IT IS SO ORDERED.

Dated: September 13, 2024

John E. Hoffman, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	Case No. 23-52507
Leroy Johnson, Jr.,	:	Chapter 7
Debtor.	:	Judge Hoffman
First Merchants Bank,	:	
Plaintiff,	:	
v.	:	Adv. Pro. No. 23-2056
Leroy Johnson, Jr.,	:	
Defendant.	:	

MEMORANDUM OPINION ON
MOTION FOR SUMMARY JUDGMENT (DOC. 10)

I. Introduction

Plaintiff First Merchants Bank ("Bank") loaned defendant-debtor Leroy Johnson, Jr. ("Johnson") $100,000 based on representations Johnson made to the Bank. Alleging that his representations were fraudulent, the Bank sued Johnson in an Ohio state court and obtained a

judgment against him for fraudulent misrepresentation. Johnson then filed a Chapter 7 bankruptcy petition, and the Bank initiated this adversary proceeding against him shortly thereafter. The Bank now seeks summary judgment finding that Johnson's judgment debt is nondischargeable under § 523(a)(2)(A) of the Bankruptcy Code. *See* Doc. 10 ("Summary Judgment Motion").

The Bank argues it is entitled to summary judgment for two reasons: (1) because the state court judgment finding that Johnson made fraudulent misrepresentations should be given issue-preclusive effect here; and (2) because the Bank's evidence from the state court case establishes that Johnson's debt is nondischargeable. Neither argument carries the day. The state court judgment was based entirely on default/deemed admissions, meaning it lacks issue-preclusive effect. And the Bank's summary judgment evidence fails to establish as a matter of law that Johnson's debt is nondischargeable under § 523(a)(2)(A). The Court must therefore deny the Summary Judgment Motion.

II. Background

Johnson, who is appearing pro se, filed his Chapter 7 bankruptcy petition on July 25, 2023. Several years earlier, the Bank sued him and two other defendants in the Franklin County Ohio Court of Common Pleas ("State Court") in a civil action captioned *First Merchants Bank v. Richard Allen Group, et al.*, Case No. 18-CV-009775 ("State Court Case"). The other defendants in that case are not parties to this adversary proceeding.

In the State Court Case, the Bank alleged that Johnson bamboozled it into loaning him $100,000 by representing that the Richard Allen Group ("Group")—a limited liability company of which he and another defendant were members—was the "financial arm of the Third Episcopal District of the African Methodist Episcopal Church" ("Church"). Summ. J. Mot. at 2. The Bank claims that Johnson and the other defendants (1) "falsely informed [the Bank] that they were authorized by the AME Church to obtain the loan," (2) "completed a loan application and signed

loan documents in the name of the AME Church," and (3) "provided fraudulent certifications to [the Bank] purporting to authorize [Johnson] . . . to act on behalf of the AME Church." *Id.* at 2–3. "In fact," the Bank says, "the AME Church never authorized [Johnson] to obtain the loan on its behalf. Instead, [Johnson] withdrew the loan proceeds to pay himself." *Id.* at 3.

The Bank won the State Court Case against Johnson. On August 27, 2021, the State Court issued its Decision and Entry Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment ("State Court Judgment"), a copy of which is attached as Exhibit A to the Summary Judgment Motion. As the State Court Judgment makes clear, the Bank won because during the State Court Case it served Johnson with requests for admissions under Rule 36 of the Ohio Rules of Civil Procedure—requests to which Johnson never responded. *See* State Ct. J. at 6. The State Court found that by failing to respond, Johnson and the other defendants admitted

> they made representations to the Bank in the form of having authority to enter into and execute on behalf of the Church a loan of $100,000; these representations were material to the Bank in issuing the loan; they knew these representations were false; they intended the Bank to rely on these representations; this reliance by the Bank was justified; and they have not made any payments on the loan resulting in injury to the Bank.

Id. at 8.

In short, by failing to respond to the Bank's requests for admission, Johnson "admitted all of the elements of fraudulent misrepresentation." *Id.* at 7. The State Court thus concluded, based solely on those deemed admissions, that "Johnson [had] engaged in fraudulent misrepresentation," *id.* at 8, and found him liable to the Bank for $120,602.69 in damages, plus costs and interest. *See* Judgment Entry Adopting Magistrate's Decision, a copy of which is attached as Exhibit B to the Summary Judgment Motion. As stated above, the Bank now seeks summary judgment that Johnson's debt from the State Court Case is nondischargeable under § 523(a)(2)(A).

III. Jurisdiction and Constitutional Authority

The Court has jurisdiction to hear and determine this adversary proceeding under 28 U.S.C. §§ 157 and 1334 and the general order of reference entered in this district. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). Bankruptcy courts have exclusive jurisdiction to determine the dischargeability of the debts described in § 523(a)(2) of the Bankruptcy Code, *i.e.*, the judgment debt at issue here. *See* 11 U.S.C. § 523(c); *Dollar Corp. v. Zebedee (In re Dollar Corp.)*, 25 F.3d 1320, 1325 (6th Cir. 1994) ("Congress intended to take the determinations governed by 11 U.S.C. § 523(c) away from state courts and grant exclusive jurisdiction in the bankruptcy courts.") (cleaned up). And because disputes over the dischargeability of debts "stem[] from the bankruptcy itself," the Court also has the constitutional authority to enter a final judgment in this adversary proceeding. *Hart v. S. Heritage Bank (In re Hart)*, 564 F. App'x 773, 776 (6th Cir. 2014) (quoting *Stern v. Marshall*, 564 U.S. 462 (2011)).

IV. Legal Analysis

A. Summary Judgment Standard

Under Rule 56(a) of the Federal Rules of Civil Procedure ("Federal Civil Rule(s)"), made applicable here by Rule 7056 of the Federal Rules of Bankruptcy Procedure, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Civ. R. 56(a). "The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact." *Johnson v. U.S. Postal Serv.*, 64 F.3d 233, 236 (6th Cir. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "Once this burden is met, it shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Where there is a genuine factual dispute, the "facts must be viewed in the light most favorable to the nonmoving party." *Scott v.*

Harris, 550 U.S. 372, 380 (2007). A dispute is genuine only if it is "based on evidence upon which a reasonable [finder of fact] could return a [judgment] in favor of the non-moving party." *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 270 (6th Cir. 2009). And "[a] factual dispute concerns a 'material' fact only if its resolution might affect the outcome of the suit under the governing substantive law." *Id.*

B. Johnson's Ineffectual Response Does Not Entitle the Bank to Summary Judgment.

Before turning to the arguments presented in the Summary Judgment Motion, the Court will first address Johnson's response to that motion, *see* Doc. 17 ("Response"), and the Bank's reply, *see* Doc. 18 ("Reply"). In its Reply, the Bank contends that the Summary Judgment Motion "is unopposed and therefore [the Bank is] entitled to summary judgment in its favor." Reply at 1. To be sure, even though the Court gave him extra time to file it, *see* Order Granting Motion to Extend Time to Respond (Doc. 14), Johnson's two-sentence response leaves much to be desired. He says only this: "Your Honor I ask the court to wait on making a descison [sic] concerning the motion for summary judgment. The reason is because a motion for relief was filed with the court of common pleas on March 22, 2024." Resp. at 1.

As the Bank noted in its Reply, no such motion has been filed with the State Court. Reply at 1. And the Response did nothing to "present some 'specific facts showing that there is a genuine issue for trial.'" *Johnson*, 64 F.3d at 236 (quoting *Anderson*, 477 U.S. at 248). But that does not mean the Bank wins by default. In fact, the Bank would not win by default even if Johnson had failed to respond at all. "[A] party moving for summary judgment always bears the burden of demonstrating the absence of a genuine issue as to a material fact," and "the movant must always bear this initial burden *regardless if an adverse party fails to respond*." *Carver v. Bunch*, 946 F.2d 451, 454–55 (6th Cir. 1991) (cleaned up) (emphasis added). That means a court "cannot grant summary judgment in favor of a movant simply because the adverse party has not responded. The

court is required, at a minimum, to examine the movant's motion for summary judgment to ensure that he has discharged that burden." *Id.* at 455.

As the Sixth Circuit reiterated more recently, "[e]ven when faced with an unopposed motion for summary judgment," courts "cannot grant [such] a motion . . . without first considering supporting evidence and determining whether the movant has met its burden." *Byrne v. CSX Transp., Inc.*, 541 F. App'x 672, 675 (6th Cir. 2013); *see also Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 242 (2d Cir. 2004) ("Even when a motion for summary judgment is unopposed, the district court is not relieved of its duty to decide whether the movant is entitled to judgment as a matter of law."); *Quorum Health Res., LLC v. Maverick Cnty. Hosp. Dist.*, 308 F.3d 451, 471 (5th Cir. 2002) ("If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response.").

All that is to say that even when ruling on an unopposed motion for summary judgment, the Court must still determine whether (1) the movant has carried its burden and (2) is entitled to judgment as a matter of law. For the reasons explained below, the Bank has not, and is not.

C. The State Court Judgment Does Not Entitle the Bank to Summary Judgment.

1. In Adversary Proceedings, State Court Judgments Have the Same Issue-Preclusive Effect They Would Have Under State Law.

In its Summary Judgment Motion, the Bank first argues that the State Court Judgment—which found Johnson liable for fraudulent misrepresentation under Ohio law—must be given issue-preclusive effect here. Issue preclusion, sometimes called collateral estoppel,[1] "refers to the effect of a judgment in foreclosing relitigation of a matter that has been actually litigated and decided." *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 703 (6th Cir. 1999). It embodies a

[1] The Supreme Court prefers the term "issue preclusion" over "collateral estoppel." *See Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008).

"fundamental precept of common-law adjudication . . . that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies[.]'" *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *S. Pac. R. Co. v. United States*, 168 U.S. 1, 48–49 (1897)). "The whole premise of [issue preclusion] is that once an issue has been resolved in a prior proceeding, there is no further factfinding function to be performed." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 n.23 (1979).

Issue preclusion applies in nondischargeability actions. *Grogan v. Garner*, 498 U.S. 279, 285 n.11 (1991) ("We now clarify that [issue preclusion] principles do indeed apply in discharge exception proceedings pursuant to § 523(a)."). And the "full faith and credit statute, 28 U.S.C. § 1738, requires a federal court to accord a state court judgment the same preclusive effect [it] would have in a state court." *Fordu*, 201 F.3d at 703. Federal courts must therefore "apply the law of the state in which the prior judgment was rendered" to determine its preclusive effect. *Id.* Here, the State Court Judgment was rendered in Ohio, so the Court must apply Ohio law.

In Ohio, issue preclusion applies when a "fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) . . . the party against whom [issue preclusion] is asserted was a party in privity with a party to the prior action." *State ex rel. Davis v. Pub. Emps. Ret. Bd.*, 899 N.E.2d 975, 982 (Ohio 2008). The latter two elements are plainly met here. The State Court had jurisdiction to enter the State Court Judgment, and the parties here were both parties in the State Court Case. But the first element—whether Johnson's fraud was "actually litigated"—requires more discussion.

Under Rule 36 of the Ohio Rules of Civil Procedure ("Ohio Civil Rules"), parties to a lawsuit may serve written requests for admission on any other party, and a "matter is admitted

unless . . . the party to whom the request is directed" responds, either by answering or objecting to the request. Ohio Civ. R. 36(A)(1). That means that "[f]ailure to respond at all to the requests [for admission] will result in the requests becoming admissions." *Cleveland Tr. Co. v. Willis*, 485 N.E.2d 1052, 1053 (Ohio 1985).

As stated above, the State Court found that "Johnson's failure to answer the Bank's requests for admissions" meant he "admitted all of the elements of fraudulent misrepresentation" under Ohio law. State Ct. J. at 7. "[T]he elements of common law fraud in Ohio are substantially equivalent to those required to establish a nondischargeable debt based on false representation under § 523(a)(2)(A)." *Schafer v. Rapp (In re Rapp)*, 375 B.R. 421, 430 (Bankr. S.D. Ohio 2007); *see also Ott v. Somogye (In re Somogye)*, No. 18-30927, 2018 WL 5810447, at *4 (Bankr. N.D. Ohio Nov. 5, 2018) ("The elements of a fraudulent misrepresentation claim under Ohio law mirror the elements that must be shown in order to prevail under § 523(a)(2)(A)."). So if the State Court Judgment carries issue-preclusive effect, its findings as to Johnson's fraud would leave nothing for the Court to decide regarding the dischargeability of Johnson's debt. But all of the State Court's findings were based on admissions that Johnson was deemed to have made under Ohio Civil Rule 36, and admissions made under that rule have a critical limitation: They are "*for the purpose of the pending action only*" and may not "*be used against the [admitting] party in any other proceeding*." Ohio Civ. R. 36(B) (emphasis added). Indeed, the first line of that rule says that parties "may serve upon any other party a written request for [] admission, *for purposes of the pending action only* . . . ." Ohio Civ. R. 36(A) (emphasis added).

Because Johnson never responded to the Bank's requests for admission, the State Court deemed him to have admitted all the facts alleged in those requests under Ohio Civil Rule 36(A). And the State Court Judgment, which found Johnson liable for fraudulent misrepresentation, is

based solely on those deemed admissions. But Ohio Civil Rule 36(B) limits the effect of such admissions—they are "for purposes of the pending action only[.]" The question, then, is whether a judgment based solely on "deemed admissions" would have issue-preclusive effect under Ohio law. The answer, in short, is no.

2. Because the State Court Judgment Would Lack Issue-Preclusive Effect Under Ohio Law, It Lacks Preclusive Effect Here.

"In construing questions of state law, the federal court must apply state law in accordance with the controlling decisions of the highest court of the state." *Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, 1181 (6th Cir. 1999) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). But the Supreme Court of Ohio has not determined whether a judgment based solely on deemed admissions under Ohio Civil Rule 36 carries issue-preclusive effect. Because Ohio's highest court has not addressed that issue, this Court "must attempt to ascertain how that court would rule if it were faced with the issue." *Id.*

To predict how a state's highest court would rule, federal courts "may use the decisional law of the state's lower courts, other federal courts construing state law, restatements of law, law review commentaries," *id.*, as well as "decisions from other jurisdictions or the 'majority' rule" among other states, *Bailey v. V & O Press Co.*, 770 F.2d 601, 604 (6th Cir. 1985) (cleaned up). And a "federal court should not disregard the decisions of intermediate appellate state courts unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Meridian*, 197 F.3d at 1181 (citing *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967)); *see also West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (same).

An Ohio intermediate appellate court has addressed whether admissions under Ohio Civil Rule 36 carry issue-preclusive effect. *See U.S. Bank Tr., N.A. v. Watson*, NO. 11-19-09, 2020 WL 3409891 (Ohio Ct. App. June 22, 2020). In *Watson*, a lender, by not responding to requests for

admissions under Ohio Civil Rule 36, had admitted in a prior foreclosure action that it did not physically possess a promissory note. *See id.* at *9. In a later foreclosure action, the Watsons argued that the lender was precluded from litigating the issue of possession based on its deemed admission in the first action. *See id.* The trial court disagreed, ruling that "the admission that [the lender] did not have the note was for [the first foreclosure] action only and [the lender was] not bound by its admission in the first foreclosure." *Id.* (cleaned up). The *Watson* panel affirmed, holding based on the rule's text that "[Ohio Civil Rule] 36 admissions should not be granted issue-preclusive effect in subsequent actions because issues established by [Ohio Civil Rule] 36 admissions are not 'actually litigated.'" *Id.*

Watson appears to be the only Ohio case to consider this issue before or since it was decided. *See id.* ("Although the text of [Ohio Civil Rule] 36 suggests that matters admitted in one action are not given issue-preclusive effect in a subsequent action, we have been unable to locate any Ohio state court decisions squarely addressing this issue."). But even though it stands alone, *Watson*'s reasoning strongly informs the Court's prediction of how the Supreme Court of Ohio would rule on the issue; again, "[a] federal court should not disregard the decisions of intermediate appellate state courts unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Meridian*, 197 F.3d at 1181. And there is simply no persuasive data indicating that the Supreme Court of Ohio would disagree with the *Watson* court's decision. Indeed, the other persuasive data is entirely consistent with *Watson*. Courts and commentators alike have uniformly said that admissions made under rules substantially identical to Ohio Civil Rule 36 should not carry issue-preclusive effect because issues established by such admissions have not been actually litigated.

Somogye, a bankruptcy decision applying Ohio Civil Rule 36 in the context of issue preclusion, is particularly instructive in this case. There, as here:

- the defendant-debtor failed to respond to requests for admission under Ohio Civil Rule 36 in a state court lawsuit prior to bankruptcy;
- the Ohio court later granted the plaintiff's motion for summary judgment "based upon [the defendant's] deemed admissions due to his failure to respond to the requests for admission";
- the defendant later filed bankruptcy; and
- the plaintiff initiated a nondischargeability action and sought summary judgment based on a state court judgment's purported preclusive effect.

Somogye, 2018 WL 5810447, at *1.

Because *Watson* had not yet been decided, the *Somogye* court found no Ohio case addressing whether a judgment based on deemed admissions under Ohio Civil Rule 36 carries issue-preclusive effect. *Id.* at *5. But the court observed that cases interpreting the near-identical Federal Civil Rule 36 "have uniformly held that a judgment based on admissions under [that rule] . . . does not have issue preclusive effect in a later proceeding." *Id.* The federal rule, much like the Ohio rule, contains an express limitation on the use of admissions made under it: "An admission under this rule is not an admission for any other purpose and *cannot be used against the party in any other proceeding*." Fed. Civ. R. 36(b) (emphasis added).

Given the near-identical limitations in both Ohio Civil Rule 36 and its federal counterpart, the *Somogye* court concluded that the "Ohio Supreme Court would find that factual findings in a prior judgment based upon deemed admissions were not 'actually litigated.'" *Somogye*, 2018 WL 5810447, at *7. On that point, *Somogye* appears unassailable—especially since it was discussed with approval by the *Watson* court. *See Watson*, 2020 WL 3409891, at *10. And even though *Somogye* relied on cases interpreting the Federal Civil Rules, the Supreme Court of Ohio has said that "[b]ecause the Ohio Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal law interpreting the federal rule is appropriate and persuasive authority in

interpreting a similar Ohio rule." *Felix v. Ganley Chevrolet, Inc.*, 49 N.E.3d 1224, 1230 (Ohio 2015). Federal law interpreting Federal Civil Rule 36 thus provides appropriate and persuasive authority in interpreting Ohio Civil Rule 36.

Federal courts have uniformly held that facts or issues established by deemed admissions under Federal Civil Rule 36—a rule functionally identical to Ohio Civil Rule 36—have not been "actually litigated," meaning judgments based on deemed admissions lack issue-preclusive effect. *See, e.g.*, *In re Cassidy*, 892 F.2d 637, 640 n.1 (7th Cir. 1990) (holding that a "judgment based solely on admissions made under [Federal Civil Rule 36] cannot be used to estop relitigation of a factual question in a later proceeding"); *Hernandez v. Pizante (In re Pizante)*, 186 B.R. 484, 489 (B.A.P. 9th Cir. 1995) (holding that deemed admissions in one proceeding were not applicable in a later proceeding because the actually litigated element of issue preclusion was not satisfied), *aff'd*, 107 F.3d 878 (9th Cir. 1997); *Wright v. Minardi (In re Minardi)*, 536 B.R. 171, 183 (Bankr. E.D. Tex. 2015) (citing *Cassidy* and *Pizante* for the proposition that "general issue preclusion principles cannot be properly applied in subsequent litigation for matters deemed admitted under [Federal Civil Rule 36] since deemed admissions have not been 'actually litigated'"). The principle established by these cases is well-recognized enough to be set forth in Moore's Federal Practice: "An admission made under [Federal Civil] Rule 36 is for the purpose of the pending action only, and cannot be used as an admission in any other proceeding. Consequently, admissions made in accordance with [Federal Civil] Rule 36 have no [issue-preclusive] effect." 7 James Wm. Moore et al., *Moore's Federal Practice* § 36.03[3] (3d ed. 2024) (cleaned up).

On top of all that, federal decisions interpreting similar state civil rules have also uniformly held that facts or issues established by deemed admissions have not been actually litigated, so judgments based on such deemed admissions lack preclusive effect. *See, e.g.*, *Liz Transp. Inc. v.*

Haifley (In re Haifley), No. 14-10359, 2014 WL 7496334, at *2 (Bankr. N.D. Ind. Dec. 19, 2014) (holding under Indiana law that "requests for admissions in one proceeding are only good for that proceeding and have no bearing in subsequent litigation" and that "[a]s a result, any facts so established are not controlling in this case and cannot form the basis of [issue preclusion]") (cleaned up); *MedPort, Inc. v. Robinson (In re Robinson)*, No. 13-00148-8-SWH-AP, 2014 WL 6477606, at *3 (Bankr. E.D.N.C. Nov. 18, 2014) (holding under North Carolina law that a "judgment which contains findings of fact based upon deemed admissions in the prior state court proceeding cannot be afforded [issue-preclusive] effect in this adversary proceeding"); *Hildebrand v. Kugler (In re Kugler)*, 170 B.R. 291, 300–01 (Bankr. E.D. Va. 1994) (holding that Virginia courts would follow *Cassidy*, *i.e.*, not give issue-preclusive effect to judgments based solely on deemed admissions).

The Court could go on, but the point should be clear: Facts or issues established by deemed admissions have not been "actually litigated," meaning judgments based solely on deemed admissions lack issue-preclusive effect. Based on *Watson*, the overwhelming and uniform persuasive authority, and the plain language of Ohio Civil Rule 36, the Court predicts that the Supreme Court of Ohio would rule that (1) facts established by deemed admissions under Ohio Civil Rule 36 were not actually litigated for issue preclusion purposes, and (2) a judgment based solely on deemed admissions therefore lacks issue-preclusive effect. Because the State Court Judgment would lack issue-preclusive effect under Ohio law, it lacks issue-preclusive effect in this adversary proceeding, and the Bank is not entitled to summary judgment based on its findings.

D. The Court May Consider the Bank's Evidence at Summary Judgment.

Since the Bank is not entitled to summary judgment based on issue preclusion, the Court must now reach the Bank's second argument: that it is entitled to summary judgment because its evidence from the State Court Case shows that Johnson's judgment debt is nondischargeable under

§ 523(a)(2)(A). "The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact," *Johnson*, 64 F.3d at 236, so the Bank's evidence—independent of the State Court Judgment's findings—must show that no genuine issue of material fact exists as to each element of its § 523(a)(2)(A) claim. But before determining whether the Bank's evidence meets that burden, the Court must determine whether it may consider that evidence. To do so, the Court must first describe the evidence on which the Bank relies.

1. The Bank's Evidence Consists of a Deposition Transcript and Its Exhibits.

In the State Court Case, the Bank took Johnson's deposition, and a copy of the deposition transcript is attached as Exhibit C to the Summary Judgment Motion ("Deposition Transcript"). The Bank believes the Deposition Transcript "clearly identifies the fraud perpetrated by Mr. Johnson upon [it]." Summ. J. Mot. at 3. Supporting its position with the Deposition Transcript and certain deposition exhibits ("Exhibit(s)"), the Bank asserts as follows:

Factual Allegation	Supporting Evidence
"On December 19, 2014, [Johnson] created the [Group] with James E. Richardson, IV, a co-Defendant in the state court action. [Johnson] and Mr. Richardson controlled one hundred percent of the membership interest of the [Group]." Summ. J. Mot. at 3.	Dep. Tr. at 28–29; Ex. 18.
"No other person held any position within the [Group]." *Id.* at 4.	Dep. Tr. at 42–43.
"The [Group] possessed a fictitious trade name, Mjolnir Development, which was a real estate development entity through which [Johnson] could get paid for his work with the AME Church." *Id.*	*Id.* at 37–38.
"Though [Johnson] claims there is a relationship between the [Group] and the AME Church, there is no written document which establishes the [Group] as the financial arm of the AME Church." *Id.*	*Id.* at 166.
"Despite there being no such relationship, in February 2018, [Johnson] and Mr. Richardson made a presentation to [the Bank] and several other banks for the purpose of securing loans for the Christians of Faith Academy, a private Christian school which [Johnson] claimed was affiliated with the AME Church." *Id.*	*Id.* at 66–68.
"Following the February 2018 presentation, [Johnson] and Mr. Richardson met with [the Bank's] representatives regarding securing a loan." *Id.*	*Id.* at 73–74.

Factual Allegation	Supporting Evidence
"[Johnson] completed a Commercial Loan Application with First Merchants Bank, identifying the AME Church as the borrower, including the church's tax identification number." *Id.*	*Id.* at 79–80; Ex. 20.
"[Johnson] submitted a signed Request for Taxpayer Identification (W-9) to [the Bank] providing the tax identification number for the AME Church, but listing the address for the [Group]." *Id.*	Dep. Tr. at 79–82; Ex. 21.
"[Johnson] presented Certifications to [the Bank] purporting to appoint the [Group] as the financial arm of the AME Church." *Id.*	Ex. 11 at 1–2.
"Ultimately, on April 23, 2018, [the Bank] extended a $100,000.00 loan to [Johnson and the other defendants], based upon the representations that [they] made with respect to the AME Church." *Id*. at 5.	Dep. Tr. at 74.
"Johnson executed a Promissory Note, a Commercial Security Agreement, and a Corporate Resolution to Borrow / Grant Collateral, identifying himself as Secretary of AME Church." *Id.*	*Id.* at 74–79; Ex. 11.
"The AME Church was identified as the borrower." *Id.*	*Id.*
"Johnson admitted he never held the position of Secretary of the AME Church, but that was his position within the [Group]." *Id.*	Dep. Tr. at 75–76.
"Thereafter, [Johnson] withdrew proceeds on the loan extended by [the Bank]." *Id.*	*Id.* at 82.
"[Johnson] caused checks to be written to Mjolnir Development, the fictitious trade name held by the [Group] created, in Defendant's own words, to pay [Johnson] and Mr. Richardson." *Id.*	*Id.* at 94–99; Ex. 11.
"[Johnson] also had a check issued payable to himself." *Id.*	Dep. Tr. at 94–99; Ex. 11.
"Those checks were deposited into a Huntington Bank account held by Mjolnir Development, which was controlled solely by [Johnson]." *Id.*	Dep. Tr. at 94–99; Ex. 11.
"The Huntington account is now closed and [Johnson] does not possess any records reflecting how those funds were distributed." *Id.*	Dep. Tr. at 94–99; Ex. 11.
"Defendant admitted the principal balance due on the loan, exclusive of interest was $105,461.82." *Id.*	Dep. Tr. at 109.
"In July 2018, the AME Church issued a statement and posted on its website an announcement that the AME Church had no affiliation with the [Group] or the Christians of Faith Academy." *Id.*	*Id.* at 87.
"In September 2018, [the Bank] informed another creditor of the [Group], Affordable Care Clinic, that it was not affiliated with the AME Church." *Id.* at 5-6.	*Id.* at 100–07; Ex. 22.
"[Johnson] never informed the [Bank] that he and the other defendants were not associated with the AME Church."	Dep. Tr. at 105.

As for the Exhibits cited by the Bank, Exhibit 11 comes in eleven parts. Parts A and B are both copies of a "Certification of the Secretary of the Third Episcopal District of the African Methodist Episcopal Church," ostensibly signed by Johnson, Taylor Thompson, and Jay

Richardson. Dep. Tr. at 218–19. Part C is a promissory note for "Loan No. 138509," listing the Church as the borrower and the Bank as the lender, apparently signed by Johnson as "Secretary of the [Church]." *Id.* at 220–22. Part D is a commercial security agreement concerning that same loan, also between the Church and the Bank and signed by Johnson as "Secretary of the [Church]." *Id.* at 223–28. Part E is a corporate resolution to borrow/grant collateral concerning the same loan, signed by Johnson as "Secretary of the [Church]." *Id.* at 229–30. Parts F–K contain various checks discussed during Johnson's deposition.

Exhibit 18 is the Limited Liability Company Agreement of the Group (the limited liability company of which Johnson and another State Court defendant were members). It appears to be signed by Johnson as well as Jay Richardson; Johnson is listed as the Group's manager. *Id.* at 246–60. Exhibit 20 is a commercial loan application to the Bank, apparently signed by Johnson, with the Church listed as the borrower. *Id.* at 262–63. Exhibit 21 is a Form W-9 request for the Church's taxpayer identification number and certification. The Bank is listed as the requester, and the Church's taxpayer ID is written in the "Employer identification number" box. The document appears to be signed by Johnson and is dated April 19, 2018. *Id.* at 264–67. Exhibit 22 is a series of emails and correspondence between, among others, Becky Shaw (president of the Affordable Care Health Clinic) and Johnson. *Id.* at 268–82.

Having set forth the contents of the Deposition Transcript and Exhibits, the Court will now determine whether it may consider them at summary judgment.

2. At Summary Judgment, Courts May Consider Materials that Are Admissible or Could Ultimately Be Presented in Admissible Form.

Federal Civil Rule 56 governs summary judgment proceedings, and allows a party to support its assertion "that a fact cannot be or is genuinely disputed" by "(A) citing to particular parts of materials in the record" or "(B) showing that the materials cited do not establish the

absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. Civ. R. 56(c)(1). A party "may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. Civ. R. 56(c)(2). Put differently, "a party may claim that 'material cited to support or dispute a fact' may not be considered on summary judgment review because it would not be admissible in evidence." *Vaughan v. City of Shaker Heights*, No. 1:10 CV 00609, 2015 WL 1650202, at *14 (N.D. Ohio Apr. 14, 2015) (cleaned up).

Under the current version of Federal Civil Rule 56, "evidence considered at the summary judgment stage need not be 'in a form that would be admissible at trial,' as long as the evidence *could ultimately be presented in an admissible form*." *Lossia v. Flagstar Bancorp, Inc.*, 895 F.3d 423, 430 (6th Cir. 2018) (emphasis added) (quoting *Celotex*, 477 U.S. at 324); *see also Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 423 (6th Cir. 2021) ("Federal Rule of Civil Procedure 56 . . . requires a plaintiff's evidence to be admissible only as to its contents and not as to its form, as long as the plaintiff can proffer that it will be produced in an admissible form.").

In sum, courts "may consider [1] materials that would themselves be admissible at trial, and [2] the content or substance of otherwise inadmissible materials where 'the party submitting the evidence show[s] that it will be possible to put the information . . . into an admissible form.'" *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 538–39 (4th Cir. 2015), *as amended* (June 24, 2015) (cleaned up). That means the Bank's evidence must either be admissible, or the Bank must show that it could ultimately be presented in an admissible form.

3. The Deposition Transcript Is Admissible Under Federal Civil Rule 32(a).

The Bank argues that the Deposition Transcript is admissible under Federal Civil Rule 32(a)(8), made applicable here by Rule 7032 of the Federal Rules of Bankruptcy Procedure.

Summ. J. Mot. at 3 n.3.[2] The Bank makes no mention of the Exhibits, apparently assuming they come in with the Deposition Transcript—an issue the Court will address below.

Federal Civil Rule 32(a)(8) allows parties to use a deposition taken in a prior proceeding "in a later action involving the same subject matter between the same parties . . . to the same extent as if taken in the later action." Fed. Civ. R. 32(a)(8). But to establish that a deposition may be used under that rule, a party must first "invoke the general authority" of Federal Civil Rule 32(a)(1). *Moratzka v. Morris (In re Senior Cottages of Am., LLC)*, 399 B.R. 218, 221 (Bankr. D. Minn. 2009); *see also Pinkney v. Winn-Dixie Stores, Inc.*, No. CV214-075, 2014 WL 7272551, at *1 (S.D. Ga. Dec. 17, 2014) ("[Federal Civil] Rule 32(a)(1) provides the general rule that a deposition may be used against a party if [its] three requirements are met[.]").

Federal Civil Rule 32(a)(1) provides that a deposition may be used against a party if:

> (A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
>
> (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
>
> (C) the use is allowed by Rule 32(a)(2) through (8).

Fed. Civ. R. 32(a)(1).

The Deposition Transcript—or at least the parts on which the Bank relies—meets all these requirements. As to subparagraph (A), Johnson was, of course, present during his deposition. As

[2] Because Federal Civil Rule 32(a) applies "[a]t a hearing or trial," some courts have held that it has no bearing on whether a court may consider deposition testimony at the summary judgment stage. *See, e.g.*, *Ava Realty Ithaca, LLC v. Griffin*, No. 19 Civ. 123 (DNH) (TWD), 2021 WL 3848478, at *5 (N.D.N.Y. Aug. 26, 2021) ("Nothing in [Federal Civil] Rule 32(a) precludes consideration of deposition testimony that may otherwise be inadmissible at a hearing or trial in support of or in opposition to a motion for summary judgment."). But other courts, including the Sixth Circuit, have applied the rule in the summary judgment context. *See Kelly Servs., Inc. v. Creative Harbor, LLC*, 846 F.3d 857, 867 (6th Cir. 2017) (holding that Federal Civil Rule 32(a)(3) allowed use of deposition at summary judgment). The Court will thus analyze the Deposition Transcript's admissibility under Federal Civil Rule 32(a).

to (B), the pages of the Deposition Transcript on which the Bank relies are admissible under Federal Rule of Evidence 801(d)(2)(A) as party-opponent statements made by Johnson in his individual capacity. *See United States v. Moffie*, 239 F. App'x 150, 156 (6th Cir. 2007) (holding that defendant's deposition, taken in a prior state court case, was admissible under Rule 801(d)(2)(A) as a party-opponent statement); *Pinkney*, 2014 WL 7272551, at *2 ("Rule 32(a)(8) permits using a deposition from an earlier action as allowed by the Federal Rules of Evidence, and . . . evidentiary rule 801(d)(2) allows Plaintiff to use the Gabler deposition as an admission of a party-opponent. It follows, then, that Rule 32(a)(8) permits Plaintiff to use the Gabler deposition as an admission of a party-opponent."). The Bank is therefore using the Deposition Transcript "to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying[.]" Fed. Civ. R. 32(a)(1)(B).

To satisfy the third requirement of Federal Civil Rule 32(a)(1), the Deposition Transcript's use must be "allowed by Rule 32(a)(2) through (8)." Fed. Civ. R. 32(a)(1)(C). As mentioned above, the Bank says the Deposition Transcript may be used under Federal Civil Rule 32(a)(8), which provides:

> A deposition lawfully taken . . . in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties . . . to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

Fed. Civ. R. 32(a)(8).

The requirements that the earlier and later actions involve the "same subject matter" and the "same parties" are "construed liberally in light of the twin goals of fairness and efficiency." *Hub v. Sun Valley Co.*, 682 F.2d 776, 778 (9th Cir. 1982); *see also Fed. Hous. Fin. Agency v. Merrill Lynch & Co.*, No. 11 Civ. 62029(DLC), 2014 WL 798385, at *1 (S.D.N.Y. Feb. 28, 2014) (same). "Consequently, courts have required only a substantial identity of issues . . . and the

presence of an adversary with the same motive to cross-examine the deponent[.]" *Hub*, 682 F.2d at 778 (cleaned up).

Johnson's deposition involved the same parties—the Bank and Johnson. The Bank's motive to cross-examine Johnson has not changed. And the deposition involved the same subject matter as this adversary proceeding—Johnson's alleged fraudulent misrepresentations. Of course, nondischargeability was not before the State Court, but the elements of the Bank's Ohio law fraudulent misrepresentation claim against Johnson "mirror the elements that must be shown in order to prevail under § 523(a)(2)(A)." *Somogye*, 2018 WL 5810447, at *4. There is, at the very least, a substantial identity between the issues addressed in Johnson's deposition and the issues here, which is all the "same subject matter" provision requires. *See Hub*, 682 F.2d at 778.

Because it involves the same subject matter and the same parties as this adversary proceeding, the Deposition Transcript is admissible under Federal Civil Rule 32(a)(8). But there is one caveat: A deposition admissible under that rule may only be used "to the same extent as if taken in the [present] action." That requirement is satisfied if the "use of a deposition taken in the prior action [is] allowed by subparts two through seven of [Federal Civil] Rule 32(a), which delineate the circumstances in which a party may use deposition testimony at trial." *Knickerbocker v. Corinthian Colleges, Inc.*, No. C12-1142JLR, 2013 WL 12414926, at *2 (W.D. Wash. July 10, 2013) (cleaned up). In this case, Johnson's deposition is admissible under Federal Civil Rule 32(a)(3), which provides that "[a]n adverse party may use for any purpose the deposition of a party[.]" For all these reasons, the portions of the Deposition Transcript on which the Bank relies are admissible under Federal Civil Rule 32(a)(8).[3]

[3] Even if the Deposition Transcript were not admissible under Federal Civil Rule 32(a)(8), the Court could still consider it under Federal Civil Rule 56, which allows depositions from prior proceedings to be treated as affidavits and thus considered at summary judgment. *See Tingey v.*

4. The Court May Consider the Exhibits Because They Could be Presented in Admissible Form and Because Johnson Failed to Object.

As stated above, the Bank makes no argument as to the admissibility of the Exhibits attached to Johnson's deposition, apparently assuming the Court may consider them under Federal Civil Rule 32(a)(8). But while that rule plainly applies to depositions, it says nothing about exhibits attached to a deposition. The caselaw addressing whether deposition exhibits may be admitted under that rule is sparse. One court has held (without any discussion) that deposition exhibits are admissible under Federal Civil Rule 32(a) so long as the deposition to which they are attached is admissible. *See Goldberg v. United States*, No. CV 82-3040-CHH, 1984 WL 3130, at *6 (C.D. Cal. Nov. 19, 1984) ("The deposition . . . and attached exhibits . . . were relevant and properly admitted pursuant to Rule 32(a)."), *aff'd*, 789 F.2d 1341 (9th Cir. 1986). As discussed below, it is much clearer that the Court may consider the Exhibits under Federal Civil Rule 56, so the Court will rely on that rule, rather than Rule 32(a), as the basis for considering the Exhibits.

Federal Civil Rule 56 allows the Court, at summary judgment, to consider evidence that is either admissible or "could ultimately be presented in an admissible form." *Lossia*, 895 F.3d at 430. But while courts may consider evidence that could be presented in admissible form, "the nonmoving party may object to the moving party's summary judgment evidence if it '*cannot*' be

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Radionics, 193 F. App'x 747, 765 (10th Cir. 2006) (holding that Federal Civil Rule 32 does not restrict summary-judgment evidence and permitting the consideration of a deposition from another proceeding as if it were an affidavit); *see also* 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2142 & n.19 (3d ed. 2024) ("A deposition is at least as good as an affidavit and should be usable whenever an affidavit would be permissible, even though the conditions of [Federal Civil Rule 32(a)(8)] are not satisfied.").

"[D]eposition testimony can be admitted at summary judgment if (1) the deposition satisfies Rule 56's affidavit requirements and (2) the deposition has been made part of the record in the case before the court." *Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 978 (7th Cir. 2014). Both those conditions are met here. Johnson's testimony was based on his personal knowledge, the facts to which he testified would be admissible at trial, and Johnson is competent to testify as those matters. And the Bank made the Deposition Transcript part of the record by attaching it as an exhibit to the Summary Judgment Motion.

presented in a form that would ultimately be admissible[.]" *Id.* (quoting Fed. Civ. R. 56(c)(2)) (emphasis added). "[O]nce a party objects that material cited . . . cannot be presented in a form that would be admissible in evidence, the burden shifts to the proponent . . . to explain the admissible form that is anticipated[.]" *Wyatt*, 999 F.3d at 423–24 (cleaned up).

The Exhibits, at present, are unauthenticated and thus not admissible.[4] But Johnson did not object that the Exhibits (or the information therein) "'cannot' be presented in a form that would ultimately be admissible[.]" *Lossia*, 895 F.3d at 430 (cleaned up). In fact, Johnson made no objection whatsoever to the Bank's evidence. "Generally, when a party fails to object to evidentiary materials submitted by the opposing party in support of summary judgment, such objections are deemed waived." *Prout v. PRG Real Est. Mgmt., Inc.*, 51 F. Supp. 3d 702, 705 n.2 (E.D. Ky. 2014) (citing *Lauderdale v. Wells Fargo Home Mortg.*, 552 Fed. App'x 566, 572 (6th Cir. 2014)); *see also Wiley*, 20 F.3d at 226 ("If a party fails to object . . . to the . . . materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived[.]").

In short, "[a]bsent an objection, the court may simply consider the proffered evidence." *McCloud v. Rice*, No. 4:20cv4, 2022 WL 18146043, at *3 (E.D. Va. Dec. 21, 2022), *aff'd*, No. 23-1004, 2023 WL 6458848 (4th Cir. Oct. 4, 2023); *see also Jones v. W. Tidewater Reg'l Jail*, 187 F. Supp. 3d 648, 654 (E.D. Va. 2016) ("[B]ecause Defendants have not objected that the [medical

[4] The Court recognizes that exhibits to a deposition can be authenticated by testimony in the deposition itself. *See Flores v. Velocity Express, LLC*, 250 F. Supp. 3d 468, 478 (N.D. Cal. 2017) ("[T]he remainder of Plaintiffs' exhibits are authenticated by foundational testimony in the deposition excerpts. Therefore, the Court considers those exhibits when ruling on this motion."). But while the Deposition Transcript provides several plausible bases for authenticating the Exhibits, it is not the Court's "duty to search through the record to develop a party's claims; the litigant must direct the court to evidence in support of its arguments before the court." *Magnum Towing and Recovery v. City of Toledo*, 287 Fed. App'x 442, 449 (6th Cir. 2008) (cleaned up). In other words, the Court has no intention of making the Bank's evidentiary arguments for it.

records] submitted cannot be presented in a form that would be admissible in evidence, and because the Court perceives no reason why such medical records could not be authenticated if Plaintiff was called upon to do so, the Court could consider their contents undisputed for purposes of the summary judgment motion.") (cleaned up).

Because Johnson failed to object to the Bank's evidence, the Court may consider the Exhibits. And even if Johnson had objected to the Exhibits, the Court sees no reason why they could not be presented in an admissible form. Exhibits 11 (loan-related documents), 18 (the Group's limited liability company agreement), 20 (the commercial loan application), and 21 (a Form W-9 request) would be admissible under the hearsay exception for business records if "accompanied by an affidavit from the custodian of the records to authenticate the records and establish that they were kept in the course of regular business." *Jones*, 187 F. Supp. 3d at 654; *see also* Evid. R. 803(6). Nothing indicates that the Bank would be unable to present the Exhibits in an admissible form, and the Bank never bore the burden of showing that it could do so because Johnson failed to object to their consideration. *See Wyatt*, 999 F.3d at 423–24.

For all these reasons, the Court will consider both the Deposition Transcript and the Exhibits cited by the Bank. But it ultimately does not matter—the evidence offered by the Bank fails to show that it is entitled to summary judgment against Johnson.

E. The Deposition Transcript and Exhibits Do Not Show That the Bank Is Entitled to Summary Judgment.

One of the most powerful forms of relief bankruptcy can provide is the discharge of prepetition debts. Discharging such debts serves a primary policy of the Bankruptcy Code: "to grant a fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (cleaned up). But while receiving a discharge is critical to a debtor's fresh start, "not all debts are dischargeable." *Bartenwerfer v. Buckley*, 598 U.S. 69, 73 (2023). Congress

made certain debts nondischargeable under § 523(a) of the Bankruptcy Code because under certain circumstances, "'debtors' interest in a complete fresh start' yields to 'creditors' interest in recovering full payment of debts.'" *Leonard v. RDLG, LLC (In re Leonard)*, 644 F. App'x 612, 618 (6th Cir. 2016) (quoting *Grogan*, 498 U.S. at 287). Still, "exceptions to discharge in § 523(a) must be narrowly construed," *Bd. of Trs. of the Ohio Carpenters' Pension Fund v. Bucci (In re Bucci)*, 493 F.3d 635, 642 (6th Cir. 2007), "to promote the central purpose of the discharge: relief for the honest but unfortunate debtor," *Meyers v. IRS (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999) (cleaned up).

Among other types of debt, individual debtors may not discharge "any debt . . . for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud[.]" 11 U.S.C. § 523(a)(2)(A). To except a debt from discharge under that statute, the party seeking to bar discharge must prove by a preponderance of the evidence that:

> (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.

Rembert v. AT&T Univ. Card Servs., Inc. (In re Rembert), 141 F.3d 277, 280–81 (6th Cir. 1998) (cleaned up); *see also Fabian v. Goss (In re Goss)*, 605 B.R. 189, 197–98 (Bankr. S.D. Ohio 2019). Here, the Deposition Transcript and Exhibits prove most—but not all—of those elements.

1. Johnson Obtained Money Through a Material Misrepresentation He Knew to Be False.

To satisfy *Rembert*'s first element, the Bank must prove that Johnson (1) obtained money from the Bank and (2) did so through a material misrepresentation he knew to be false or made with gross recklessness as to its truth.

Circuits "have split on the question whether [§ 523(a)(2)(A)] requires that the debtor *obtain* something from the fraud, rather than only causing loss to the victim of the fraud." *Leonard*, 644 F. App'x at 619. In *Leonard*, the Sixth Circuit did not reach that issue because the debtor "clearly obtained a financial benefit from his fraud," and "[e]ven the stricter reading of subsection (a)(2)(A) does not rigidly require plaintiffs to prove the direct transfer of money from a creditor to a debtor." *Id.* Instead, it is sufficient to "show that the debtor . . . indirectly obtained some tangible or intangible financial benefit as a result of his misrepresentation." *Id.*

A debtor indirectly obtains a financial benefit for the purposes of § 523(a)(2)(A) when a company controlled by the debtor receives money from a creditor. *See Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172 (6th Cir. 1996) (holding that "debtor, who controlled and was the president of the recipient of creditor's diverted funds," had "'obtained' money" under § 523(a)(2)(A)); *Vicars v. Freeman (In re Freeman)*, Adv. No. 11-5028, 2013 WL 4447007, at *6 (Bankr. E.D. Tenn. Aug. 16, 2013) ("[A]s found in *Brady*, a debtor who fraudulently induces a loan to a corporation that he controls may be liable for purposes of § 523(a)(2)(A)."); *Ash v. Hahn (In re Hahn)*, No. 11-32001, 2012 WL 392867 (Bankr. N.D. Ohio Feb. 6, 2012) (holding that the debtor-defendant obtained money within the meaning of § 523(a)(2)(A) through a check made payable to a corporation he controlled).

Based on those cases, as well as the Deposition Transcript and Exhibits, there is no question that Johnson indirectly obtained money from the Bank within the meaning of § 523(a)(2)(A). He caused the Bank to extend a $100,000 loan in the name of the Church, Dep. Tr. at 74, and he withdrew the proceeds of that loan, *id.* at 82. Five checks by which Johnson withdrew the loan proceeds were made payable either directly to him or to Mjolnir Development ("Mjolnir"), a real estate development entity owned by the Group. *See id.* at 94–99, 112. Those loan proceeds were

then deposited into Mjolnir's bank account—an account over which Johnson admitted to having sole control. *Id.* at 95–96. In total, Mjolnir received nearly $83,000 in loan proceeds. *See id.* at 94–99; Ex. 11 Parts G–K. Although nothing in the Deposition Transcript or Exhibits establishes where the funds went after being deposited into Mjolnir's account, Johnson admitted that at least one of those withdrawals was a way for him (and another State Court defendant) to be compensated for their work with the Church. Dep. Tr. at 94.

Having established that he obtained money from the Bank, the second issue is whether Johnson did so through a material misrepresentation that, at the time, he (1) knew was false or (2) made with gross recklessness as to its truth. "A misrepresentation is a false statement of fact." *CSC Cap. Corp. v. Kergosien (In re Kergosien)*, No. 12-33246-HDH-7, 2013 WL 6133560, at *3 (Bankr. N.D. Tex. Nov. 21, 2013). Johnson made a misrepresentation by executing loan documents in the name of the Church that identified him as the Church's secretary—a position he never held. Dep. Tr. at 75. And his misrepresentation was material. A misrepresentation is material if it contains "substantial inaccuracies of the type which would generally affect a lender's . . . decision" to loan money. *Lawrence Bank v. Brent (In re Brent)*, 539 B.R. 788, 799 (Bankr. S.D. Ohio 2015). Whether Johnson held an official position with the Church—and was authorized to borrow money on its behalf—was certainly material to the Bank's decision to extend the loan.

Finally, Johnson knew his misrepresentation was false. In his deposition, Johnson claimed that Church officials consented to his holding himself out as its secretary. *See* Dep. Tr. at 76–77. But even if that were true, it would not make his representation that he actually was the Church's secretary any less false. He may have been secretary of the Group, and he may have thought the Group was affiliated with the Church, but he still knew he was not secretary of the Church.

Because the Bank's evidence shows that Johnson obtained money through a material misrepresentation he knew to be false at the time he made it, the Bank has satisfied *Rembert*'s threshold element.

2. Johnson Intended to Deceive the Bank.

The second *Rembert* element requires the Bank to prove that Johnson "intended to deceive" it. *Rembert*, 141 F.3d at 281. "Whether a debtor had the requisite fraudulent intent is a subjective inquiry." *Keeley v. Grider*, 590 F. App'x 557, 560 (6th Cir. 2014). Courts should "consider whether the circumstances, as viewed in the aggregate, present a picture of deceptive conduct by the debtor which indicates an intent to deceive the creditor." *Bernard Lumber Co. v. Patrick (In re Patrick)*, 265 B.R. 913, 916–17 (Bankr. N.D. Ohio 2001). "Because debtors are unlikely to admit they intended to deceive," their deceptive intent "may be inferred from the totality of the circumstances[,] *i.e.*, their actions at the time of and subsequent to the loss." *Liberty Sav. Bank v. McClintic (In re McClintic)*, 383 B.R. 689, 693 (Bankr. S.D. Ohio 2008). But "[i]f there is room for an inference of honest intent, the question of nondischargeability must be resolved in the debtor's favor." *Buckeye Ret. Co. v. Kakde (In re Kakde)*, 382 B.R. 411, 427 (Bankr. S.D. Ohio 2008) (cleaned up).

There is no room for an inference of honest intent here. "An intent to deceive may logically be inferred from a false representation which the debtor knows or should know will induce another to make a loan (or otherwise part with property or services)." *City Loan Bank v. Nechovski (In re Nechovski)*, No. 2-85-01760, 1987 WL 109003, at *3 (Bankr. S.D. Ohio Sept. 2, 1987); *see also Am. Express Travel Related Servs. Co. v. Nahas (In re Nahas)*, 181 B.R. 930, 933 (Bankr. S.D. Ind. 1994) ("An intent to deceive may be inferred from a false representation which the debtor knows or should know will induce another to advance money to the debtor."). Again, Johnson falsely represented that he was the Church's secretary, which he knew or should have known would

induce the Bank to loan money to the Church. From Johnson's highly deceptive conduct, it can be inferred that he intended to deceive the Bank.

3. The Bank Did Not Justifiably Rely on Johnson's Misrepresentation.

The third *Rembert* element requires the Bank to prove that it justifiably relied on Johnson's misrepresentation. *See Rembert*, 141 F.3d at 280. Justifiable reliance is a lower standard than reasonable reliance, and a creditor can be "justified in relying on a representation of fact" even if "he might have ascertained the falsity of the representation had he made an investigation." *Field v. Mans*, 516 U.S. 59, 70 (1995) (cleaned up); *see also Columbiana Cnty Sch. Emp. Cr. Union, Inc. v. Cook (In re Cook)*, No. 05-8034, 2006 WL 908600, at * 4 (B.A.P. 6th Cir. Apr. 3, 2006) ("[R]easonable reliance imposes a duty to investigate, while justifiable reliance does not.") (cleaned up). But even under the justifiable reliance standard, "a duty to investigate can arise when the surrounding circumstances give rise to red flags that merit further investigation." *Colombo Bank v. Sharp (In re Sharp)*, 340 F. App'x 899, 907 (4th Cir. 2009) (cleaned up). In other words, creditors "cannot turn a blind eye where a 'patent' falsity could be determined by a 'cursory examination or investigation.'" *Simply Funding LLC v. Werman (In re Werman)*, No. 22-11618, 2023 WL 4038586, at *4 (Bankr. N.D. Ohio June 15, 2023) (quoting *Field*, 516 U.S. at 71); *see also Brent*, 539 B.R. at 802 (same). As the Supreme Court has explained at length, a creditor cannot ignore red flags, *i.e.*, facts that would call a debtor's representation into question:

> Justifiability is not without some limits . . . . [A] person is required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had [made] a cursory examination or investigation.
>
> . . . .
>
> Similarly, the edition of Prosser's Law of Torts available in [the year the Bankruptcy Code was enacted] . . . states that justifiable reliance is the standard applicable to a victim's conduct in cases of alleged misrepresentation and that "[i]t is only where, under the

> circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." W. Prosser, Law of Torts § 108, p. 718 (4th ed. 1971)[.]

Field, 516 U.S. at 71–72.

As the Prosser treatise quoted by the *Field* Court said, a person's reliance is not justifiable if the true facts should be apparent to one of his knowledge and intelligence from a cursory glance. "Thus, when the circumstances are such that they should warn a creditor that he is being deceived, he cannot justifiably rely on the fraudulent statements without further investigation." *Sharp*, 340 F. App'x at 907. "In other words, if there are any warning signs (*i.e.*, obvious or known falsities[]) either in the documents, in the nature of the transaction, or in the debtor's conduct or statements, the creditor has not justifiably relied on his representation." *Guske v. Guske (In re Guske)*, 243 B.R. 359, 363–64 (B.A.P. 8th Cir. 2000) (cleaned up); *see also Ardizzone v. Scialdone (In re Scialdone)*, 533 B.R. 53, 61 (Bankr. S.D.N.Y. 2015) ("While a plaintiff is entitled to rely on the veracity of financial documents provided by the debtor, a duty to investigate on his own arises once he receives an indication of deception.").

Justifiable reliance "turns on an individual standard of the creditor's own capacity and the knowledge which he has." *Sharp*, 340 F. App'x at 907 (cleaned up). That means "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff and the circumstances of the particular case." *Waring v. Austin (In re Austin)*, 317 B.R. 525, 530 (B.A.P. 8th Cir. 2004), *aff'd*, 177 F. App'x 505 (8th Cir. 2006) (citing *Field*, 516 U.S. at 71); *see also WLP Capital, Inc. v. Tolliver (In re Tolliver)*, No. 20-8021, 2021 WL 6061853, at *17 (B.A.P. 6th Cir. Dec. 20, 2021) ("In considering justifiable reliance, the court may consider the sophistication of the creditor and the parties' past relationship.") (cleaned up); *Lawson v. Conley (In re Conley)*, 482 B.R. 191, 209 (Bankr. S.D. Ohio 2012) (same).

The particular creditor at issue here was a bank. "Where banks have established a history of dealing, involving trust and confidence, they may be justified in relying on that customer's representations." *McClintic*, 383 B.R. at 694. "On the other hand, where there is no history, the bank is sophisticated, the sums are significant, and the lender restricts its inquiry to information provided by the borrower, it is more difficult to establish justifiable reliance." *Id.* (cleaned up); *see also Brent*, 539 B.R. at 802 (quoting *McClintic*).

Here, the Bank's entire argument as to its justifiable reliance is as follows:

> [Johnson] presented substantial documentation to convince [the Bank] to extend a loan to what it believed was the AME Church. [Johnson] presented certifications and resolutions that the [Group] was the financial arm of the AME Church. These documents appear to include AME Church leadership, namely Reverend Thompson as a signatory. [Johnson] submitted loan applications to [the Bank] in the name of the AME Church and produced information about the church including the church's tax identification number. Given the information provided about the church by [Johnson], [the Bank] justifiably relied upon the documents and misrepresentations produced by [Johnson] . . . .

Summ. J. Mot. at 11–12.

For the reasons discussed below, this argument is unpersuasive.

a. There Were Glaring Red Flags in the Documentation Johnson Presented the Bank.

The Bank argues it was justified in relying on the "substantial documentation" Johnson presented to it, but there were obvious red flags in that documentation that should have alerted the Bank to Johnson's deception. First, by "certifications and resolutions," the Bank is apparently referring to the same thing: the "Certification[s] of the Secretary of the [Church]," purportedly signed by Johnson and Reverend Thompson. *See* Dep. Tr. at 218–19 (Exhibit 11, Parts A and B); *see also id.* at 62, 76 (referring to "those resolutions that are there at the beginning of Exhibit 11"). But those certifications, on their face, should have cast doubt on Johnson's authority to borrow

money on behalf of the Church. The certifications (falsely) said Johnson was the Church's secretary, and set forth the duties of that position:

> [A]s the Secretary, my duties to the Church include, but are not limited to, being responsible for keeping and maintaining accurate records of the actions of the Board of Directors/trustees, overseeing the taking of minutes at all Board meetings, sending out meeting announcements and notices as required, distributing copies of minutes and the agenda to Board Members, and assuring that accurate Church records are kept and maintained so the Church maintains its entity status.

Dep. Tr. at 218 (Exhibit 11, Parts A and B).

None of those ostensible duties relate to borrowing money for the Church. And nothing in the certifications indicates that Johnson would have had any authority to do so, even if he were actually the Church's secretary. All of the secretary's duties are clerical or related to recordkeeping. None of those duties include borrowing money on the Church's behalf, and nothing in the certifications indicates that the secretary would have authority to do so. Nor does a corporate secretary have any inherent authority to borrow money on a corporation's behalf—at least not under Ohio law. *See* Ohio Rev. Code Ann. § 1701.64(A) (West 2024) (listing a secretary as a corporate officer); *Vannoy v. Maxine's Enter.'s, Inc.*, No. 89 CA 8, 1990 WL 34248, at *2 (Ohio Ct. App. Mar. 12, 1990) ("[O]fficers and agents of a corporation have no inherent authority to borrow money on behalf of the corporation[.]") (citing *Armstrong v. Chem. Nat'l Bank of New York*, 83 F. 556 (6th Cir. 1897), *aff'd sub nom. Aldrich v. Chem. Nat'l Bank*, 176 U.S. 618 (1900)).

Like any other corporate officer, secretaries can certainly be given authority to borrow money on behalf of a corporation. But nothing in the certifications purported to give Johnson any such authority. Again, none of the ostensible duties set forth in Johnson's certifications involved borrowing money. And while that list of duties was non-exclusive (*i.e.*, the duties "include, but are not limited to" clerical responsibilities), "[i]t is widely accepted that general expressions such

as 'including, but not limited to' that precede a specific list of included items *should not be construed in their widest context*, but apply only to persons or things of the same general kind or class as those specifically mentioned in the list of examples." *Post v. St. Paul Travelers Ins. Co.*, 691 F.3d 500, 520 (3d Cir. 2012) (cleaned up) (emphasis added); *see also Harrington v. Purdue Pharma L. P.*, 144 S. Ct. 2071, 2082 (2024) ("When faced with a catchall phrase . . . , courts do not necessarily afford it the broadest possible construction it can bear. Instead, we generally appreciate that the catchall must be interpreted in light of its surrounding context and read to embrace only objects similar in nature to the specific examples preceding it.") (cleaned up).

Applying for a loan, signing a promissory note, and executing a commercial security agreement are each a far cry from taking minutes of board meetings. And again, nothing in Johnson's documentation indicates that he, as the Church's ostensible secretary, had authority to borrow money on its behalf. He would not have had that authority even if he were the Church's secretary, according to the certifications relied upon by the Bank. Given all this, the red flags raised by Johnson's certifications should have warned the Bank that it was being deceived, especially given the Bank's expertise and sophistication in matters of money lending. Reading the documentation provided by a debtor is perhaps the most "cursory examination" conceivable—and that is all the Bank needed to do to see those red flags. Because the certifications, on their face, called Johnson's authority to borrow money for the Church into question, it was not justifiable for the Bank to take those documents at face value and rely on them without further investigation.

Johnson presented some other documents to the Bank, but they do not justify the Bank's reliance on his representations either. First, the operating agreement of the Group stated that its purpose was to "provide independent consulting services for [the Church]." Dep. Tr. at 246 (Exhibit 18). But nothing in that document proves that the Group has any real affiliation with the

Church. Anyone can form a limited liability company to "provide independent consulting services" for any entity they want, without that entity's knowledge or consent. Further, Johnson apparently knew the Church's taxpayer identification number, which he supplied on the commercial loan application to the Bank and a W-9 form. Dep. Tr. at 81–82. Johnson claims that Church officials gave him that information. But even if that were true, the mere fact that a person knows an entity's taxpayer identification number does not show that person has authority to borrow money for that entity. It might show some relationship with the entity, but even a close relationship is not the same thing as authority to borrow money. A parent might know their child's social security number, or vice versa, but that says nothing about whether the parent or child has any authority to borrow money on the other's behalf.

Yet another document in the record, Part E of Exhibit 11, was not cited or discussed by the Bank—perhaps because it shows the degree to which the Bank buried its head in the sand. Part E of Exhibit 11 is a "Corporate Resolution to Borrow / Grant Collateral." That resolution was not signed or executed by any director of the Church. Under Ohio law, "all of the authority of a corporation shall be exercised by or under the direction of its directors." Ohio Rev. Code § 1701.59(A). And "[a]ll officers, as between themselves and the corporation, shall respectively have such authority and perform such duties as are determined by the directors[.]" Ohio Rev. Code § 1701.64(B)(1). As discussed above, "officers and agents of a corporation have no inherent authority to borrow money on behalf of the corporation," *Vannoy*, 1990 WL 34248, at *2, so it follows that an officer's authority to do so must be "determined by the directors" of the corporation. Yet the resolution supposedly granting Johnson the authority to borrow money for the Church was never signed by a director of the Church—it was signed only by the (purported) officer who sought that authority in the first place. The corporate resolution also states that it was adopted on April

23, 2018, but the Bank presented no evidence showing that the resolution was ever actually adopted by the Church. The documentation stating that Johnson was the Church's secretary says nothing about his authority to borrow money on the Church's behalf, nor does it speak to the adoption of the resolution at Part E of Exhibit 11.

Put another way: The corporate resolution, signed only by Johnson, purports to give him authority to borrow money on behalf of a corporation of which he was not a director. The resolution was ostensibly adopted by the Church's corporate director(s), but there is no evidence in the record showing it was ever actually adopted—other than Johnson's signature saying so. This amounts to Johnson—the officer seeking authority to borrow money for the Church—somehow acquiring that authority through a resolution executed solely by him. If that were not damning enough, the resolution itself cautions against doing precisely what the Bank did here. The note at the end of the resolution states that "[i]f the officer signing this Resolution is designated by the foregoing document as one of the officers authorized to act on the Corporation's behalf, *it is advisable to have this Resolution signed by at least one non-authorized officer of the Corporation*." Dep. Tr. at 230 (emphasis added). It's unclear why the Bank ignored this warning—particularly since it appears to have drafted the resolution itself.[5]

b. While Justifiable Reliance Is a Lenient Standard, It Is Not Without Some Limits.

The red flags discussed above, the Bank's sophistication in matters of money lending, and the lack of any relationship between the parties prior to the loan at issue all show that the Bank

[5] The promissory note, commercial security agreement, and the resolution (Parts C, D, and E of Exhibit 11) all appear to be form documents drafted by the Bank. At the top of the first page of each document, there is a small table containing information on the loan. Beneath that table, there is a note that says: "References in the boxes above are for Lender's use only . . . ." *See* Dep. Tr. at 220, 223, 229. This strongly indicates that all three of those documents are based on forms prepared by the Bank itself—making its failure to heed its own warnings all the more troubling.

was not justified in relying on Johnson's representations. In general, creditors can justifiably rely on a debtor's representations without investigating their truthfulness. But when a creditor receives an indication of deception, it has a duty to investigate further. The Bank received several indications of deception and apparently ignored them. That fails to satisfy even the forgiving standard of justifiable reliance.

To that point, a Sixth Circuit Bankruptcy Appellate Panel case (not discussed by either party) provides a useful contrast to the circumstances in this case. In *Kraus Anderson Cap., Inc. v. Bradley (In re Bradley)*, 507 B.R. 192 (B.A.P. 6th Cir. 2014), a lender brought a § 523(a)(2)(A) action asserting that the debtor "obtained an extension of credit through false representations" regarding its collateral. *Bradley*, 507 B.R. at 197. Analyzing the elements of *Rembert*, the bankruptcy court "found that Lender did not justifiably rely on the misrepresentations" because it "'did little to keep tabs on its collateral,'" even though the lender "knew that Debtor had previously sold equipment without turning over the proceeds[.]" *Id.* at 206 (cleaned up). Given the debtor's past behavior, the bankruptcy court said "it was not reasonable to enter into a [contract with the debtor] without conducting a more thorough investigation." *Id.*

Bradley held that the bankruptcy court's finding was "clearly erroneous" because it "imposed a duty upon the Lender to investigate the truthfulness of Debtor's representations that is not required by law." *Id.* *Field*, the *Bradley* panel said, "specifically rejected the notion that creditors must conduct an investigation to discover fraud." *Id.* (citing *Field*, 516 U.S. at 72).

The lender in *Bradley* relied on (1) "oral statements and written documentation provided by Debtor (whom the Bankruptcy Court found 'quite credible')" and (2) the debtor's "continued false representations as to the status of the collateral in its decision to agree to a forbearance under the Settlement Agreement." *Id.* at 207. The lender also attempted "to determine the location and

status of its collateral . . . through several audits and requests for information from Debtor." *Id.* The debtor, however, gave several reasons that the collateral was "unavailable to view," all of which "appeared legitimate in light of the supporting documentation provided by Debtor . . . ." *Id.* Because of this, the *Bradley* panel found that the lender "did not shut its eyes to an obvious falsehood," making its reliance on the debtor's misrepresentations justifiable. *Id.*

While the lender in *Bradley* may not have "shut its eyes to an obvious falsehood," the Bank did here. Ordinarily, creditors can justifiably rely on a debtor's representations without investigating the truthfulness of those representations. But *Field* made clear that creditors cannot ignore obvious red flags indicating that a debtor's representations may be false. Creditors who are sophisticated enough to spot those red flags cannot simply ignore them and go on their merry way. As discussed above, Johnson's documentation raised obvious red flags indicating that he lacked authority to borrow money on behalf of the Church and may therefore have been attempting to deceive the Bank. Justifiable reliance, again, "is a matter of the qualities and characteristics of the particular plaintiff and the circumstances of the particular case." *Austin*, 317 B.R. at 530. The plaintiff in this case—the Bank—is a sophisticated money lender with the wherewithal to read Johnson's documentation and spot the many red flags/warning signs it contained. Because the Bank ignored red flags that should have immediately alerted a creditor of its sophistication to Johnson's deception, it was not justifiable for the Bank to rely on Johnson's representations.

Bradley is also distinguishable on another key point: Unlike the one-off transaction involved here, the parties in *Bradley* had a history of dealing and a relationship based on trust. *See Bradley*, 507 B.R. at 197–99, 206. Johnson and the Bank, by contrast, had absolutely no history or relationship prior to the loan at issue. It is much easier for creditors to establish justifiable reliance where they have had prior dealings with the debtor. *See, e.g.*, *Sanford Inst. for Sav. v.*

Gallo, 156 F.3d 71, 76 (1st Cir. 1998) (lender was justified in relying on debtor's statements without further investigation because "[p]rior to this incident, [the debtor] was reputed to be an honest, trustworthy, and reliable businessman in the community and was a long-time [] customer [of the lender] who always paid off his previous loans . . . . He had a strong business and somewhat personal relationship with [the bank's president]. . . . *Certainly, the representations of a long-time customer with a reputation for honesty and trustworthiness and an excellent track record of consistent loan repayments was a basis on which to justify reliance*.") (emphasis added). In cases without any history of dealing or relationship based on trust between the parties, courts have been far more reluctant to find justifiable reliance by creditors. *See, e.g.*, *Sharp*, 340 F. App'x at 906–07 (holding that, in finding that the creditor's reliance was not justifiable, it was "[i]mportant[] . . . that the Bank—a sophisticated entity—had no previous relationship of trust or confidence with [the debtor] upon which it could rely"); *Brent*, 539 B.R. at 802 ("The Bank did not show that it had an established transactional history with [the debtor] such that it may be justified in relying solely on their history in order to have confidence that the Bank's requirements were being met.").

At the end of the day, Johnson's information and documentation, on its face, indicated that he had no authority to borrow money for the Church and should have alerted the Bank to his deception. Johnson and the Bank had no history of dealing, and the Bank is a sophisticated party when it comes to the essence of its business—lending money. The Bank also loaned a significant sum of money ($100,000), while apparently restricting its inquiry to the documentation Johnson provided. Given that, and the many red flags in that documentation discussed above, the Court cannot find that the Bank justifiably relied on Johnson's representations. Perhaps the Supreme Court said it best: "Justifiability is not without some limits." *Field*, 516 U.S. at 71.

4. The Bank's Reliance Was the Proximate Cause of Its Loss.

To satisfy the fourth *Rembert* element, the Bank must show that "its reliance was the proximate cause of loss." *Rembert*, 141 F.3d at 281. Creditors establish proximate cause "by showing the conduct was a substantial factor in the loss, or the loss may be reasonably expected to follow." *McClintic*, 383 B.R. at 694; *see also Werman*, 2023 WL 4038586, at *4 (same). The Bank only extended the loan to the Church because Johnson falsely claimed to be the Church's secretary. Johnson's misrepresentation was therefore a substantial factor in the Bank's loss, which may be reasonably expected to follow from the Bank's reliance on that misrepresentation. So, the Bank's reliance on Johnson's misrepresentation, while not shown by the summary judgment record to be justifiable, was the proximate cause of its loss.

V. Conclusion

The State Court Judgment would lack preclusive effect under Ohio law, meaning it lacks preclusive effect in this adversary proceeding. And the Bank's evidence fails to establish that Johnson's judgment debt may not be discharged under § 523(a)(2)(A). The Summary Judgment Motion is therefore **DENIED**.

IT IS SO ORDERED.

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