SO ORDERED.
SIGNED this 11th day of January, 2022

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

EARL WAYNE HOSKINS
MARSHA LYNN HOSKINS
fka MARSHA LYNN MCCONKEY

Debtors

Case No. 3:20-bk-23538-SHB
Chapter 7

WANDA ENGLAND

Plaintiff

v.

EARL WAYNE HOSKINS and
MARSHA LYNN HOSKINS

Defendants

Adv. Proc. No. 3:21-ap-3011-SHB

MEMORANDUM AND ORDER
ON MOTION TO DISMISS COMPLAINT

Plaintiff filed the Complaint for Conversion, Fraud, and Elder Abuse ("Complaint") against Chapter 7 Debtors, commencing this adversary proceeding on February 18, 2021, to ask the Court for a declaratory judgment that certain property is not property of the bankruptcy

estate, for a monetary judgment including compensatory and punitive damages, and for a determination that any judgment entered in her favor against Defendants is nondischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4), or (a)(6). [Doc. 1.] Defendants filed a Motion to Dismiss Complaint ("Dismissal Motion") on August 24, 2021, seeking dismissal under Federal Rule of Civil Procedure 4(m) and Federal Rule of Civil Procedure 12(b)(6),[1] raising several arguments. [Docs. 26, 27.]

I. PROCEDURAL POSTURE

Plaintiff initially attempted to serve the summons and Complaint on Defendants by delivering it to their counsel in the Chapter 7 case. [Doc. 7.] The Court denied Plaintiff's Motion for Default filed on April 1, 2021 [Doc. 8], for numerous procedural reasons, including that default had not been entered by the Clerk as required by Federal Rule of Civil Procedure 55(a) (made applicable here by Federal Rule of Bankruptcy Procedure 7055) and the record did not reflect proper service on Defendants. [Doc. 9.]

Plaintiff's second attempt to serve Defendants was ineffective because the Certificate of Service for the Alias Summons failed to identify who was served with the Alias Summons and Complaint. [Docs. 13.] As a result, the Entry of Default [Doc. 15] was set aside on Defendant's Motion to Set Aside Entry of Default[2] [Docs. 16, 17].

Plaintiff finally accomplished service on Defendants on July 28, 2021, by mailing the Complaint and the Pluries Summons in an Adversary Proceeding to Defendants at their

[1] Rules 4(m) and 12 are applicable in adversary proceedings pursuant to Rules 7004(a) and 7012(b) of the Federal Rules of Bankruptcy Procedure, respectively.

[2] The Motion to Set Aside Entry of Default correctly stated that the Certificate of Service for the Alias Summons failed to identify which defendant was served. [Doc. 16 at ¶ 2.] It also incorrectly stated that Defendants' bankruptcy counsel had not been served, and although the Order – Set Aside Entry of Default [Doc. 17] correctly set aside the Entry of Default, the Order incorrectly states that "Plaintiff is not entitled to entry of default for failure to properly serve the Complaint on counsel for the Debtors as provided by Bankruptcy Rule 7004(g)." Defendants' bankruptcy counsel had been served with the summons and Complaint on February 23, 2021. [Doc. 7.]

residence. [Doc. 24.] Plaintiff also mailed another copy of the Complaint and Pluries Summons to Defendants' bankruptcy counsel on July 28, 2021. [Doc. 24-1.]

Plaintiff initially objected to the Dismissal Motion on September 13, 2021, by addressing only the issue of whether service was timely under Rule 4(m) and filing a Motion of Plaintiff for an Extension of Time to Effectuate Service ("Motion to Extend Time"). [Docs. 28, 29.] On September 22, 2021, the Court granted Plaintiff's Motion to Extend Time, finding that Plaintiff had shown good cause for the failure to effectuate service within 90 days as required by Rule 4(m) and extending the deadline to July 28, 2021, the date that Defendants were finally served with the Complaint and Pluries Summons. [Doc. 31.] The Court then denied the Dismissal Motion in part, to the extent that Defendants sought dismissal under Rule 4(m), and directed Plaintiff to respond to the other arguments raised by Defendants in the Dismissal Motion. [Doc. 31.] Plaintiff responded to Defendants' Rule 12 arguments on October 2, 2021 [Doc. 33], making the Dismissal Motion ripe for adjudication.

II. THE PARTIES' POSITIONS

The Complaint includes the following stated causes of action: "Count I – Injunctive Relief"; "Count II – Determination that Lexus Not Part of Bankruptcy Estate"; "Count II [*sic*] – Conversion/Fraud"; "Count III – Intentional Infliction of Emotional Distress"; "Count IV – Exploitation of an Elderly Person Tenn. Code Ann. § 71-6-120"; and "Count V – Conspiracy." [Doc. 1.] Plaintiff's prayer for relief seeks a restraining order concerning a Lexus vehicle;[3] a declaratory judgment that the Lexus is not an asset of the bankruptcy estate and that Plaintiff owns the vehicle; an order lifting the automatic stay under 11 U.S.C. § 362 and finding that the "permanent stay [is] not applicable" as to "Plaintiff [*sic*] claims as the claims are not within the

[3] The vehicle at issue was a 2016 Lexus RX350 (the "Lexus").

ambit of dischargeable matters"; an award of economic, non-economic, and punitive damages for the conversion/fraud claim; an award of non-economic and punitive damages for intentional infliction of emotional distress; an award of economic, non-economic, and punitive damages for exploitation of an elderly person; a joint-and-several award of compensatory and punitive damages for conspiracy; and an award of attorney's fees under Tennessee Code Annotated § 71-6-120. [Doc. 1 at pp. 11-12.]

Construed as broadly as possible notwithstanding the failure of Defendants' pleadings to fully develop arguments, the Dismissal Motion asserts that dismissal is appropriate under Rule 12(b) for the following reasons:

(1) the request for injunctive relief in Count I is moot because the Court authorized the sale of the Lexus by the Chapter 7 Trustee [Doc. 26 at ¶¶ 1-2; Doc. 27 at pp. 2-3];

(2) the request in Count II for a declaratory judgment that the Lexus is not part of the bankruptcy estate is moot because the Chapter 7 Trustee sold the vehicle with Court approval in the Chapter 7 case [Doc. 26 at ¶¶ 1-3; Doc. 27 at pp. 2-3];

(3) the request in Count II for a declaratory judgment that the Lexus is not part of the bankruptcy estate is inappropriate because the Chapter 7 Trustee is not a party defendant [Doc. 26 at ¶ 4];

(4) Plaintiff lacks standing to assert any claims because any claim that might exist belongs to the Estate of Dollie Hoskins ("Hoskins Estate"), not Plaintiff in her individual capacity or as the sole beneficiary of the Hoskins Estate [Doc. 26 at ¶ 8];

(5) although the complaint cites to § 523(a)(2)(4) and (6), "the prayer in the cause of action simply requests . . . [a] determin[ation] that the Lexus is not property of the estate under 11 U.S.C. § 541" [Doc. 26 at ¶ 4] and "the Complaint does not plead the necessary elements for

each of those statutory exceptions to discharge" [Doc. 27 at p. 3];

(6) the claim for intentional infliction of emotional distress does not fall under any section of the Bankruptcy Code, no bankruptcy statute is cited in support of the claim, and no representative of the Hoskins Estate has asserted any such tort claim [Doc. 26 at ¶ 5];

(7) the claim for exploitation of an elderly person under Tennessee Code Annotated § 71-6-120 is "an unliquidated claim of a State of Tennessee cause of action . . . , which is neither within the Court's jurisdiction . . . nor within the scope of a dischargeability action" under § 523 [Doc. 26 at ¶ 6]; and

(8) the conspiracy claim does not arise under the Bankruptcy Code and is not a non-dischargeability claim [Doc. 26 at ¶ 7].

Plaintiff's supplemental response to Defendants' Rule 12 arguments asserts that Defendants addressed only the Rule 4(m) issue and made only a "bare bone assertion of a general nature and no law supporting the [Dismissal Motion]" as it applies to the state-law claims. [Doc. 33 at p. 3.] Plaintiff argues that Defendants failed to comply with E.D. Tenn. LBR 7007-1 by failing "to set out facts and law in support of the [Dismissal Motion]." [Doc. 33 at p. 4.]

Nonetheless, Plaintiff acknowledges that the request for injunctive relief was mooted by the Chapter 7 Trustee's sale of the Lexus. [Doc. 33 at ¶ 4.a.] Plaintiff next asserts that the request for a determination that the Lexus was not part of the bankruptcy estate is not moot because the proceeds from the sale of the Lexus remain in possession of the Chapter 7 Trustee pending further order of the Court and because funds "obtained to the bankruptcy estate, which are traced to fraud, by nature are not assets of the estate given the exception to discharge." [Doc. 33 at ¶ 4.b, p. 5.] Plaintiff also recites 11 U.S.C. § 523(a)(2), (4), and (6), asserting that this

adversary proceeding was initiated "to obtain a determination of an exception to discharge of events" that included "actual fraud, false representation, fraud while acting in a fiduciary capacity, embezzlement, larceny, or willful and malicious injury by the debtor to another entity or to the property of another entity." [Doc. 33 at p. 4.] Plaintiff also asserts, "The entry of an Order finding certain claims are not discharged is important relief, even if the Court declines to exercise jurisdiction over all state claims." [Doc. 33 at p. 4.] Plaintiff then argues that the bankruptcy court has subject matter jurisdiction to decide core proceedings and that "Defendant[s] ha[ve] waived any objection" under Rule 12(g)(2) because they "failed to object to the issue of dischargeability of issues before this Court," all of which are "core proceedings." [Doc. 33 at p. 5.]

As to the claim for "conversion/fraud," Plaintiff recites the elements of state-law claims for conversion and fraud and argues that the Complaint alleges that Defendant Earl Hoskins defrauded Dollie Hoskins by converting to Defendants' use funds from a joint bank account with Dollie Hoskins. [Doc. 33 at pp. 6-8.] Similarly, Plaintiff recites the elements for the state-law tort claim of intentional infliction of emotional distress, the state statutory claim under section 71-6-120, and the state-law civil conspiracy claim. She then says that, although she alleges that "[all three] state claim[s are] so entwined with the conduct [of Defendants] which is part of the core proceeding that the claim[s are] within the ambit of 28 U.S.C. § 157 (b), [she also] must acknowledge that where a claim would require transmit to the Federal District Court under 28 U.S.C. § 157 (c), that 28 U.S.C. § 1334(c) provides the method for transmit of the non title 11 proceeding to the state court where the action was commenced for timely adjudication, here Knox Circuit Court docket 2-321-19, State of Tennessee."[4] [Doc. 33 at pp. 8-9, 10.]

[4] Although the Court acknowledges this statement is included thrice in Plaintiff's response to the Dismissal Motion [Doc. 33 at pp. 8-9, 9, 10], even if the Court were to overlook the syntax and grammatical errors in the statement, the

Finally, as to Defendants' argument that Plaintiff lacks standing, she argues that she is the sole beneficiary of the Hoskins Estate and that "[s]ubstitution of a deceased party may either be a successor or a representative" under Tennessee Rule of Civil Procedure 25.01. [Doc. 33 at p. 11.] She concludes her response concerning standing by asserting, "Here Plaintiff is an heir." [*Id.*]

III. ANALYSIS

A. Rule 12(b)(6) Standard

Rule 12(b)(6) requires dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief." Fed. R. Civ. P. 8(a).[5] When fraud is alleged, Rule 8 is read in conjunction with Rule 9(b),[6] which requires fraud to be pled with particularity so that the defendant has sufficient notice of the alleged misconduct. *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc*., 501 F.3d 493, 503 (6th Cir. 2007) (requiring that, "at a minimum, [the complaint] must 'allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud'" (quoting *Coffey v. Foamex L.P*., 2 F.3d 157, 161-62 (6th Cir. 1993))).

Court is challenged to make any sense of the legal argument. However, because Plaintiff concludes her response by suggesting that if the Court lacks jurisdiction over any of her claims, then she seeks "transmit to the State of Tennessee Circuit Court . . . , specifically addressing that the claims are an Exception to Discharge and that by transmit the permanent stay is not implicated, the jurisdiction of the State Court is not disturbed by the bankruptcy action as to the remaining claims" [Doc. 33 at p. 11], the Court perceives that Plaintiff improperly asks this Court to transfer to a state court any claims over which this Court lacks jurisdiction.

[5] Rule 8 is applicable in adversary proceedings under Rule 7008 of the Federal Rules of Bankruptcy Procedure.

[6] Rule 9 is applicable in adversary proceedings under Rule 7009 of the Federal Rules of Bankruptcy Procedure.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint need not contain "detailed factual allegations[; however,] a plaintiff's obligation to provide the grounds of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 545.

> [Although] a complaint will survive a motion to dismiss if it contains "either direct or inferential allegations respecting all material elements" necessary for recovery under a viable legal theory, [the] court "need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice."

Philadelphia Indem. Ins. Co. v. Youth Alive, Inc., 732 F.3d 645, 649 (6th Cir. 2013) (quoting *Terry v. Tyson Farms, Inc*., 604 F.3d 272, 275-76 (6th Cir. 2010)).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556-57).

When deciding whether to dismiss under Rule 12(b)(6), the court "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] its allegations as true, and draw[s] all reasonable inferences in favor of the plaintiff." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). The Court also "'consider[s] the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial

notice.'" *Solo v. United Parcel Serv. Co*., 819 F.3d 788, 794 (6th Cir. 2016) (alteration in original) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007)).

B. Standing

"Standing is a fundamental prerequisite for any federal case. At a minimum, '[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Howard v. Tennessee*, 740 F. App'x 837, 842 (6th Cir. 2018) (citations omitted). Defendants argue that because Plaintiff did not file this adversary proceeding in her capacity as the duly appointed representative of the Estate of Dollie Hoskins, she does not possess standing to bring any causes of action against them that would have belonged to the decedent. [Doc. 26 at pp. 4-5.] In her Response, Plaintiff argues that as the sole beneficiary of Ms. Hoskins's estate, she possesses standing under Tennessee law, Tennessee Code Annotated sections 20-5-102, -106, and -107.[7]

As explained by one bankruptcy court,

> The fact that an initiating party may not have the capacity to file a lawsuit does not mean that the Court does not have subject matter jurisdiction to ultimately hear the substantive allegations alleged in the complaint; these are two mutually exclusive concepts. On the one hand, the defense of lack of capacity can be waived if it is not timely and specifically asserted by the party challenging it; *FDIC v. Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994). On the other hand, subject matter jurisdiction cannot be waived by a party, nor can the parties stipulate to a matter being heard in federal court when there is a lack of subject matter jurisdiction. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939). As stated in *Roche v. Country Mutual Insurance Co.*, No. 07-367-GPM, 2007 WL 2003092, at *3 (S.D. Ill. July 6, 2007):
>
> > Turning first to the question of whether, . . . [the] real party in interest. . . must be joined, the Supreme Court of the United States clarified recently that the requirement set out in Rule 17 of the Federal Rules of Civil

[7] Plaintiff also cites to Tennessee Rule of Civil Procedure 25.01; however, adversary proceedings are governed by the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure, to the extent that they are applicable through the Federal Rules of Bankruptcy Procedure. The Tennessee Rules of Civil Procedure are inapplicable.

> Procedure that "[e]very action shall be prosecuted in the name of the real party in interest" generally has no bearing on the scope of federal subject matter jurisdiction, save in a narrow class of cases where there has been collusion to manufacture federal jurisdiction or a nominal party has been joined to defeat such jurisdiction. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 89-92 (2005) (quoting Fed. R. Civ. P. 17(a)) (emphasis omitted).
>
> Therefore, the potential lack of capacity of a party plaintiff to sue does not negate the subject matter jurisdiction of the Court to hear a matter brought pursuant to 11 U.S.C. § 523(a)(4). Therefore, the Defendant's motion to dismiss pursuant to Fed. R. Bankr. P. 7012/Fed. R. Civ. P. 12(b)(1) must be denied.

Valich v. Trutko-Clayton (In re Trutko-Clayton), 384 B.R. 813, 816 (Bankr. N.D. Ind. 2007).

"[A]ny creditor may file a complaint to obtain a determination of the dischargeability of any debt." Fed. R. Bankr. P. 4007(a). The Code's definition of "creditor" includes "['a person [or] estate . . .'] that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor," 11 U.S.C. § 101(10)(A), (15). The term "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" 11 U.S.C. § 101(5)(A).

There is no dispute that Ms. Hoskins's estate possesses the requisite standing to file a nondischargeability action against Defendants.[8]

> Under Tennessee law, a "right of action . . . based on the wrongful act or omission of another" is not abated by a party's death; rather, it passes "to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin; [or] to the personal representative, for the benefit of the person's surviving spouse or next of kin...." Tenn. Code Ann. § 20-5-102; § 20-5-106(a). Tennessee's survival statute further provides that "[t]he action may be instituted by the personal representative of the deceased or by the surviving spouse in the surviving spouse's own name, or, if there is no surviving spouse, by the children of the deceased or by the next of kin." Tenn. Code Ann. § 20-5-107(a).

[8] The personal representative of the Hoskins Estate also is the real party in interest for the action under Tennessee Code Annotated section 71-6-120(b). *See Vaughn v. Dickens-Durham*, No. W2017-00716-COA-R3-CV, 2018 WL 4847231, at *3 (Tenn. Ct. App. Oct. 4, 2018) (dismissing the claim for lack of standing).

Pheap v. City of Knoxville, No. 3:20-CV-00387-DCLC-DCP, 2020 WL 10731256, at *1 (E.D. Tenn. Dec. 9, 2020).

Thus, although the administrator of the Hoskins Estate is the real party in interest to prosecute this action, Federal Rule of Civil Procedure 17(a)(3), made applicable here by Federal Rule of Bankruptcy Procedure 7017, prohibits dismissal of this action because Plaintiff is not the real party in interest: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

To cure the deficiency, the Court will allow time "for the real party in interest [i.e., the duly appointed personal representative of the Hoskins Estate] to ratify, join, or be substituted into th[is] action." Fed. R. Civ. P. 17(a)(3). Notwithstanding that Plaintiff is not the real party in interest, in the interest of judicial economy, assuming that timely substitution of the real party in interest will cure the defect, the Court will address herein the remainder of Defendants' Dismissal Motion.

C. Property of the Bankruptcy Estate

Although Plaintiff admits that her request for injunctive relief was mooted by the Chapter 7 Trustee's sale of the Lexus,[9] she argues that her request in Count II for a determination that the Lexus was not part of the bankruptcy estate is not moot because the proceeds from the sale of the Lexus remain in possession of the Chapter 7 Trustee pending further order of the Court and because funds "obtained to the bankruptcy estate, which are traced to fraud, by nature are not

[9] Based on this acknowledgement, the Court will dismiss Plaintiff's Count I – Injunctive Relief.

assets of the estate given the exception to discharge." [Doc. 33 at ¶ 4.b, p. 5.]

The filing of Debtors' bankruptcy petition created an "estate" consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The Chapter 7 Trustee, Ann Mostoller, became the representative of the bankruptcy estate under 11 U.S.C. § 323(a), which imbued her with the authority to "collect and reduce to money the property of the estate . . . and close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(a)(1). A trustee's rights in property under § 541(a)(1), as a successor to the debtor, generally are no greater than the rights of the debtor on the petition date. *See In re Klinger*, No. 18-33456, 2020 WL 1671555, at *3 (Bankr. N.D. Ohio Apr. 1, 2020) (citing *Demczyk v. Mutual Life Ins. Co. of N.Y. (In re Graham Square, Inc.)*, 126 F.3d 823, 831 (6th Cir. 1997)).

Defendants are correct that the Chapter 7 Trustee is the proper party defendant for Plaintiff's claim that the Lexus (or its proceeds) are not property of the bankruptcy estate. As in *Smith v. Khalif (In re Khalif)*, 308 B.R. 614, 621 (Bankr. N.D. Ga. 2004), "[t]he Court takes judicial notice that the Chapter 7 Trustee has not abandoned any estate property and that Defendant[s] did not exempt in . . . Schedule C [the Lexus]." The *Khalif* court explained:

> [P]roperty in which Defendant had an interest on the petition date, excluding exempted property but including [the property claimed by the plaintiffs], [presumptively] remains property of the estate. Debtor lacks the authority to turn over estate property even if it is still in his possession. The representative of the estate is the Chapter 7 Trustee, who is an indispensable party in an action seeking a turn-over of property of the estate, but Plaintiffs did not name the Trustee as a defendant. Hence, count II fails to state a claim on which relief can be granted.

Id.

In response to Defendants' assertion that the Court must dismiss Plaintiff's request for a determination that the Lexus is not property of the estate because the Chapter 7 Trustee is not a

party to this adversary proceeding, Plaintiff does not address the failure to name the Chapter 7 Trustee as the proper defendant and argues, instead, that because the proceeds from the sale of the Lexus are the product of Defendants' fraud, they are not property of the estate.

Unquestionably, the substituted plaintiff must bring such an action against the Chapter 7 Trustee, not Debtors. Thus, Count II of Plaintiff's Complaint will be dismissed without prejudice to the real party in interest bringing an action against the Chapter 7 Trustee for a determination that the sale proceeds are not property of the estate.[10]

D. Intentional Infliction of Emotional Distress

Plaintiff asks this Court to award compensatory and punitive damages for Defendants' intentional infliction of emotional distress on Ms. Hoskins. "[I]ntentional infliction of emotional distress is a personal injury tort[.]" *Leach v. Taylor*, 124 S.W.3d 87, 91 (Tenn. 2004). "Personal injury matters are not within the bankruptcy court's jurisdiction. *See* 28 U.S.C. § 157(b)(5).

> In enacting 28 U.S.C. § 157, Congress entrusted the district court with the authority to refer matters under Title 11 to the bankruptcy judges in their district. The statute provides a non-exhaustive list of core-proceedings which bankruptcy judges may adjudicate. Not included in that list are personal injury matters. Specifically, the statute provides in relevant part that "personal injury tort claims shall be tried in the district court in which the bankruptcy case is pending or in the district in which the claim arose[.]" 28 U.S.C. § 157(b)(5).

Lentz v. Bureau of Med. Econ. (In re Lentz), 405 B.R. 893, 900 (Bankr. N.D. Ohio 2009); *see*

[10] Although this decision need not address the merits of the underlying claim concerning whether the proceeds of the sale of the Lexus are property of the estate, the Court notes that the Chapter 7 Trustee's strong-arm powers under 11 U.S.C. § 544(a) may defeat an inchoate claim of an equitable interest in property held by the debtor when the bankruptcy case commenced. *See In re Omegas Group, Inc.*, 16 F.3d 1443, 1451 (6th Cir. 1994) ("We think that § 541(d) simply does not permit a claimant . . . to persuade the bankruptcy court to impose the remedy of a constructive trust for alleged fraud committed against it by the debtor . . . and thus to take ahead of all creditors, and indeed, ahead of the trustee. Because a constructive trust . . . is a remedy, it does not exist until a plaintiff obtains a judicial decision finding him to be entitled to a judgment 'impressing' defendant's property or assets with a constructive trust. Therefore, a creditor's claim of entitlement to a constructive trust is not an 'equitable interest' in the debtor's estate existing prepetition, excluded from the estate under § 541(d)."); *see also Kitchen v. Boyd (In re Newpower)*, 233 F.3d 922, 931 (6th Cir. 2000) (holding that property purchased by the debtor with embezzled funds, which might be subject to a constructive trust in favor of the original owner of the stolen funds, became property of the bankruptcy estate even though embezzled money that the debtor still possessed at time of the bankruptcy petition was not property of the estate because legal title to the stolen funds was never transferred to the debtor).

also Papamechail v. Stigliano, Inc. (In re Papamechail), Adv. Proc. No. 17-1133, 2020 WL 812988, at *9 n.5 (Bankr. D. Mass. Feb. 18, 2020).

Because the Court lacks jurisdiction over any claim for intentional infliction of emotional distress, Count III must be dismissed.[11]

E. Private Right of Action under Tennessee Code Annotated Section 71-6-120

Plaintiff also asks the Court to award economic, non-economic, and punitive damages against Defendants under section 71-6-120 of the Tennessee Code, also known as the Tennessee Adult Protection Act ("TAPA"), which provides a private right of action for the exploitation or theft of an elderly person or disabled adult. [Doc. 1 at ¶¶ 55-59.] Defendants argue that a TAPA claim "is an unliquidated claim for violations of a State of Tennessee cause of action . . . , which is neither within the Court's jurisdiction under the Bankruptcy code nor within the scope of a dischargeability action of 11 U.S.C. § 523." [Doc. 26 at ¶ 6.]

This Court's subject matter jurisdiction is limited by 28 U.S.C. § 157, which permits bankruptcy courts to hear "core proceedings" (i.e., cases that "arise under" title 11 or "arise in" cases under title 11) and "non-core proceedings" (i.e., cases that are not core but that are "otherwise related to a case under title 11"). 28 U.S.C. § 157(a), (b), (c)(1).

> A core proceeding is one that "either invokes a substantive right created by federal bankruptcy law or one which could not exist outside of bankruptcy." *In re Lowenbraun*, 453 F.3d 314 (6th Cir. 2006). The term "core proceeding" is not defined, but Section 157(b)(2) provides a non-exhaustive list of "core proceedings." In core proceedings, the bankruptcy court may enter appropriate orders and judgments, subject to review under 28 U.S.C. § 158. 28 U.S.C. § 157(b)(1). Section 157(c)(1) allows a bankruptcy judge to hear a proceeding that is not a core proceeding but is otherwise "related to" a case under title 11. 28 U.S.C. § 157(c)(1). In these cases, in which the matter is deemed "non-core," the bankruptcy judge is required to submit proposed findings of fact and conclusions of law to the district

[11] Plaintiff concludes her response to the Dismissal Motion: "If any claims are considered outside the jurisdiction of this Court then transmit to the State of Tennessee Circuit Court is sought, specifically addressing that the claims are an Exception to Discharge and that by transmit the permanent stay is not implicated." [Doc. 33 at p. 11.] No procedure exists nor does this Court have the power to transfer any claim to a state court. *See supra* n.4.

> court for entry of a final order or judgment. *Id.* If all of the parties consent, the bankruptcy judge may hear and determine the case and enter a final order and judgment subject to review under 28 U.S.C. § 158. 28 U.S.C. § 157(c)(2).

Cawood v. Seterus, Inc. (In re Cawood), 577 B.R. 538, 548 (Bankr. E.D. Tenn. 2017).

TAPA provides a right to recover compensatory damages "for abuse or neglect, sexual abuse or exploitation as defined in this part or for theft of such person's or adult's money or property whether by fraud, deceit, coercion or otherwise." Tenn. Code Ann. § 71-6-120(b). Although the action is created by state statute, federal courts possess jurisdiction to hear such a claim. *See, e.g., Nutt v. Smart*, No. 1:20-cv-00002-CHS, 2021 WL 1015832 at *5 (E.D. Tenn. Feb. 23, 2021) (awarding damages for violation of TAPA); *Frankenfield v. Strong*, No. No. 2:12-00054, 2014 WL 1234709 (M.D. Tenn. Mar. 25, 2014) (awarding damages for violation of TAPA). Further, importantly here, TAPA authorizes an award of attorneys' fees "if it is proven upon clear and convincing evidence that . . . theft resulted from intentional, fraudulent or malicious conduct by the defendant." Tenn. Code Ann. § 71-6-120(d). Additionally, subsection (e) of the statute authorizes an award of punitive damages.

Because the state-law cause of action under TAPA authorizes an award of attorneys' fees that otherwise would not be available to Plaintiff (or the real party in interest) under § 523, the Court finds that the TAPA claim is "related to" the bankruptcy case so that the Court possesses subject matter jurisdiction under 28 U.S.C. § 157(c)(1).[12]

F. Conspiracy

Tennessee recognizes the concept of civil conspiracy.

> As defined by the Tennessee Supreme Court, "[a]n actionable civil conspiracy is a combination of two or more persons who, each having the intent and knowledge of the other's intent, accomplish by concert an unlawful purpose, or accomplish a

[12] If the real party in interest is substituted for Plaintiff and prosecutes this action, and if Defendants do not consent to entry of a final order by this Court on the TAPA claim, then this Court will be required to submit proposed findings of fact and conclusions of law to the district court.

> lawful purpose by unlawful means, which results in damage to the plaintiff." *Trau–Med of Am., Inc., v. Allstate Ins. Co.*, 71 S.W.3d 691, 703 (Tenn. 2002). . . . [T]he fact that a conspiracy exists does not, in and of itself, create a cause of action. A conspiracy is not independently actionable. *Watson's Carpet & Floor Coverings, Inc. v. McCormick*, 247 S.W.3d 169, 186 (Tenn. Ct. App. 2007). "Civil conspiracy requires an underlying predicate tort allegedly committed pursuant to the conspiracy." *Id.* Once the underlying tort is established, the existence of a conspiracy is a means of establishing vicarious liability. *Id.*; *see also Freeman Mgmt. Corp. v. Shurgard Storage Ctrs., LLC*, 461 F. Supp. 2d 629, 642-43 (M.D. Tenn. 2006) ("Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.").

Ray v. Garland (In re Martin), Adv. No. 10-5059, 2011 WL 6130422, at *5 (Bankr. E.D. Tenn. Dec. 8, 2011).

Because the Complaint alleges underlying torts and conspiracy between Defendants to commit those torts, Defendants' request for dismissal of the conspiracy count is denied.

G. Nondischargeability Under 11 U.S.C. § 523(a)

Plaintiff's Complaint references § 523(a) numerous times. [Doc. 1 at p. 1; ¶¶ 2, 37, D.] Specifically, Plaintiff references subsections (a)(2), (a)(4), and (a)(6). [*Id.*]

§ 523(a)(2)(A)

To satisfy the statutory elements of § 523(a)(2)(A), the real party in interest must prove that Defendants obtained money from or belonging to Ms. Hoskins through actual fraud or through material misrepresentations that they knew were false or were made with gross recklessness, that Defendants intended to deceive Ms. Hoskins, that Ms. Hoskins justifiably relied on Defendants' false representations, and that Ms. Hoskins's reliance was the proximate cause of her losses. *See, e.g., Lansden v. Jones (In re Jones)*, 585 B.R. 465, 502 (Bankr. E.D. Tenn. 2018). "In the context of § 523(a)(2)(A), 'false representations and pretense encompass

statements that falsely purport to depict current or past facts." *Almasudi v. Ibrahim (In re Ibrahim)*, 580 B.R. 218, 234 (Bankr. E.D. Tenn. 2017) (citations omitted). "The term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356, 359 (2016).

§ 523(a)(4)

Nondischargeability under § 523(a)(4) requires a showing that the debt was incurred by embezzlement, larceny, or fraud or defalcation while acting in a fiduciary capacity.

Embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). "Both the intent and the actual misappropriation necessary to prove embezzlement may be shown by circumstantial evidence . . . , [and] the Plaintiff must prove fraud in fact, involving moral turpitude or intentional wrong, rather than implied or constructive fraud." *WebMD v. Sedlacek (In re Sedlacek)*, 327 B.R. 872, 880-81 (Bankr. E.D. Tenn. 2005) (citations and quotation marks omitted). "The fraud element may . . . be satisfied by a showing of deceit . . . , but such intent can be inferred from the relevant circumstances." *Powers v. Powers (In re Powers)*, 385 B.R. 173, 179-80 (Bankr. S.D. Ohio 2008). The lawful entrustment of property involved in embezzlement does not require the existence of a fiduciary relationship. *See In re Sedlacek*, 327 B.R. at 880.

Larceny is the fraudulent misappropriation of funds that differs from embezzlement because possession of the property was never lawful. *See First Nat'l Bank v. Simerlein (In re Simerlein)*, 497 B.R. 525, 537 (Bankr. E.D. Tenn. 2013). Fraud or defalcation while acting in a fiduciary capacity encompasses embezzlement, as well as the failure to properly account for any

funds but requires a plaintiff to prove "(1) a pre-existing fiduciary relationship; (2) breach of that relationship; and (3) resulting loss." *Patel v. Shamrock Floorcovering Servs., Inc. (In re Patel)*, 565 F.3d 963, 968 (6th Cir. 2009). In the Sixth Circuit, that fiduciary relationship exists only in "those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." *R.E. Am., Inc. v. Garver (In re Garver)*, 116 F.3d 176, 180 (6th Cir. 1997).

§ 523(a)(6)

Nondischargeability under § 523(a)(6) "for willful and malicious injury by the debtor to another entity or to the property of another entity" requires proof that the injury is both willful and malicious. *MarketGraphics Rsch. Grp., Inc. v. Berge (In re Berge)*, 953 F.3d 907, 914, 916 (6th Cir. 2020) (holding that courts "must analyze independently whether a debtor has willfully, and also maliciously, injured the creditor before rendering a debt nondischargeable in accordance with § 523(a)(6)."). Proof of willfulness requires proof that Defendants actually intended to cause an injury to Ms. Hoskins, i.e., the existence of "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury," *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998), which is measured by the subjective standard of whether they either desired to cause injury or believed with substantial certainty that injury would occur, with intent "inferred from the circumstances of the injury." *In re Berge*, 953 F.3d at 915 (citing *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999)). Maliciousness is also a requirement – that Defendants acted "in conscious disregard of [their] duties or without just cause or excuse." *Id*. (quoting *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986)). "Maliciousness may be proved by a showing that "(1) the [defendant] has committed a wrongful act, (2) the [defendant] undertook the act intentionally, (3) the act necessarily causes injury, and (4) there is no just cause

or excuse for the action[,]" *R & L Pricecorp LLC v. Hall (In re Hall)*, Adv. No. 12-3026, 2013 WL 1739658, at *3 (Bankr. E.D. Tenn. Apr. 23, 2013) (citations omitted); however, mere negligence or recklessness are insufficient to except a debt from discharge under § 523(a)(6). *Cash Am. Fin. Servs. v. Fox (In re Fox)*, 370 B.R. 104, 119 (B.A.P. 6th Cir. 2007).

Application of Rule 12(b)(6)

Plaintiff's Complaint alleges that Defendants – Dollie Hoskins's stepson and his spouse – withdrew and converted $162,333.30[13] through a series of withdrawals between February 28 and August 14, 2019, from a "members managed fund" with Knoxville TVA Employees Credit Union (the "MMF Account") that was owned by Ms. Hoskins but on which Defendant Earl Hoskins was a joint owner "to ease division of her estate upon her demise." [Doc. 1 at ¶¶ 7, 16, 21.] Ms. Hoskins, however, did not authorize Defendant Earl Hoskins to withdraw from the MMF Account. [*Id.* at ¶ 8.] The total of $162,333,30 included a $64,933.30 draft payable to Lexus of Knoxville for the purchase of the Lexus by Defendants jointly. [*Id.* at ¶¶ 19-20.]

Plaintiff also alleges that Defendant Earl Hoskins misappropriated funds from Ms. Hoskins's checking account at the Knoxville TVA Employees Credit Union (the "Checking Account"). Specifically, Plaintiff asserts that although Defendant Earl Hoskins assisted Ms. Hoskins with paying bills from the Checking Account, she signed all of the checks and kept her check book in a locked location. [*Id.* at ¶ 9.] Plaintiff alleges that Defendant Earl Hoskins admitted in state-court discovery[14] that, without the permission of Dollie Hoskins, from December 19, 2017, to November 12, 2018, he wrote checks to himself totaling $12,900.00,

[13] This amount is referenced in paragraph 21 of the Complaint; however, it does not equal the $162,081.95 amount derived from subtracting the $792.36 ending balance as of August 14, 2019, from the beginning balance of $162,874.31 as of February 28, 2019, reflected in paragraph 16 of the Complaint.

[14] The discovery was in the state-court case captioned *Dollie D. Hoskins v. Earl Wayne Hoskins, and Marsha McConkey Hoskins aka Marsha L. McConkey*, case no. 2-321-19, filed in the Knox County Circuit Court ("State-Court Case").

forging Ms. Hoskins's signature as payor, and deposited the funds into Defendants' joint account at ORNL Federal Credit Union. [*Id.* at ¶ 25.]

Based on these allegations of fact, Plaintiff's Complaint seeks issuance of a restraining order to prevent disposition of the Lexus; a determination that the Lexus is not property of the bankruptcy estate and the surrender of the Lexus by Defendants to Plaintiff; the lifting of the automatic stay and a determination that "the permanent stay [*sic*] not applicable . . . as to Plaintiff [*sic*] claims as the claims are not within the ambit of dischargeable matters" under 11 U.S.C. § 523(a)(2), (4), and (6); and an award of actual damages in the amount of $175,233.30, non-economic damages of $250,000.00, and conspiracy damages in the amount of $150,000.00, plus punitive damages of $250,000.00 and attorneys' fees pursuant to Tennessee Code Annotated § 71-6-120. [*Id.* at p. 12.]

The rather inartful organization of Plaintiff's Complaint does not change the Rule 12(b)(6) standard, which requires construction in the light most favorable to Plaintiff. Assuming, as the Court must, the truth of the factual allegations in the Complaint that Defendant Earl Hoskins withdrew more than $162,000.00 from Ms. Hoskins's account without her permission, including $64,933.30 for the purchase of the Lexus titled jointly in Defendants, plus the unauthorized drafts by Defendant Earl Hoskins on Ms. Hoskins's checking account totaling $12,900.00, the Court concludes that the Complaint complies with the specificity requirements of Rule 9, the purpose of which is to put defendants on notice of the claims against them so that they can defend against them. Therefore, assuming substitution of the real party in interest, the Complaint states a claim on which relief may be granted for a judgment against Defendants and a determination of nondischargeability under § 523(a)(2)(A), (a)(4), and/or (a)(6).

IV. ORDER

1. No later than February 11, 2022, the real party in interest must "ratify, join, or be substituted into th[is] action under Rule 17(a)(3). Failure to timely cure the defect under Rule 17 will result in dismissal of this adversary proceeding without further notice or hearing.

2. Because the Lexus has been sold, to the extent the Dismissal Motion seeks dismissal of Plaintiff's requested injunctive relief in Count I – Injunctive Relief, which is moot, the Dismissal Motion is GRANTED in part. Count I – Injunctive Relief is DISMISSED.

3. Because the Chapter 7 Trustee is not a party-defendant to this proceeding, to the extent the Dismissal Motion seeks dismissal of the claim for a determination that the Lexus (or its proceeds after the Chapter 7 Trustee's sale of the Lexus) was not property of the bankruptcy estate, the Dismissal Motion is GRANTED in part. Count II – Determination that Lexus Not Part of Bankruptcy Estate is DISMISSED.

4. Because the Court lacks subject matter jurisdiction over personal injury matters, to the extent the Dismissal Motion seeks dismissal of the claim for intentional infliction of emotional distress, the Dismissal Motion is GRANTED in part. Count III – Intentional Infliction of Emotional Distress is DISMISSED.

5. Because Plaintiff has alleged facts that, if true, state a claim on which relief may be granted as to the remaining counts for conversion/fraud, exploitation of an elderly person under Tennessee Code Annotated section 71-6-120, and conspiracy such that the Court could make a determination of nondischargeability under 11 U.S.C. § 523(a)(2)(A), (a)(4), and/or (a)(6), the Dismissal Motion is DENIED as to Count II – Conversion/Fraud, Count IV – Exploitation of an Elderly Person Tenn. Code Ann. § 71-6-120, and Count V – Conspiracy.

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