The relief described hereinbelow is SO ORDERED.

SIGNED this 13th day of December, 2021.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

KENT LINDEMUTH,

Debtor.

Case No. 12-23060
Chapter 11

KENT LINDEMUTH,

Plaintiff,

v.

LLOYD & MacLAUGHLIN LLC, **et al.**,

Defendants.

Adv. No. 21-6001

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO DISMISS COUNTS I-V OF THE COMPLAINT

This matter comes before the court on a motion by defendants Lloyd & MacLaughlin LLC ("**L&M**") and Jim Lloyd to dismiss Counts I through V of plaintiff Kent Lindemuth's adversary complaint.[1] For the reasons set forth below, the motion to dismiss will be granted as to Count IV under Fed. R. Civ. P. 9(b), granted as to Count V under Fed. R. Civ. P. 12(b)(6), and denied as to Counts I through III.[2]

I. Background

Kent Lindemuth, his late wife Vikki, and five of their companies[3] (together with Kent and Vikki, "**Debtors**") filed Chapter 11 bankruptcy petitions in 2012. The five debtor companies owned a number of commercial real estate properties, mostly in Topeka; the properties served as collateral for tens of millions of dollars in loans.

Soon after the petitions were filed, Debtors' secured lenders began to

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[1] ECF 53. Defendant Shannon Mesker, as successor trustee for the Vikki Lindemuth Revocable Trust, also moves to dismiss Count V, *see* ECF 49; the Court will address that motion in a separate order.

[2] Rules 9(b) and 12(b)(6) apply to this adversary proceeding through Fed. R. Bankr. P. 7009 and Fed. R. Bankr. P. 7012(b).

Although Kent has filed a motion to withdraw the reference of this proceeding, *see* ECF 11, Fed. R. Bankr. P. 5011(c) provides that "[t]he filing of a motion for withdrawal of a case or proceeding . . . shall not stay the administration of the case or any proceeding therein before the bankruptcy judge" unless the bankruptcy judge orders otherwise. Because the motion to withdraw the reference has not stayed the administration of this proceeding, this Court will proceed to rule on the defendants' motions to dismiss.

[3] The "**Debtor Companies**" are Lindemuth, Inc.; Lindy's, Inc.; KDL, Inc.; Bellairre Shopping Center, Inc.; and K. Douglas, Inc.; Debtors' bankruptcy cases are jointly administered under case number 12-23055 (Lindemuth, Inc.).

complain that Kent was mismanaging the mortgaged properties and not cooperating with the lenders in bankruptcy-related matters. According to Debtors' current attorney-in-fact, defendant Jim Lloyd:

> In or around early 2013, several of the lenders to the Debtor Companies began to express to Chapter 11 counsel their frustration and complete lack of confidence in Mr. Lindemuth due to his persistent actions in blocking and/or attempting to block several proposed sales of the real property securing their loans and Mr. Lindemuth's general mismanagement of the subject properties. The lenders did not want Mr. Lindemuth to be a debtor-in-possession and have control of the Debtors' assets. He was constantly attempting to block the Chapter 11 Debtors' efforts to develop and implement a plan of reorganization.[4]

Debtors filed proposed Chapter 11 plans (the "**Joint Plans**") in 2014.[5] To obtain their secured lenders' acceptance of the Joint Plans, and as a precondition to confirmation of the Joint Plans,[6] Kent and Vikki entered into an agreement appointing Lloyd as Debtors' attorney-in-fact (the "**Power of Attorney**"). The Power of Attorney authorizes Lloyd, among other things:

> 1. To administer and preserve all assets of the Bankruptcy Estates.
>
> 2. To exercise authority and control of the financial affairs, including but not limited to real properties, owned by Kent, Vikki or any entities owned by

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[4] ECF 55 at 2-3.

[5] *See* Debtors' First Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (No Substantive Consolidation) (March 14, 2014), Case No. 12-23055, ECF 443.

[6] *See infra* pp. 9-10 (describing agreement with secured lenders); *cf.* 11 U.S.C. § 1124 ("Impairment of claims or interests"); 11 U.S.C. § 1126 ("Acceptance of plan"); 11 U.S.C. § 1129 ("Confirmation of plan").

Kent and Vikki, with the express goal and direction to maximize the value of the entire bankruptcy estate.

3. To draft, negotiate and implement a plan of reorganization in the consolidated bankruptcy cases. [and]

4. To sell, lease, transfer or exchange any of Debtors' real or personal property as the above mentioned attorney-in-fact considers correct at reasonable prices and with other terms and conditions that may be required.[7]

The Power of Attorney also provides:

> [Kent and Vikki] hereby give Lloyd *full, exclusive authority* to perform every necessary and proper act as fully as I could if I was personally present and during the pendency of this power of attorney Lloyd's rights *shall be exclusive and shall supersede and divest* Us of the above described powers. The rights, power and authority to Lloyd that I now grant shall become effective as soon as I sign below and *shall not terminate until further Bankruptcy Court order terminating this instrument.*[8]

This Court entered an order confirming Lloyd's authority under the Power of Attorney on May 6, 2014 (the "**Bankruptcy Court Order**").[9]

The Joint Plans, which state 31 separate times that Debtors "shall continue to utilize Jim Lloyd as a financial advisor," and that the Debtors will "make Jim Lloyd available" to creditors "for consultation" and "to enable [the creditors] to

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[7] Pre and Post Confirmation Bankr. Power of Attorney, ECF 1-1.

[8] *Id.* (emphases added).

[9] *See* Order Approving Mot. to Confirm Jim Lloyd's Binding Authority, Case No. 12-23055, ECF 502.

monitor [Debtors'] compliance with the Plan,"[10] were confirmed early in 2015.[11]

Lloyd reports:

> Pursuant to Mr. Lloyd's authority and in implementation of the confirmed Chapter 11 Plan, Mr. Lloyd has sold a total of approximately $40 million in real property out of an initial portfolio valued by the applicable County authorities at approximately $61 million. Throughout Mr. Lloyd's appointment as attorney-in-fact and as agent of the Debtors, he has had the full support of the secured lenders holding mortgages on the Debtors' assets securing their loans.[12]

Upon confirmation of the Joint Plans, the Debtor Companies received a discharge, but Kent and Vikki individually did not.[13] Debtors' bankruptcy cases were administratively closed at the end of 2015.[14]

On June 1, 2016, Kent was indicted on 103 counts of bankruptcy fraud arising out of his omission of 103 firearms from his Chapter 11 bankruptcy

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[10] *See* Joint Plans §§ 5.01(e), 5.03(h), 5.04(h), 5.06(g), 5.07(h), 5.08(h), 5.10(e), 5.12(h), 5.13(h), 5.17(e), 5.18(h), 5.19(h), 5.24(h), 5.27(h), 5.28(g), 5.29(h), 5.30(h), 5.31(h), 5.32(h), 5.34(g), 5.36(h), 5.37(h), 5.42(h), 5.43(h), 5.46(h), 5.50(e), 5.51(h), 5.52(h), 5.53(g), 5.55(h), 5.57(h).

[11] *See* Order Confirming Plan of Reorganization ("**Confirmation Order**"), Case No. 12-23055, ECF 652.

[12] ECF 54 at 8.

[13] *See* Joint Plans §§ 11.04-.05 (providing for discharge "to the fullest extent permitted by section 1141 of the Bankruptcy Code"). With exceptions not relevant here, an individual Chapter 11 debtor does not receive a discharge until one is granted by the bankruptcy court "on completion of all payments under the plan." *See* 11 U.S.C. § 1141(d)(5)(A). In contrast, a non-individual Chapter 11 debtor typically receives a discharge at plan confirmation. *See* 11 U.S.C. § 1141(d)(1)(A).

[14] *See* Final Decree, Case No. 12-23055, ECF 690.

schedules and monthly operating reports.[15] Superseding indictments charged him with additional counts of bankruptcy fraud as well as money laundering, perjury, and receipt of firearms and ammunition while under indictment.[16]

Vikki filed for divorce from Kent in Shawnee County, Kansas, on September 7, 2016. The Shawnee County court entered an order at the outset of the case providing, among other things, that (1) "neither party shall change the beneficiary of any benefits or assets during the pendency of this action except as authorized by the [Joint Plans]" and that (2) Lloyd continued to have the powers granted to him under the Power of Attorney (the "**Divorce Court Order**").[17] As to Lloyd, the order—which was prepared and approved by Kent and Vikki's divorce counsel—also states that "[i]t is integral to the completion of the [Joint Plans] and the preservation of the assets that Jim Lloyd continue to manage and have the powers granted to him in the [P]ower of [A]ttorney and the [Bankruptcy Court] Order."[18]

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[15] *See* Indictment, *United States v. Lindemuth*, No. 16-cr-40047-DDC (D. Kan. June 1, 2016), ECF 1.

[16] *See* First Superseding Indictment, *United States v. Lindemuth*, No. 16-cr-40047-DDC (D. Kan. Dec. 14, 2016), ECF 32; Second Superseding Indictment, *United States v. Lindemuth*, No. 16-cr-40047-DDC (D. Kan. Apr. 5, 2017), ECF 56; Third Superseding Indictment, *United States v. Lindemuth*, No. 16-cr-40047-DDC (D. Kan. May 3, 2017), ECF 71.

[17] *See* Temp. Order for Appt. of Bus. Manager for the Parties' Bus. Interests ¶¶ 6, 8, ECF 1-4.

[18] *Id.* ¶ 8.

On March 10, 2017, the United States Trustee moved to reopen Kent and Vikki's individual bankruptcy case under 11 U.S.C. § 350(b),[19] alleging that Kent owned 2,166 undisclosed firearms (including the 103 for which he was originally indicted). This Court reopened the case that same day.[20]

On April 24, 2017, in connection with their divorce, Kent and Vikki entered into an agreement that appointed Lloyd's firm, defendant Lloyd & MacLaughlin ("**L&M**"), as agent for themselves and three of the five Debtor Companies (the "**Agent Agreement**").[21] The Agent Agreement provides that "the Services to be performed by [L&M] pursuant to this Agreement include but are not limited to duties and functions to be performed by Lloyd pursuant to the [Power of Attorney]"; it further authorizes L&M:

> [i]n general to administer, protect and preserve all marital or other joint assets of the Lindemuths or their marital estate that are directly or indirectly owned or controlled by any of the Lindemuth Entities,[22] including but not limited to real and personal property assets of the Lindemuth Entities, and to exercise authority and control of the related financial affairs of the Lindemuth Entities,

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[19] *See* U.S. Trustee's Mot. to Reopen, Case No. 12-23060, ECF 47. Section 350(b) provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."

[20] *See* Order Granting U.S. Trustee's Mot. to Reopen, Case No. 12-23060, ECF 48.

[21] *See* Agent Agreement, ECF 1-5.

[22] The Agent Agreement defines "Lindemuth Entities" as KDL, Inc.; Lindemuth, Inc.; Lindy's, Inc.; and "[a]ny other additional legal entities as may be mutually agreed in writing from time to time by the Lindemuths and the Agent." *See* Agent Agreement at 14 (Schedule 1).

> with the express goal and direction of maximizing value of these assets.[23]

As to termination, the Agent Agreement provides that Kent and Vikki's "authority to terminate this Agreement . . . shall be subject to obtaining any approvals of the Court as may be required."[24]

Vikki's individual bankruptcy case was deconsolidated from Kent's on May 1, 2017.[25]

On June 22, 2017, this Court ordered the appointment of a Chapter 11 trustee in Kent's individual case.[26] Four months later, the Chapter 11 trustee, Bruce Strauss, filed a motion for turnover requesting that Kent be ordered to turn over five unregistered, untitled, and uninsured vehicles that were found on Kent's property following a report of a break-in.[27] Kent responded that the vehicles were owned by Lindy's Auto Sales, a non-debtor.[28]

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[23] *Id.* at 16 (Schedule 2).

[24] *Id.* § 8.4.

[25] *See* Order Granting Mot. to Sever Joint Case, Case No. 12-23060, ECF 66.

[26] *See* Courtroom Minute Sheet, Case No. 12-23060, ECF 75; Order on Appt. of Ch. 11 Trustee, Case No. 12-23060, ECF 76.

[27] *See* Trustee's Mot. for Turnover, Case No. 12-23060, ECF 139.

[28] *See* Resp. & Obj. to Trustee's Mot. for Turnover, Case No. 12-23060, ECF 163.

On December 8, 2017, a jury acquitted Kent of all bankruptcy-related charges.[29] He was acquitted on the remaining charge—willful receipt of firearms while under indictment—following a bench trial in 2018.[30]

At the February 15, 2018 hearing on Strauss's motion for turnover, this Court ordered Kent to turn over all documents in his possession regarding his acquisition of the vehicles at issue.[31] The Court also directed Kent to cooperate with Lloyd in preparing sworn, accurate balance sheets and cash flow statements for each of the debtors. At that hearing, Kent's counsel acknowledged Kent's agreement with the secured lenders regarding Lloyd's authority over the Debtor Companies:

> [T]hey made a deal, they made an agreement. And in order—and in return for Mr. Lindemuth giving his agreement to give Mr. Lloyd a—a complete irrevocable power of attorney that gave him complete control over all the real estate, Mr. Lindemuth got to keep those non-real estate businesses. That was the deal. And that's what Mr. Deines' affidavit says and that's what his testimony

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[29] *See* Verdict, *United States v. Lindemuth*, No. 16-40047-01-DDC (D. Kan. Dec. 2, 2017), ECF 139.

[30] *See* Special Verdict, *United States v. Lindemuth*, No. 16-40047-01-DDC (D. Kan. Aug. 2, 2018), ECF 187. Kent was charged with violation of 18 U.S.C. §§ 922(n) and 924(a)(1)(D) for willful "receipt" of two firearms while under felony indictment. *See id.* at 9. The government proved that while under indictment for bankruptcy fraud, Kent attended an auction with one Ledford, to whom he gave cash and asked "to bid on and, as the winning bidder, purchase the two guns at issue." *Id.* at 15. Kent then directed Ledford to deliver the guns to Ledford's in-laws. *See id.* at 16. The court reasoned that although Kent had "[c]learly . . . engaged in some sort of subterfuge at the auction," *id.* at 17, the government had not proved that Kent "received" the guns under the meaning of § 922(n). *See id.* at 15-16 (reasoning that § 922(n) "does not criminalize ownership interests that do not result in receipt").

[31] *See* Order, Case No. 12-23060, ECF 188.

> at trial was. And that's the fundamental reason why the government's [criminal] case failed at trial.[32]

The "Deines affidavit" cited by Kent's counsel—from Jeffrey Deines, Kent's former bankruptcy counsel—explains that Kent executed the Power of Attorney in exchange for the secured lenders' consent to confirmation of the Joint Plans:

> In connection with seeking confirmation of the plan, the creditors wanted, among other things, Debtor to execute an irrevocable power-of-attorney in favor of Jim Lloyd. . . . In return for Jim Lloyd having more control and authority and other concessions, the creditors agreed and consented to Debtor's proposed plan and that plan provided for full repayment of debts from the revenues of the real estate businesses.[33]

On September 17, 2018, Strauss moved to set the motion for turnover back onto this Court's docket, alleging that "[t]o date Mr. Lindemuth has not provided the Trustee with anything."[34] At the hearing on that motion in October, the Court reminded Kent's counsel that the court's orders to provide documents and information remained outstanding.

Later that year, after receiving a terminal cancer diagnosis, Vikki created the Vikki Lindemuth Revocable Trust dated November 9, 2018 (the "**Trust**"). The following year, she filed a "Quit-Claim Deed to Sever Joint Tenancy" (the "**Quitclaim Deed**") in Shawnee County as to a number of properties that she and Kent owned as joint tenants. The Quitclaim Deed transferred Vikki's rights in the

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[32] Hearing Tr. 52:14-23, Feb. 15, 2018, Case No. 12-23060, ECF 201.

[33] Deines Aff. ¶¶ 8-9, Case No. 12-23060, ECF 162-4.

[34] *See* Trustee's Mot. to Immediately Reschedule Trustee's Mot. for Turnover, Case No. 12-23060, ECF 211.

properties to herself as a tenant-in-common; its purpose and effect was to sever the joint tenancies and eliminate Kent's rights of survivorship. Vikki then placed her tenant-in-common interests into the Trust. Some of the properties have since been sold to third parties, but the rest remain under Lloyd's management.

On January 7, 2019, this Court suspended Strauss's appointment as Chapter 11 trustee, administratively terminated the motion for turnover, and ordered Kent to pay general unsecured claims in full by May 6, 2019.[35]

Vikki died on November 11, 2019, while the divorce was still pending, and the Lindemuths' individual bankruptcy cases were still open. The Shawnee County court dismissed the Lindemuths' divorce action the next day without entering a final decree.

On November 13, 2019, Kent's counsel sent Lloyd a letter purporting to terminate the Agent Agreement.[36]

On December 4, 2019, Kent filed two motions against Lloyd and L&M in his individual bankruptcy case, the first seeking damages for alleged violations of the automatic stay and the second seeking a TRO and preliminary injunction.[37] Both motions related to Lloyd's proposed sale of properties occupied by A&A Mini Storage South and A&A Mini Storage West, two of Kent's non-debtor businesses. This

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[35] *See* Order Suspending Appt. of Ch. 11 Trustee, Case No. 12-23060, ECF 226.

[36] *See* Letter from Neil Sader to Philip N. Krause & Jim Lloyd (Nov. 13, 2019), ECF 1-11 at 12-13.

[37] *See* Mot. for Damages for Violations of the Automatic Stay, Case No. 12-23060, ECF 349; Debtor's Mot. for TRO and Prelim. Injunctive Relief, Case No. 12-23060, ECF 351.

Court denied the motions and held that "although one of the signors of the Power of Attorney has now died, the Power of Attorney remains in effect and confers to Mr. Lloyd the authority to proceed with transactions as specified therein."[38]

This Court ordered Vikki's bankruptcy case closed without discharge on June 16, 2020.[39]

To date, Kent has not complied with the Court's orders to cooperate with Lloyd in preparing sworn financial statements and to provide documentation regarding the five unregistered vehicles found on his property. According to Strauss:

> And I don't think—and I would hope Mr. Sader [Lindemuth's current bankruptcy attorney] would not deny telling me that—two things that Mr. Lindemuth was never doing to do. He was never going to sell the firearms and he was never going to provide the financial statements that the court had ordered in its earlier order, that he just told me those were off the table, he is never going to do that, and—and Mr. Sader made a comment whether he thought that was wise or not. But that's where we came from, and that's why we never reached a resolution.[40]

II. Adversary Proceeding

Although Lloyd has been a capable and successful steward of the Debtor Companies, Kent's relationship with him has turned adversarial.[41] On December 7,

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[38] Order Denying Debtor's Mots. ¶ 3, Case No. 12-23060, ECF 407.

[39] *See* Order Closing Case, Case No. 17-20763, ECF 99.

[40] Hearing Tr. 30:7-16, Mar. 14, 2019, Case No. 12-23060, ECF 242.

[41] *See, e.g.*, Mot. for Order Enforcing Ch. 11 Plan Inj. ¶ 48, Case No. 12-23060, ECF 453. This view is consonant with this Court's observations of Kent's behavior, which includes failures to file reports, explain assets discovered by the Chapter 11

2020, Kent's counsel sent Lloyd a letter purporting to terminate the Power of Attorney and "reiterat[ing] his prior termination of the Agent Agreement."[42]

Two months later, Kent filed the seven-count complaint at issue here against Lloyd, L&M, and Shannon Mesker as trustee of the Trust. (Mesker is one of Kent and Vikki's two daughters.) As against Lloyd and L&M, Kent's complaint alleges that they[43] (1) sold assets belonging to a non-debtor company without authorization (Compl. ¶¶ 42-43, 161); (2) "interfere[d] with [Kent's] ability to access his financial resources to protect his civil and property rights" (*id.* ¶ 48); (3) favored Vikki over Kent in providing information and financial support (*id.* ¶¶ 53-54, 124-25, 149-51); (4) refused Kent's requests for information (*id.* ¶¶ 55-56, 58-60, 131, 145-48); (5) "coerced [Kent] to take actions that were not in his best interests" (*id.* ¶ 57);

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trustee, and comply with court orders. It is also consonant with the observations of his daughter; according to the Trust's counterclaim against Kent, he:

> has engaged in a concerted effort to interfere with the completion of the Plan and reorganization of the Companies through a series of actions directed primarily at Lloyd and L&M's administration of the Plan, including (but not limited to) . . . stealing auction signs at the site of Company properties that were set for auction in an effort to chill the bidding, resulting in criminal proceedings being brought against Kent . . . , [and] refus[ing] to sign Company tax returns.

ECF 59 ¶ 31.

[42] Letter from Neil Sader to James B. Lloyd & Philip Krause, (Dec. 7, 2020), ECF 1-11 at 2-5.

[43] Neither the complaint nor the motion to dismiss makes much distinction between Lloyd and L&M. However, they are parties to separate agreements (Lloyd, the Power of Attorney; L&M, the Agent Agreement) executed in connection with separate court proceedings (the Power of Attorney is part of the Lindemuths' bankruptcy; the Agent Agreement, their divorce).

(6) "refused to consult with [Kent] concerning numerous significant management issues regarding the bankruptcy estate" (*id.* ¶ 62); (7) failed to insure two Ford "Super Snake" Mustangs owned by Kent (*id.* ¶¶ 63, 162); (8) failed to secure the White Lakes Mall, a property owned by debtor KDL, Inc. (*id.* ¶¶ 64, 163); (9) failed to notify Kent about pertinent events and expenditures (*id.* ¶¶ 75-76, 86, 92, 95, 104, 126, 128, 152, 154, 157-58, 195); (10) sold Kent's assets and tendered the sale proceeds to creditors in exchange for mortgage releases (*id.* ¶¶ 90-91); (11) failed to take action regarding the Quitclaim Deed (*id.* ¶¶ 96, 159-60, 197); (12) used Debtors' assets to "fund litigation against" Kent (*id.* ¶ 127); (13) took no action to prevent the Trust from liquidating companies it co-owns with Kent (*id.* ¶¶ 155-56); and (14) "conspired" with Vikki and/or the Trust[44] to deprive Kent of his rights of survivorship in the properties affected by the Quitclaim Deed (*id.* ¶¶ 184, 186, 196, 198). As against the Trust, the complaint alleges the conspiracy with Lloyd and L&M regarding Kent's rights of survivorship in the Quitclaim Deed properties (*id.* ¶¶ 184, 186, 196, 198) and also that the Quitclaim Deed was executed and recorded in contempt of the Divorce Court Order (*id.* ¶ 207).

Count I of Kent's complaint, "Declaratory Judgment," seeks a declaration under 28 U.S.C. § 2201 that the Power of Attorney, the Divorce Court Order, and the Agent Agreement are "void, terminated, and of no effect." Count II, "Accounting," demands that Lloyd and L&M provide an accounting under

[44] Paragraph 184 of Kent's complaint names the Trust as the third co-conspirator, but paragraphs 186 and 198 name Vikki instead, and paragraph 196 names "Vikki Lindemuth and the Trust."

K.S.A. § 58-662(a)[45] of "receipts, disbursements and transactions" from, to, and on behalf of Kent and his five debtor companies. Counts III and IV, "Breach of Fiduciary Duty" and "Constructive Fraud," seek damages from Lloyd and L&M under K.S.A. § 58-657(g).[46] Count V, "Civil Conspiracy," seeks damages from all three defendants for an alleged conspiracy to terminate Kent's rights of survivorship in the properties covered by the Quitclaim Deed. Count VI, "Declaratory Judgment," seeks a declaration that (a) the Quitclaim Deed is "null and void" and (b) Kent was a joint tenant with right of survivorship in the properties identified therein at the time of Vikki's death. Count VII, "Quiet Title," seeks a judgment quieting title in Kent's favor as to, and extinguishing the Trust's interest in, those properties identified in the Quitclaim Deed that are still under Lloyd's control.

III. Motion to Dismiss

Lloyd and L&M now move to dismiss Counts I through V on four grounds, arguing that (1) Kent released Lloyd from such claims under the express terms of the Joint Plans; (2) Kent's claims are barred by the law-of-the-case doctrine; (3)

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[45] "The principal may petition the court for an accounting by the principal's attorney in fact or the legal representative of the attorney in fact." Kan. Stat. Ann. § 58-662(a).

[46] "As between the principal and any attorney in fact or successor, if the attorney in fact or successor undertakes to act, and if in respect to such act, the attorney in fact or successor acts in bad faith, fraudulently or otherwise dishonestly, . . . and thereby causes damage or loss to the principal . . . , such attorney in fact or successor shall be liable to the principal . . . for such damages, together with reasonable attorney fees, and punitive damages as allowed by law." Kan. Stat. Ann. § 58-657(g).

Kent's claims against them are barred by the *Barton* doctrine; and (4) as "quasi-judicial officers," they have "absolute immunity" from Kent's claims. Additionally, Lloyd and L&M argue that Count III fails to state a claim for breach of fiduciary duty because it does not "show actual damages"; that Count IV fails to state a claim for constructive fraud because it does not allege any concealment of material fact, that Count IV does not plead the alleged fraud with particularity as required by Fed. R. Civ. P. 9(b), and that Count V fails to state a claim for civil conspiracy because (1) civil contempt is not a valid "underlying tort" for purposes of that claim; (2) only the Shawnee County court that issued the Divorce Court Order has jurisdiction to find anyone in contempt of it; and (3) the complaint does not allege a "meeting of the minds" among the defendants.[47]

A. Plan releases

Section 11.11 of the Joint Plans provides:

> ***Exculpation.*** Notwithstanding anything in the Joint First Amended Plan to the contrary, as of the Effective Date, none of the Debtors, the equity owners, employees, accountants, financial advisors, agents, restructuring advisors and attorneys and representatives (but solely in their capacities as such) shall have or incur any liability for any Claim, cause of action or other assertion of liability for any act taken or omitted to be taken in connection with, or arising out of, the Chapter 11 Cases, the formulation, dissemination, confirmation, consummation or administration of the Plans, property to be distributed under the Plans or any other act or omission in connection with the Chapter 11 Cases, the Plans, the Disclosure Statement or any contract,

[47] In making this argument, the motion to dismiss does not distinguish between Vikki and the Trust, but rather refers generally to "Vikki/the Trust." *See* ECF 54 at 36-37.

> instrument, document or other agreement related thereto; provided, however, that the foregoing shall not affect the liability of any person that would otherwise would result from any such act or omission to the extent such act or omission is determined by a Final Order to have constituted willful misconduct or gross negligence.[48]

Lloyd and L&M argue that Kent has therefore "released Lloyd from [Kent's] claims under the express terms of the confirmed Chapter 11 Plan."[49] However, release is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1); Fed. R. Bankr. P. 7008. It is only proper to dismiss a claim on the pleadings based on an affirmative defense "when the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements." *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018) (citing *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004)). Thus, however meritorious Lloyd and L&M's "release" defense may be, it is not a proper basis for dismissal under Rule 12(b)(6) because Kent's complaint does not confess to it. *Cf. Fernandez*, 883 F.3d at 1300 ("The defendant's first line of defense in that circumstance is ordinarily summary judgment, not dismissal on the pleadings."). The Court will therefore deny Lloyd and L&M's motion to dismiss Counts I through V as it relates to the affirmative defense of release.

B. Law-of-the-case doctrine

"The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages

[48] Joint Plans § 11.11 ("Exculpation").

[49] ECF 54 at 17.

in the same case." *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011) (quoting *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir. 1991)). "This doctrine is designed to promote finality and prevent re-litigation of previously decided issues, but does not serve to limit a court's power." *Id.* (citing *Wilson v. Meeks*, 98 F.3d 1247, 1250 (10th Cir. 1996)).

Lloyd and L&M argue that the law-of-the-case doctrine "bars" Kent's claims against Lloyd and L&M because this Court ruled last year that Lloyd was not violating the automatic stay and that Kent was not entitled to preliminary injunctive relief. However, none of Kent's claims in this proceeding will require this Court to hold that Lloyd is violating the automatic stay, or that Kent is entitled to preliminary injunctive relief, vis-à-vis the non-debtor entities that were at issue in his prior motions. Therefore, while the law-of-the-case doctrine might apply to specific issues raised by Kent's claims (for example, to the Court's prior holding that the Power of Attorney remained in effect following Vikki's death), it does not apply generally to require dismissal of those claims. This Court will therefore deny Lloyd and L&M's motion to dismiss Counts I through V as it relates to the law-of-the-case doctrine.

C. Subject-matter jurisdiction/*Barton* doctrine

"It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained." *Barton v. Barbour*, 104 U.S. 126, 128 (1881). This "*Barton* doctrine" is jurisdictional; it "precludes suit against a bankruptcy trustee for claims based on alleged misconduct in the discharge of a

trustee's official duties absent approval from the appointing bankruptcy court." *Satterfield v. Malloy*, 700 F.3d 1231, 1234-35 (10th Cir. 2012). The doctrine applies to the trustee's counsel as well. *See Lankford v. Wagner*, 853 F.3d 1119, 1122 (10th Cir. 2017). However, "the majority rule is that a plaintiff need not seek approval before suing a bankruptcy trustee in his appointing bankruptcy court." *In re Horton*, 612 B.R. 400, 405 (Bankr. D.N.M. 2020) (collecting cases).

Arguing that Lloyd is the "functional equivalent of a bankruptcy trustee," Lloyd and L&M conclude that Kent's claims against them[50] should be dismissed for lack of subject-matter jurisdiction under *Barton* and Fed. R. Civ. P. 12(b)(1). However, this action is currently before the same bankruptcy court that "quasi-appointed" Lloyd. Therefore, even assuming that *Barton* protects Lloyd, it does not divest this Court of subject-matter jurisdiction over Kent's claims against him. The Court will therefore deny Lloyd and L&M's motion to dismiss Counts I through V as it relates to *Barton* and Rule 12(b)(1).

D. Quasi-judicial immunity

"It is well established that judges and judicial officials enjoy absolute immunity from suit for acts performed in their official capacities." *Teton Millwork Sales v. Schlossberg*, 311 F. App'x 145, 149-50 (10th Cir. 2009) (unpublished). Bankruptcy trustees enjoy "quasi-judicial immunity" as a derivative of this

[50] The motion to dismiss does not explain how *Barton* applies to L&M, which was "quasi-appointed" in the Lindemuths' divorce rather than their bankruptcy.

principle. *See Gregory v. United States*, 942 F.2d 1498, 1500 (10th Cir. 1991); *cf. Teton Millwork*, 311 F. App'x at 150.

Citing *Teton Millwork*, and arguing once more that "Lloyd is the functional equivalent of a bankruptcy trustee," Lloyd and L&M assert that they are therefore "entitled to absolute immunity from Plaintiff's claims."[51] Kent does not contest Lloyd's functional-equivalent argument, but points out that quasi-judicial immunity does not apply where the trustee "exceeds the scope of his authority" or "acts willfully and deliberately in violation of his fiduciary duties." *See Teton Millwork*, 311 F. App'x at 150; *Sherr v. Winkler*, 552 F.2d 1367, 1374 (10th Cir. 1977). The issue here, then, is whether Kent's complaint plausibly alleges that quasi-judicial immunity does not apply—i.e., whether it plausibly alleges that Lloyd and L&M either exceeded the scope of their authority or willfully and deliberately breached their fiduciary duties. *See Teton Millwork*, 311 F. App'x at 152; *id.* at 149 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *cf.* Fed. R. Civ. P. 12(b)(6) and section III(E) *infra*.

It does. Paragraphs 42, 43, and 161 of the complaint allege that Lloyd and L&M exceeded the scope of their authority by selling property owned by Allied Bailey Moving & Storage, a non-debtor company. And paragraphs 145 through 163 allege that Lloyd and L&M breached their fiduciary duties by acting (and failing to act) in a number of specific ways—for example, paragraph 162 alleges that they

[51] ECF 54 at 16-17. As with their *Barton*-doctrine argument, Lloyd and L&M's motion does not explain how their quasi-judicial-immunity argument (which is based on Lloyd's involvement in Debtors' bankruptcies) would extend to L&M.

failed to insure two vehicles Kent owned. Lloyd and L&M do not argue that these alleged actions (and failures to act) fail to plausibly state a claim under Kent's various legal theories; rather, they argue that Kent has not adequately alleged, and has provided no evidence of, willfulness and deliberateness.[52] However, the existence of evidence is irrelevant on a motion to dismiss. *See Mrs. Fields Franchising, LLC v. MFGPC*, 721 F. App'x 755, 759 (10th Cir. 2018) (unpublished). And willfulness can be alleged generally if the plaintiff alleges other facts that are specific enough to make willfulness plausible. *See Fernandez*, 883 F.3d at 1299-1300 (citing Fed. R. Civ. P. 9(b) and following *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902-03 (9th Cir. 2013)). Here, Kent has generally alleged willfulness, and the allegations in paragraphs 145 through 163 are specific enough to make willfulness plausible. Because the complaint thus plausibly alleges that Lloyd and L&M both exceeded the scope of their authority and acted willfully and deliberately, the Court will deny Lloyd and L&M's motion to dismiss Counts I through V as it relates to quasi-judicial immunity.

E. Failure to state a claim and/or allege fraud with particularity

To survive a motion to dismiss, a complaint "must contain enough allegations of fact, taken as true, 'to state a claim to relief that is plausible on its face.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Legal conclusions, unlike factual allegations, are not entitled to the assumption of truth in this analysis. *See Ashcroft v. Iqbal*,

[52] *See* ECF 54 at 18.

556 U.S. 662, 678 (2009). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). However, factual allegations made "on information and belief," without supporting factual assertions, are insufficient to state a valid claim. *See Walker v. Hickenlooper*, 627 F. App'x 710, 715 (10th Cir. 2015) (unpublished) (citing *Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 926-27 (9th Cir. 2013)); *cf. Al-Owhali v. Holder*, 687 F.3d 1236, 1243 (10th Cir. 2012).

1. Count III – Breach of Fiduciary Duty

Actual damages are an "essential element" of a claim for breach of fiduciary duty under Kansas law. *Pipeline Prods., Inc. v. Madison Cos., LLC*, 446 F. Supp. 3d 733, 738 (D. Kan. 2020) (citations omitted). Here, Lloyd and L&M argue that Count III fails to state a claim for breach of fiduciary duty because it "entirely fails to show the existence of non-speculative, actual damages."[53] However, paragraph 162 of the complaint alleges that Lloyd and L&M failed to maintain insurance on two vehicles that were destroyed in a fire, and paragraph 163 alleges that they failed to secure the White Lakes Mall, "resulting in the property being severely damaged through the loss of copper pipes and wiring, flooding, and arson."[54] Without any explanation

[53] ECF 54 at 26.

[54] Because the White Lakes Mall is owned by debtor KDL, Inc., Kent may not have standing to sue for the damages alleged in paragraph 163. *See Bixler v. Foster*, 596 F.3d 751, 756 (10th Cir. 2010) ("In general, the law is that conduct which harms a corporation confers standing on the corporation, not its shareholders."); *id.* at 756-59 & nn.4-5; *Lightner v. Lightner*, 266 P.3d 539, 547 (Kan. Ct. App. 2011) ("Shareholders do not have standing to sue for harms to the corporation or even for

from Lloyd and L&M as to why these allegations of damages do not satisfy Rule 12(b)(6),[55] the Court must reject their argument. This is not to say that Count III necessarily *does* adequately plead breach of fiduciary duty—only that Lloyd and L&M's motion does not, in light of the harms alleged in paragraphs 162 and 163, provide the Court with a basis to hold otherwise at this stage of the proceeding. The Court will therefore deny Lloyd and L&M's motion to dismiss Count III as it relates to allegations of actual damages.

2. Count IV – Constructive Fraud

Constructive fraud involves the suppression or concealment of "facts which the party is under a legal or equitable obligation to communicate and in respect of which he could not be innocently silent." *Moore v. State Bank of Burden*, 729 P.2d 1205, 1212 (Kan. 1986) (quoting *DuShane v. Union Nat'l Bank*, 576 P.2d 674, 678 (Kan. 1978)). In order to establish constructive fraud, a plaintiff must also prove "(1) a confidential relationship, and (2) a betrayal of this confidence or a breach of a duty imposed by the relationship." *Schuck v. Rural Tel. Serv. Co.*, 180 P.3d 571,

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the derivative harm to themselves that might arise from a tort or other wrong to the corporation.") (citing *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 777 (7th Cir. 1994) (Posner, C.J.)).

[55] Neither of the two cases cited by Lloyd and L&M address the *pleading* standard for a breach-of-fiduciary-duty claim. *See id.* (citing *CoBank, ACB v. Reorganized Farmers Coop. Ass'n*, 334 F. Supp. 2d 1273, 1277-78 (D. Kan. 2004) (granting summary judgment), and *Pipeline Prods.*, 446 F. Supp. 3d at 738 (overruling motion for judgment as a matter of law)).

577 (Kan. 2008) (citing *Garrett v. Read*, 102 P.3d 436, 445 (Kan. 2004), *disapproved on other grounds by Nelson v. Nelson*, 205 P.3d 715, 729 (Kan. 2009)).[56]

Constructive fraud must be pleaded with particularity under Rule 9(b).[57] *See Pine Tel. Co. v. Alcatel Lucent USA Inc.*, 617 F. App'x 846, 860 (10th Cir. 2015) (unpublished); *Geer v. Cox*, 242 F. Supp. 2d 1009, 1024 (D. Kan. 2003). In the Tenth Circuit, this means that a complaint alleging fraud must also set forth the consequences of that fraud. *See Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000). Put differently, the complaint must state with particularity *how* the defendant's alleged actions amounted to fraud. *See Geer*, 242 F. Supp. 2d at 1024.

Here, Lloyd and L&M argue that Count IV fails to state a claim for constructive fraud because it (1) does not allege "concealment of a material fact" and (2) fails to comply with Rule 9(b).[58] The complaint does allege, however, that Lloyd

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[56] While Kent cites *Rail Logistics, L.C. v. Cold Train, L.L.C.*, 397 P.3d 1213, 1226 (Kan. Ct. App. 2017), for the apparent proposition that (1) a confidential relationship and (2) betrayal or breach are the *only* two elements of constructive fraud under Kansas law, *Schuck* is clear that another element is the suppression or concealment of fact as described in *Moore*. *See Schuck*, 180 P.3d at 577 ("The party must also conceal facts . . . .") (citing *Moore*, 729 P.2d at 1212).

[57] Although Kent argues that Rule 9(b) does not apply to constructive fraud claims, a number of federal appellate courts—including the Tenth Circuit—have applied Rule 9(b) to determine whether a constructive-fraud claim was adequately pleaded. *See Pine Tel. Co. v. Alcatel Lucent USA Inc.*, 617 F. App'x 846, 860 (10th Cir. 2015) (unpublished); *see also Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 668 (9th Cir. 2019); *Horton v. Wells Fargo Bank, N.A.*, 703 F. App'x 23, 25 (2d Cir. 2017); *Farnsworth v. Nationstar Mortg., LLC*, 569 F. App'x 421, 430 (6th Cir. 2014); *Wiley v. Mitchell*, 106 F. App'x 517, 521-22 (8th Cir. 2004); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1078-80 (7th Cir. 1997).

[58] ECF 54 at 27.

and L&M failed to provide Kent with information regarding a number of relatively specific events and expenditures.[59] Without any explanation from Lloyd and L&M as to why these allegations do not describe any concealment of material fact,[60] the Court must reject Lloyd and L&M's first argument. As before, this is not to say that Count IV necessarily *does* adequately plead such concealment—only that Lloyd and L&M's motion does not provide the Court with a basis to hold otherwise at this stage.

However, as Lloyd and L&M point out via their second argument, the Tenth Circuit does require a complaint alleging fraud to set forth the consequences of that fraud. *See Koch*, 203 F.3d at 1236; *Geer*, 242 F. Supp. 2d at 1024. Here, while Kent's complaint alleges that Lloyd and L&M failed to notify him about a number of events and expenditures, it does not allege that (or how) Kent was thereby deceived,

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[59] *See* Compl. ¶ 75 (complaints from the City of Topeka concerning White Lakes Mall), ¶ 76 (fire at, and fire damage to, White Lakes Mall), ¶¶ 86, 95, 195 (recording and existence of the Quitclaim Deed and its effect on Kent's property interests), ¶ 92 (asset sales and mortgage releases), ¶¶ 104, 157-58 (Trust's plan to seek stay relief and partition corporate assets; Lloyd and L&M's lack of objection thereto; Trust's desire to leave Power of Attorney in place until partition action was complete), ¶¶ 126, 152 (details of sale of real property from Kent's bankruptcy estate), ¶¶ 128, 154 (cost of improvements to Vikki's house).

[60] In defining constructive fraud to include "concealment of material fact," Lloyd and L&M cite two Tenth Circuit cases that applied Oklahoma law. *See* ECF 54 at 27 (first citing *Myklatun v. Flottek Indus.*, 734 F.3d 1230, 1235 (10th Cir. 2013); then citing *Pine Tel. Co. v. Alcatel-Lucent USA Inc.* 617 F. App'x 846, 860 (10th Cir. 2015) (unpublished)). While Oklahoma law does not apply here, the Kansas standard also requires concealment of material fact. *See City of Wichita v. U.S. Gypsum Co.*, 72 F.3d 1491, 1495 (10th Cir. 1996) ("Under Kansas law the materiality of the facts allegedly misrepresented or concealed is an element of actionable fraud."); *see also Andres v. Claassen*, 714 P.2d 963, 970 (Kan. 1986) (quoting *Nairn v. Ewalt*, 32 P. 1110 (1893)).

or that Kent took, or failed to take, any actions as a result—i.e., it does not set forth the consequences of the alleged fraud or state with particularity *how* such failures-to-notify amounted to fraud. Because the complaint does not set forth the consequences of Lloyd and L&M's alleged constructive fraud, this Court will grant Lloyd and L&M's motion to dismiss Count IV under Fed. R. Civ. P. 9(b) for failure to state constructive fraud with particularity.

3. Count V – Civil Conspiracy

Civil conspiracy is "a means of establishing vicarious liability for [an] underlying tort." *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983), *quoted in State ex rel. Mays v. Ridenhour*, 811 P.2d 1220, 1228 (Kan. 1991).[61] "Elements of a civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *Meyer Land & Cattle Co. v. Lincoln Cty. Conservation Dist.*, 31 P.3d 970, 976 (Kan. Ct. App. 2001) (citing *Stoldt v. City of Toronto*, 678 P.2d 153, 161 (Kan. 1984)). Here, Lloyd and L&M argue that Count V fails to state a claim for civil conspiracy because it does not allege a "meeting of the minds" among the defendants.[62]

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[61] *See also* Restatement (Third) of Torts § 27 (Am. Law Inst. 2020) ("Civil conspiracy is a basis of secondary liability. It allows a defendant to be held responsible for a tort committed by another.").

[62] *See* ECF 54 at 31-35. While Lloyd and L&M also argue that (1) Vikki's alleged civil contempt arising out of the Divorce Court Order is not a valid "underlying tort" for purposes of civil conspiracy, and that (2) only the Shawnee County court that issued the Divorce Court Order has jurisdiction to find anyone in contempt of it, Kent responds that the "underlying tort" in Count V is not civil contempt, but

Kent responds that a meeting of the minds can be found in paragraph 186 of his complaint. That paragraph alleges:

> Upon information and belief, Lloyd and L&M, in conjunction with Vikki Lindemuth, determined that a Quit Claim Deed to Sever Joint Tenancy would achieve Defendants' goal of depriving Plaintiff of his joint tenancy with right of survivorship interest in real property he co-owned with Vikki Lindemuth.

This allegation is insufficient to plead a meeting of the minds because it is made "upon information and belief" without any supporting factual assertions that would make an agreement among the defendants plausible. *See Twombly*, 550 U.S. at 551; *Walker*, 627 F. App'x at 715.[63] Count V therefore fails to state a claim for civil conspiracy because it does not adequately allege a meeting of the minds. Moreover, the result of this inadequately-alleged agreement—the termination of Kent's joint tenancy in property—was lawful. *See Reicherter v. McCauley*, 283 P.3d 219, 222-23 (Kan. Ct. App. 2012) (holding that a joint tenant may unilaterally sever a joint tenancy with a quitclaim deed to himself as a tenant in common). Count V fails to state a claim for civil conspiracy on that basis as well. *Cf. Stoldt*, 678 P.2d at 161-

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rather his claims against Lloyd and L&M for breach of fiduciary duty and/or constructive fraud. *See* ECF 65 at 14-15.

[63] At most, the complaint alleges that Lloyd and L&M found out about the Quitclaim Deed after it was executed and recorded. However, a defendant's after-the-fact knowledge is insufficient to allege a before-the-fact conspiracy. *Cf. Chisler v. Randall*, 259 P. 687, 690 (Kan. 1927) (directing lower court to enter judgment for defendant on libel-conspiracy claim where defendant "knew nothing about any publication concerning the matter until after it was made"); 16 Am. Jur. 2d *Conspiracy* § 53 (2020) ("The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.").

62 (holding that civil conspiracy requires an unlawful result).[64] For these reasons, the Court will grant Lloyd and L&M's motion to dismiss Count V under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

III. Conclusion

Lloyd and L&M's motion to dismiss is hereby GRANTED IN PART as to Counts IV and V and DENIED IN PART as to Counts I through III.

IT IS SO ORDERED.

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[64] *See also* 16 Am. Jur. 2d *Conspiracy* § 53 (2020) ("The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.").