008, Martin entered into an agreement with M&W Midwest Properties, LLC ("M&W"), a company also controlled by Martin, to convey to M&W all or substantially all of Convenience USA's assets.

Sinclair Oil filed suit in state court against Convenience USA, Convenience Express, and Martin, seeking compensation for the product acquired. There, as it does here, Sinclair Oil

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[4] Doc. 1 ¶ 6(a).

[5] Doc. 1 ¶ 6(d).

alleged individual liability by Martin based on Martin being the alter ego of the Convenience entities.[6] Again, Sinclair Oil alleges that Martin knowingly and intentionally engaged in fraud, deceit, and misrepresentation to maliciously and willfully injure Sinclair Oil by "fraudulently and deceitfully obtaining product from Sinclair without paying for it so that Martin could further his individual and personal financial interests."[7] At some point after Sinclair Oil filed its state court lawsuit, Convenience USA and Convenience Express filed bankruptcy petitions, followed by the individual chapter 7 bankruptcy petition filed by Martin.

Rather than answering the adversary proceeding complaint, Martin has moved to dismiss. Martin challenges the sufficiency of the complaint for all three counts: §§ 523(a)(2)(A), 523(a)(6), and 727. In its response to Martin's motion to dismiss, Sinclair Oil additionally alleges that Martin's intent in orchestrating the scheme outlined in the complaint was to get assets to M&W, so that the bank holding a note on M&W would not call the note and Martin's personal guaranty of the M&W debt. Sinclair also claims in its response that Martin "essentially acknowledged" in a deposition in the state court lawsuit "both the wrongful scheme to deceive Sinclair in order to obtain the motor fuel and to convey it to MW thereafter."[8] Sinclair Oil also attaches to its response a journal entry of judgment entered in an adversary proceeding in the bankruptcy cases of the Convenience entities against M&W. Because these additional alleged

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[6] To support its alter ego claim, Sinclair Oil alleges that neither Convenience USA nor Convenience Express were sufficiently capitalized when the debt was incurred, that Martin failed to follow or meet the corporate formalities required by controlling Kansas statutes, that no corporate dividends were paid and no person other than Martin ever acted as an officer or director, that Martin siphoned corporate funds as the dominant stockholder, and that Martin merely operated Convenience Express as a facade for his own operations. *See* Doc. 1 ¶ 10. Martin does not challenge this portion of Sinclair Oil's complaint as insufficiently plead.

[7] Doc. 1 ¶ 6(f).

[8] Doc. 16, at 3.

facts stated in Sinclair Oil's response to Martin's motion to dismiss do not appear in the complaint but in a response brief, they will not be considered further.[9]

Finally, Sinclair Oil states in its response that it elects not to pursue the § 727 claim, and it seeks to withdraw that claim without prejudice.

II. Analysis

A. Standard for Motion to Dismiss

An adversary proceeding to determine the dischargeability of particular debts is a core proceeding under 28 U.S.C. § 157(b)(2)(I), over which this Court may exercise subject matter jurisdiction.[10]

Martin brings his motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which permits a motion for "failure to state a claim upon which relief can be granted."[11] The requirements for a legally sufficient claim stem from Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[12] To survive a motion to dismiss, a complaint must present factual allegations that, when assumed to be true, "raise a right to relief above the speculative level."[13] The complaint must contain "enough facts to state a claim to relief that is plausible on its face."[14] "[T]he complaint must give the court reason to

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[9] *See Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001) (citing cases stating general rule that a complaint may not be amended by a response to a motion to dismiss).

[10] 28 U.S.C. § 157(b)(1) and § 1334(b).

[11] Rule 12 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7012(b).

[12] Rule 8 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7008(a).

[13] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[14] *Id.* at 570.

believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims."[15]

The plausibility standard does not require a showing of probability that a defendant has acted unlawfully, but requires more than "a sheer possibility."[16] "[M]ere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim."[17] Finally, the Court must accept the nonmoving party's factual allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven.[18]

Where a party alleges fraud—here, a claim under § 523(a)(2)(A) can be for "false pretenses, a false representation, or actual fraud"—Rule 9(b) requires the party to "state with particularity the circumstances constituting fraud or mistake," with general allegations only allowed for "[m]alice, intent, knowledge, and other conditions of a person's mind."[19] A party alleging fraud must "'set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'"[20] In other

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[15] *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis omitted).

[16] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[17] *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555).

[18] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

[19] Rule 9(b) is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7009.

[20] *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997) (quoting *Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991)).

words, the alleging party must specify the "who, what, where, and when of the alleged fraud."[21]

B. § 523(a)(2)(A) Claim

Under § 523(a)(2)(A), an individual is not discharged for any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud[.]" The creditor, here Sinclair Oil, bears the burden of establishing false pretenses, a false representation, or actual fraud.[22]

To state a claim under § 523(a)(2)(A), Sinclair Oil must allege facts supporting the following elements: (1) Martin engaged in false pretenses, false representations, or actual fraud; (2) which Martin knew at the time to be false or fraudulent; (3) with the intent to deceive Sinclair Oil; (4) Sinclair Oil justifiably relied on the representation; and 5) Sinclair Oil sustained damage as a proximate result of the debtor's false pretenses, false representations, or actual fraud.[23] The intent to deceive a creditor need not be from an express misrepresentation, but may be inferred from the totality of circumstances.[24]

Martin's motion to dismiss argues that Sinclair Oil's complaint points to no express misrepresentation and does not expressly state an intent to deceive or justifiable reliance. Sinclair Oil responds that a § 523(a)(2)(A) claim can be proven by either affirmative acts *or* omissions, even without affirmative misrepresentations, and that justifiable reliance can be

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[21] *Jamieson v. Vatterott Educ. Ctr., Inc.*, 473 F. Supp. 2d 1153, 1156 (D. Kan. 2007) (quoting *Plastic Packaging Corp. v. Sun Chem. Corp.*, 136 F. Supp. 2d 1201, 1203 (D. Kan. 2001)).

[22] *DSC Nat'l Prop. LLC v. Johnson (In re Johnson)*, 477 B.R. 156, 169 (B.A.P. 10th Cir. 2012).

[23] *Id.*

[24] *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1375 (10th Cir. 1996); *see also 6050 Grant, LLC v. Hanson (In re Hanson)*, 428 B.R. 475, 486 (Bankr. N.D. Ill. 2010) (noting that false pretenses "do not necessarily require overt misrepresentations" but can also include concealment or "failure to disclose pertinent information").

proven by Sinclair Oil's justifiable expectation of payment.

Although not a model of clarity, the allegations here support a claim under § 523(a)(2)(A). The complaint alleges that Martin, through the Convenience companies, knowingly and through deceit acquired petroleum and other products from Sinclair Oil without any reasonable likelihood of being able to pay for those products and without Sinclair Oil's full consent. The allegations also state that Martin then absconded with the product by transferring that product to M&W, knowing that the Convenience entities had not and would not make payment for the product. Sinclair Oil alleges that Martin engaged in this scheme so that he "could further his individual and personal financial interests." Sinclair Oil justifiably relied on Martin, through the Convenience entities, for payment, and was damaged by nonpayment. As stated above, to bring a § 523(a)(2)(A) claim, Sinclair Oil need not prove an express false statement, although it can certainly make its case by doing so; it can also prove its case by Martin's knowing omissions regarding obtaining the product and thereafter secreting the product away.

Sinclair Oil has carried its burden to plead the § 523(a)(2)(A) claim by stating just enough facts to make the claim plausible on its face.[25] At this stage, these facts must be viewed in the light most favorable to Sinclair Oil,[26] and although the Court expresses no opinion on whether Sinclair Oil will ultimately prevail on its claim, the complaint sufficiently pleads each element of a § 523(a)(2)(A) claim; Martin will not be hampered in his ability to prepare a

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[25] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (stating that "heightened fact pleading of specifics" is not required, "but only enough facts to state a claim to relief that is plausible on its face").

[26] *See Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991) (stating that the facts alleged in a bankruptcy complaint must be assumed to be true).

defense. Martin's motion to dismiss this claim is denied.

C. § 523(a)(6) Claim

Under § 523(a)(6), an individual is not discharged for any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Again, Sinclair Oil as the creditor bears the burden of establishing the elements of § 523(a)(6).[27]

The injury alleged by the creditor under this subsection must be both willful and malicious.[28] For injury to property to be willful under § 523(a)(6), it must be "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury."[29] Willfulness of injury is typically inferred from a debtor's other actions.[30] For injury to property to be malicious, there must be "an intentional act [that is] 'performed without justification or excuse.'"[31] Under this subsection, therefore, the debtor "must intend the consequences of his actions, not just the actions themselves."[32] "[T]he debtor must 'desire . . . [to cause] the consequences of his act or . . . believe [that] the consequences are substantially certain to result from it.'"[33]

In his motion to dismiss, Martin claims the allegations regarding transfer of the petroleum products from the Convenience entities to M&W cannot support a claim for injury to

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[27] *Mitsubishi Motors Credit of America, Inc. v. Longley (In re Longley)*, 235 B.R. 651, 655 (B.A.P. 10th Cir. 1999).

[28] *Panalis v. Moore (In re Moore)*, 357 F.3d 1125, 1129 (10th Cir. 2004).

[29] *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

[30] *Richards v. Smith (In re Smith)*, 472 B.R. 833 (Bankr. D. Colo. 2012).

[31] *Tso v. Nevarez (In re Nevarez)*, 415 B.R. 540, 544 (Bankr. D.N.M. 2009) (quoting *Am. First Credit Union v. Gagle (In re Gagle)*, 230 B.R. 174, 181 (Bankr. D. Utah 1999)).

[32] *Melquiades v. Hill (In re Hill)*, 390 B.R. 407, 411 (10th Cir. BAP 2008).

[33] *In re Moore*, 357 F.3d at 1129 (quoting *In re Longley*, 235 B.R. at 657).

the property of Sinclair Oil, because after the sale of the property to Convenience USA, Sinclair Oil no longer had any property interest in the property that could be damaged. Sinclair Oil responds that it is the initial alleged false pretenses and deceit by Martin (acting through the Convenience entities) that form the basis for its complaint and that this behavior by Martin is clearly alleged as causing deliberate and intentional harm to Sinclair Oil in the amount of $511,451.56.

Sinclair Oil has sustained its pleading burden here again, as the allegations found in Sinclair Oil's complaint also support a claim under § 523(a)(6). Again, although not a model complaint with many details, the complaint alleges that Martin acted through his Convenience entities to wrongfully and intentionally cause injury to Sinclair Oil, with the intent to cause harm to Sinclair Oil (because Martin knew he could not pay for the product he had obtained, but deceitfully took the product to instead further his own individual financial interests). Sinclair Oil has met the pleading standards of Rule 8(a), and Martin's motion to dismiss this claim must also be denied.

D. § 727 Claim

Finally, Sinclair Oil's complaint purports to state a claim under § 727, although no factual support or any attempts to meet the elements of a § 727 claim is made in the complaint. Wisely, in response to Martin's motion to dismiss, Sinclair Oil abandons this claim. As a result, Martin's motion to dismiss this claim is granted, without prejudice.

III. Conclusion

For the reasons set forth above, the Court finds that Plaintiff has stated just enough facts to support its claims under §§ 523(a)(2)(A) and (a)(6), and the Court denies Defendant's motion

to dismiss as to the § 523 claims. Because Plaintiff has chosen not to pursue its § 727 claim, however, the Court grants the motion to dismiss, without prejudice, as to that claim.

It is, therefore, by the Court ordered that Defendant Martin's Motion to Dismiss is DENIED IN PART and GRANTED IN PART, as stated more fully herein.

IT IS SO ORDERED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS