The relief described hereinbelow is SO ORDERED.

SIGNED this 18th day of August, 2025.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

RUDOLF ROBERT DEMETER,

Debtor.

Case No. 24-20997
Chapter 7

KAPITUS SERVICING, INC., as servicing agent for KAPITUS, LLC,

Plaintiff,

v.

RUDOLF ROBERT DEMETER,

Defendant.

Adv. No. 24-6031

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

In 2022, defendant Rudolf Demeter personally guaranteed a $200,000 loan made to his company, E&R Construction Inc., by plaintiff Kapitus LLC. Two years later, Demeter filed for bankruptcy. Kapitus brought this adversary proceeding to determine whether the guarantee is excepted from Demeter's Chapter 7 discharge under 11 U.S.C. § 523(a)(2), (4), and/or (6).[1] Demeter now moves to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).[2] For the reasons stated below, Demeter's motion will be denied.

To survive a motion to dismiss under Rule 12(b)(6), a complaint must state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible on its face if the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Although the court must accept the complaint's factual allegations as true at this stage, conclusory allegations are not entitled to the assumption of truth. *Clinton v. Security Benefit Life Ins. Co.*, 63 F.4th 1264, 1275 (10th Cir. 2023). The court must disregard conclusory statements and look to the remaining factual allegations to determine whether the complaint states a plausible claim. *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). Here, Demeter's motion argues that Kapitus's complaint fails to state a claim

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[1] A proceeding to determine the dischargeability of debts is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Venue in this Court is proper under 28 U.S.C. § 1409(a).

[2] ECF 9. Rule 12(b)(6) applies to this adversary proceeding under Fed. R. Bankr. P. 7012(b). Demeter appears by attorney Colin Gotham. Kapitus appears by attorney Janice Stanton.

because (1) the loan from Kapitus to E&R Construction was void under Virginia law and (2) the complaint does not comply with Fed. R. Civ. P. 9(b).[3] (Demeter's reply brief raises four additional arguments, which the Court will address at the end of this order.)

First, Demeter argues that the loan agreement between Kapitus and E&R Construction, which required E&R Construction to pay back the $200,000 over two years with $94,000 in interest,[4] was void under Virginia law because its annual interest rate exceeded 12%.[5] (By arguing that the loan agreement is void, Demeter seems to be arguing that the complaint fails to plead the existence of a "debt" to which § 523(a) would apply.) But the statute Demeter cites for that proposition, Va. Code Ann.§ 6.2-303, does not prohibit *all* agreements to pay more than 12% interest—it prohibits them "[e]xcept as otherwise permitted by law," Va. Code Ann. § 6.2-303(A), and lists a number of laws that permit such agreements, Va. Code Ann. § 6.2-303(B). One law permitting such agreements applies to loans "made to a person for business or investment purposes, if the initial amount of the loan is $5,000 or more." Va. Code Ann. § 6.2-317; *see* Va. Code Ann. § 6.2-303(B)(1). The

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[3] The dismissal of a complaint for failing to satisfy the requirements of Rule 9(b) is treated as a dismissal for failure to state a claim under Rule 12(b)(6). *See Clinton*, 63 F.4th at 1274 (quoting *Seattle-First Nat'l Bank v. Carlstedt*, 800 F.2d 1008, 1011 (10th Cir. 1986)).

[4] *See* Loan Agreement, ECF 1-1 at 4. Exhibits attached to a complaint are properly treated as part of the pleadings for purposes of ruling on a motion to dismiss. *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) (citing *Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 964-65 (10th Cir. 1994)).

[5] ECF 9 at 3. Kapitus agrees that Virginia law governs the loan agreement. *See* ECF 13 at 3.

$200,000 loan from Kapitus to E&R Construction fits that description.[6] Since the loan agreement was permitted by § 6.2-317, it was not void under § 6.2-303. Because the loan agreement was not void under § 6.2-303, Demeter's first argument fails.[7]

The remainder of Demeter's motion to dismiss pertains only to Kapitus's claims under § 523(a)(2)(A) and (B). The motion will therefore be denied as to Kapitus's claims under § 523(a)(4) and (6).

Next, Demeter argues that Kapitus's claims do not satisfy Fed. R. Civ. P. 9(b),[8] under which "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Demeter's argument is actually twofold: first, that the complaint's allegations under § 523(a)(2) are conclusory; and second, that the complaint only alleges breach of the loan agreement (whereas breach of contract does not, standing alone, render a debt nondischargeable under § 523(a)(2)(A)). This argument implicates not only Fed. R.

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[6] *Cf.* Loan Agreement § 1-1.13 ("Under no circumstances will the loan be used for personal, family, or household purposes."), ECF 1-1 at 5; Va. Code Ann. § 6.2-317(A)(1) (defining "business or investment purposes" as "not for personal, family, or household purposes"); Va. Code Ann. § 6.2-100 (defining "person" as "any individual, corporation, partnership, association, cooperative, limited liability company, trust, joint venture, . . . or other legal or commercial entity.").

[7] Moreover, even if the loan agreement *were* void under § 6.2-303, it would not necessarily follow that there is no "debt" for purposes of § 523(a). *Cf.* Va. Code Ann. § 6.2-304 ("If the court determines that the contract is usurious, judgment shall be rendered only for the principal sum."); *Shannon v. Smalls*, Case No. CL-2022-7030, 110 Va. Cir. 499 (Va. Cir. Ct. Nov. 28, 2022) (reconciling apparent conflict between Va. Code Ann. § 6.2-303(F) and § 6.2-304), *rev'd on other grounds*, Record No. 1958-22-4, 2024 WL 1624747 (Va. Ct. App. Apr. 16, 2024).

[8] Rule 9(b) applies to this adversary proceeding under Fed. R. Bankr. P. 7009.

Civ. P. 9(b), but also Fed. R. Civ. P. 8(a)(2) and the first two elements of "false representation" under § 523(a)(2)(A); the Court will address each in turn.[9]

Under Rule 9(b), "a complaint 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." *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2008 (quoting *Koch v. Koch Indus.*, 203 F.3d 1202, 1236 (10th Cir. 2000)). Kapitus's complaint satisfies this standard. It alleges that Demeter made false statements on May 4 and 19, 2022, in the documents attached to the complaint as Exhibits 1, 3, and 4. *See* Compl. ¶¶ 16, 22, 28; *id.* at ¶ 16 (defining documents attached as Exhibit 1 collectively as the "Agreement"). It specifically identifies the statements alleged to be false. *See* Compl. ¶¶ 23, 28, 37, 42. And it alleges that as a consequence of these false statements, Kapitus loaned $200,000 to E&R Construction when it would not have otherwise done so. *See* Compl. ¶¶ 57, 73. These allegations set forth the "who, what, when, where and how of the alleged fraud," *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006), thus satisfying Rule 9(b).

However, compliance with Rule 9(b) "does not give [a plaintiff] license to evade the less rigid—though still operative—strictures of Rule 8." *Iqbal*, 556 U.S. at 686 (citing 5A Wright & Miller, *Fed. Prac. & Proc.* § 1301 (3d ed. 2004)). Under Rule

[9] *Cf. Clinton*, 63 F.4th at 1274 n.9 ("[W]e first determine if the complaint has satisfied Rule 9(b), and if so satisfied, we next consider, on the basis of the particularized allegations, whether the complaint alleges a facially plausible claim for relief.") (citing *Iqbal*, 556 U.S. at 678).

8(a)(2), a complaint must contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). This requires "more than labels and conclusions." *Id.* A conclusion, or conclusory allegation, is one that states an inference without stating the underlying facts on which the inference is based. *See Brooks*, 985 F.3d at 1281 (citing *Kellum v. Mares*, 657 F. App'x 763, 770). Thus, statements such as "defendant violated the law" or "defendant failed to exercise reasonable care," standing alone, will not support a claim for relief. *Brooks*, 985 F.3d at 1281 (citing *Iqbal*, 556 U.S. at 679). Nor does the phrase "on information and belief" transform a conclusory allegation into a factual one. *See, e.g.*, *Hatfield v. Cottages on 78th Cmty. Ass'n*, Nos. 21-4035; 21-4042; 21-4045, 2022 WL 2452379, at *5 (10th Cir. July 6, 2022)

Demeter argues that Kapitus's claim that he "failed to disclose Borrower's true financial condition to Kapitus"—which implicates § 523(a)(2)(B)[10]—should be dismissed as a "general assertion without factual support."[11] However, as Kapitus points out, the complaint also alleges that (1) Demeter provided Kapitus with E&R Construction's 2021 federal tax return when applying for the loan; (2) according to

[10] Section 523(a)(2)(B) applies to debts obtained by the use of a statement (1) in writing; (2) that is materially false; (3) respecting the debtor's or an insider's financial condition; (4) on which the creditor reasonably relied; (5) that the debtor caused to be made or published with intent to deceive. *Coller on Bankruptcy* ¶ 523.08[2] (Richard Levin & Henry J. Sommer eds., 16th ed.). The discharge exceptions in sections 523(a)(2)(A) and (B) are mutually exclusive. *Id.*

[11] ECF 9 at 8 (citing Compl. ¶¶ 25, 32).

that tax return, E&R Construction had current assets of $305,495.20, including a $305,495.20 receivable from E&R Services, a company wholly owned by Demeter; (3) in § 2.1 of the loan agreement, Demeter/E&R Construction stated:

> The information and financial statements which have been furnished to LENDER by Borrower and Guarantor . . . fairly represent . . . the financial condition of Borrower and Guarantor at such dates, and since those dates, there has been no material adverse change, financial or otherwise, in such condition . . . ;

and (4) as of May 2022, the E&R Services receivable was uncollectible and worthless.[12] Those allegations are not conclusory; they are factual. Because Demeter makes no other arguments regarding Kapitus's claim under § 523(a)(2)(B), the motion to dismiss will be denied as to that claim.

To state a claim for false representation under § 523(a)(2)(A), a creditor must allege that (1) the debtor made a false representation; (2) with the intent to deceive the creditor; (3) the creditor relied on the representation; (4) the creditor's reliance was justifiable; and (5) the debtor's representation caused the creditor to sustain a loss. *See Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996); *Bank of Cordell v. Sturgeon (In re Sturgeon)*, 496 B.R. 215, 222 & n.11 (B.A.P. 10th Cir. 2013) (citing *Field v. Mans*, 516 U.S. 59, 60 (1995)). Breach of contract is not, in itself, sufficient evidence of fraudulent intent for purposes of § 523(a)(2)(A). *See Cobra Well Testers, LLC v. Carlson (In re Carlson)*, No. 06-8158, 2008 WL 8677441,

[12] *See* Compl. ¶ 42 (citing Loan Agreement § 2.1). A statement about a single asset can be a "statement respecting the debtor's financial condition" for purposes of § 523(a)(2). *See Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 712 (2018).

at *3 (10th Cir. Jan. 23, 2008). In order for a representation regarding future performance to be actionable under § 523(a)(2)(A), a debtor must lack an intent to perform when the promise was made. *Id.* (quoting *Donaldson v. Hayes (In re Hayes)*, 315 B.R. 579, 587 (Bankr. C.D. Cal 2004)). Intent to deceive can be inferred from the totality of the circumstances. *See In re Sturgeon*, 496 B.R. at 222-23 (citing *Copper v. Lemke (In re Lemke)*, 523 B.R. 917, 922 (B.A.P. 10th Cir. 2010)).

Thus: to adequately plead that some provision of the Agreement was a false representation made by Demeter with the intent to deceive Kapitus (i.e., to plead the first two elements of § 523(a)(2)), Kapitus must allege enough facts for the Court to infer that (1) E&R Construction/Demeter failed to perform under that provision and (2) E&R Construction/Demeter lacked the intent to perform when the loan agreement was executed. Conclusory allegations of "misrepresentation," without more, do not satisfy Rule 8(a)(2). Factual allegations of breach, without more, do not satisfy the "intent" element of § 523(a)(2)(A).

Parts of Kapitus's claim under § 523(a)(2)(A) consist of conclusory allegations of misrepresentation. *Cf.* Compl. ¶ 42 (identifying "[m]isrepresentations that the Borrower/Guarantor and Debtor/Defendant were in compliance with all loans, financing agreements, promissory notes, and/or other obligations of indebtedness, except as disclosed to Kapitus," "[m]isrepresentations that Borrower would not use the loan proceeds for any other purpose other than in Borrower's business," and "[m]isrepresentation that Borrower was not paying one creditor more than once a month"). Other parts of Kapitus's claim under § 523(a)(2)(A) consist of factual

allegations of breach. *Cf. id.* (alleging that "Borrower placed a stop payment on the Account prior to the Repayment Amount being paid in full," "Borrower sold its receivables to two separate lenders," and "Debtor/Defendant effectively closed the Borrower, converted it into a sole proprietorship, and is currently operating the business under the name 'Rudolf Demeter Flooring'"). None of these allegations plead the first two elements of § 523(a)(2)(A) in accordance with Rule 8(a)(2).

However, one component of Kapitus's complaint does satisfy both Rule 8(a)(2) and the first two elements of § 523(a)(2)(A). Kapitus alleges that in the Agreement, which the parties executed on May 19, 2022, E&R Construction and Demeter promised "not to create, incur, assume, or permit to exist, directly or indirectly, any additional financings, loans, lien or other encumbrance of any kind with respect to any of the Collateral or the Additional Collateral, as applicable, without the prior written permission of Lender." *See* Compl. ¶ 38. It alleges that the previous day, May 18, 2022, E&R Construction had applied for a $144,000 loan from Channel Partner Capital. *See id.* at ¶¶ 19, 42.[13] And it alleges that on May 22, 2022, three days after executing the Agreement, E&R Construction received the Channel loan proceeds and pledged the Kapitus collateral to Channel. *See id.* If E&R Construction had applied for the Channel loan one day before executing the Agreement, and if E&R Construction pledged the Kapitus collateral to Channel just three days after executing the Agreement, one may reasonably infer that at the

[13] Paragraph 42 alleges that E&R Construction applied for the Channel loan "two days before the Kapitus loan was funded." Paragraph 19 alleges that the Kapitus loan was funded on May 20, 2022.

time the Agreement was executed, E&R Construction/Demeter did not intend to comply with their promise not to further encumber the Kapitus collateral. Because this component of the complaint pleads the first two elements of § 523(a)(2)(A) in accordance with Rule 8(a)(2), Demeter's motion to dismiss will be denied as to Kapitus's claim under § 523(a)(2)(A).

In his reply, Demeter raises four additional arguments. The first—that the parties entered into a settlement agreement that replaced the debt at issue for purposes of § 523(a)[14]—is frivolous. *See Archer v. Warner*, 538 U.S. 314 (2003) (rejecting "novation theory" and holding that § 523(a)(2)(A) includes "debt embodied in a settlement agreement that settled a creditor's earlier claim for money obtained by fraud"). The second—that § 523(a)(2)(B) requires a written statement regarding the financial condition of Demeter himself[15]—is likewise frivolous. *See* 11 U.S.C. § 523(a)(2)(B) (applying to written statement "respecting the debtor's *or an insider's* financial condition") (emphasis added). The third argument—involving application of Virginia's usury statute to Demeter's personal guarantee as opposed to the loan agreement itself[16]—would not, even if successful, eliminate Demeter's debt. *See* note 7 *supra*. And the fourth argument—that under both Virginia and Kansas law, a plaintiff cannot, without more, recover in tort for breach of contract—is irrelevant because the issue here is not whether Kapitus states a claim for fraud under state

[14] *See* ECF 14 at 1-4.

[15] *See id.* at 5.

[16] *See id.* at 6-7.

law; the issue is whether Kapitus states a claim under § 523(a), which is a matter of federal law. *See Grogan v. Garner*, 498 U.S. 279, 283-84 (1991) ("The validity of a creditor's claim is determined by rules of state law. Since 1970, however, the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code.") (citations omitted).

For the foregoing reasons, Demeter's motion to dismiss is hereby denied.

IT IS SO ORDERED.

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