UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	CHAPTER	7
DAVID JOHN UVA, DEBTOR.	CASE No.	14-31656 (JAM)
NEW COUNTRY MOTOR CARS OF GREENWICH, INC., PLAINTIFF,	ADV. PRO. No.	14-03038 (JAM)
v. DAVID JOHN UVA, DEFENDANT.	ECF Nos.:	1, 9, 18, 19, 24

APPEARANCES

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MEMORANDUM OF DECISION ON MOTION TO DISMISS AND MOTION TO AMEND COMPLAINT

I. INTRODUCTION

On December 1, 2014, New Country Motor Cars of Greenwich, Inc. ("New Country"), commenced this adversary proceeding by filing a Complaint to Determine Non-Dischargeability of Debt (the "Complaint"), allegedly owed to it by the Debtor/Defendant David John Uva

("Uva"). The Complaint contains seven (7) counts[1] and demands a money judgment of one million dollars ($1,000,000.00).

Count One alleges that New Country's debt should be deemed nondischargeable under 11 U.S.C. § 523(a)(2)(A). Count Two alleges that New Country's debt should be deemed nondischargeable under 11 U.S.C. § 523(a)(2)(A), based on Uva's alleged violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). Count Three alleges that New Country's debt should be deemed nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and (a)(4), due to Uva's alleged breach of a fiduciary duty. Counts Four and Five allege that New Country's debt should be deemed nondischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6), due to Uva's alleged common law conversion and statutory theft under Conn. Gen. Stat. § 52-564.

On January 23, 2015, Uva filed a Motion to Dismiss the Complaint (the "Motion to Dismiss"). On February 17, 2015, New Country filed an Objection to the Motion to Dismiss (the "Objection to Motion to Dismiss"), and a Motion to Amend the Complaint (the "Motion to Amend"). On February 27, 2015, Uva filed a Reply to the Objection to Motion to Dismiss (the "Reply"). A hearing on the Motion to Dismiss, the Objection to Motion to Dismiss, the Motion to Amend, and the Reply was held on May 6, 2015.

As discussed below, the Motion to Dismiss is **DENIED** and the Motion to Amend is **GRANTED**.

II. STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Bankr. P. 7012(b), a motion to dismiss is decided by "construing the complaint liberally, accepting all factual allegations in the complaint

[1] In the Objection to Motion to Dismiss, New Country states that "it does not intend on pursuing [the RICO] claim at this time." Furthermore, at a hearing on May 6, 2015, New Country orally withdrew Counts Six and Seven of the Complaint. Therefore, any assertions in the Motion to Dismiss regarding Counts Six and Seven do not need to be addressed.

as true, and drawing all reasonable inferences in the plaintiff's favor." *Gibbons v. Malone,* 703 F.3d 595, 599 (2d Cir. 2013) (quoting *Chase Grp. Alliance LLC v. City of N.Y. Dep't of Fin.*, 620 F.3d 146, 150 (2d Cir. 2010) (internal quotation marks omitted)). Fed. R. Civ. P. 12(b)(6) is designed "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) (quoting *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc.,* 748 F.2d 774, 779 (2d Cir.1984)).

To survive a motion to dismiss, a complaint must contain sufficient factual information that is plausible on its face to state a claim upon which relief can be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937 (2009). A court accepts all of the information contained in the complaint as true for purposes of a motion to dismiss. *Id.* However, as set forth in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), "[f]actual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555.

The plausibility standard set forth in *Twombly* and *Iqbal* obligates a plaintiff to "provide the grounds of his entitlement to relief" through more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly,* 550 U.S. at 555 (quotation marks omitted). Plausibility at the complaint stage is distinct from probability, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the claims] is improbable, and...recovery is very remote and unlikely." *Id.* at 556 (quotation marks omitted).

III. DISCUSSION

A. First ground in support of Motion to Dismiss: misnumbering of paragraphs in the Complaint.

Uva asserts that the entire Complaint should be dismissed due to New Country's failure to correctly number the paragraphs in the Complaint. In response, New Country asserts

that the misnumbered paragraphs are a scrivener's error and easily corrected pursuant to Fed. R. Civ. P. 15(a)(2). New Country's failure to correctly number the paragraphs in the Complaint is not a sufficient basis to grant the Motion to Dismiss.

The Second Circuit case of *Phillips v. Girdich* addressed dismissal of a complaint that failed to comply with the Federal Rules of Civil Procedure by not sequentially paginating the complaint and not setting forth claims into numbered paragraphs. 408 F.3d 124, 128 (2d Cir. 2005). The Court of Appeals stated, "[a]t base, the Rules command us never to exalt form over substance." *Id.* The Second Circuit emphasized its willingness to excuse "technical pleading irregularities as long as they neither undermine the purpose of notice pleading nor prejudice the adverse party." *Id.* In reaching its conclusion, the Court of Appeals found that "where the absence of numbering or succinct paragraphs does not interfere with one's ability to understand the claims or otherwise prejudice the adverse party, the pleading should be accepted." *Id.*

The Complaint complies with the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure. While the numbering of the paragraphs in the Complaint is not correct, the Complaint contains separate paragraphs with concise allegations. The pleading form does not interfere with Uva's ability to understand New Country's claims, it does not hinder Uva's ability to coherently respond to the Complaint, and it does not otherwise prejudice Uva. *Phillips,* 408 F.3d at 128. Therefore, the first ground in the Motion to Dismiss is denied and New Country is given leave to amend the Complaint to properly number the paragraphs.

B. Second ground in support of Motion to Dismiss: Count One lacks specificity in pleading fraud under Section 523(a)(2)(A).

Uva asserts that Count One should be dismissed for failure to state a claim for fraud with sufficient particularity. Because Count One asserts a cause of action under Section 523(a)(2)(A), Uva argues that New Country must plead fraud with particularity as required by

Fed. R. Civ. P. 9 and Fed. R. Bankr. P. 7009. Uva claims that the fraud alleged in Count One lacks specificity because it simply states that Uva was "selling cars to Exporters and failing to inform the Plaintiff about it, all in violation of the Plaintiff's company policy." Motion to Dismiss at 6.

Uva cites *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993), in support of his argument that fraud must be pled with particularity. In order to plead fraud with particularity, *Mills* held that a complaint must contain the following allegations: (1) the statements alleged to be fraudulent; (2) the identity of the speaker; (3) where and when the statements were made; and (4) an explanation of why the statements were fraudulent.

A review of Count One establishes that it complies with the pleading requirements of Fed. R. Civ. P. 9(b) and Fed. R. Bankr. P. 7009. The four required elements for pleading fraud with particularity in *Mills* are alleged in Count One. *See Mills*, 12 F.3d at 1175. Under *Mills*, and several other Second Circuit cases that cite to *Mills,* including *Rombach v. Chang,* 355 F.3d 164, 170 (2d Cir. 2004), a complaint must first allege that the statements at issue are fraudulent. New Country alleges that the statements at issue are the fraudulent statements of Uva contained in the Bills of Sale. New Country also alleges that the statements in the Bills of Sale are fraudulent because the automobiles were ultimately going to be sold to export buyers through MGD, LLC ("MGD"), Uva's company. Complaint at 3, ¶8 and ¶17. Count One further alleges that Uva knew at the time he prepared the Bills of Sale that the statements contained in them were false because the Bills of Sale did not disclose that the automobiles sold to MGD were ultimately intended to be sold to export buyers. Complaint at 5, ¶¶18-21.

Mills also requires that a complaint identify the "speaker" of the fraudulent statements. New Country alleges that Uva was the "speaker" of fraud, because he personally

completed the Bills of Sale for the automobiles sold to MGD. Complaint at 3-4, ¶11. *Mills* further requires that a complaint contain allegations of where and when the fraudulent statements were made. New Country alleges that Uva made the fraudulent statements on the Bills of Sale from March 9, 2009, when Uva created MGD, to April 2, 2012, when Uva resigned from New Country. Complaint at 3, ¶8 and ¶13. Finally, Mills requires that a complaint allege why the statements were fraudulent. Paragraphs 21 through 24 allege that Uva's statements were fraudulent because he failed to disclose that the automobiles were ultimately being sold to export buyers and concealed his involvement with MGD on the Bills of Sale. Complaint at 5, ¶¶21-24.

Therefore, Count One of the Complaint complies with the requirement of pleading fraud with particularity under Fed. R. Civ. P. 9(b) and Fed. R. Bankr. P. 7009. Viewing the facts as alleged in the light most favorable to New Country, Count One of the Complaint states a claim upon which relief can be granted under Section 523(a)(2)(A).

C. Third ground in support of Motion to Dismiss: failure to state a claim and/or lack of jurisdiction over relief sought in Counts Two, Four, and Five.

Uva asserts that Counts Two, Four, and Five of the Complaint should be dismissed for failure to state a claim and/or for lack of jurisdiction. Uva first argues that New Country has attempted to confer jurisdiction on this Court by "bootstrapping" state law causes of action to nondischargeability claims. In support of the "bootstrapping" argument, Uva asserts that New Country is attempting to "conflate the alleged dischargeability of a debt pursuant to the very specific categories of debt in Sec. 523 with causes of action." Motion to Dismiss at 7. Uva then cites to case law involving collateral estoppel principles and state court judgments, both of which do not apply in this case. New Country's claims have not been tried in state court and it is not seeking to have this Court apply collateral estoppel in this adversary proceeding. Uva's argument

that Counts Two, Four, and Five fail to state a claim upon which relief can be granted by "bootstrapping" state law causes of action to nondischargeability claims is not persuasive.

Uva next asserts that this Court does not have jurisdiction over the state law claims because they are not core proceedings and are not matters as to which this Court can enter a final judgment. In support of this argument, Uva cites to *Stern v. Marshall*, 564 U.S. ___, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). However, after the Motion to Dismiss was filed, the United States Supreme Court issued its opinion in the case of *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015). In *Wellness*, the Supreme Court held that Article III of the Constitution allows bankruptcy judges to adjudicate and enter final judgment on *Stern* claims with the consent of the parties. *Id.* at 1939.

Assuming for the moment that Counts Two, Four, and Five are *Stern* claims, prior to *Wellness*, the issue of trying the state law claims in state court before trying the nondischargeability claims in this Court was discussed at a Pre-Trial Conference held on March 4, 2015. At a subsequent Pre-Trial Conference held on May 6, 2015, the parties agreed to have the claims remain in this Court, subject to adjudication by this Court. Under *Wellness*, Article III of the Constitution is not violated when the parties knowingly and voluntarily consent to adjudication of claims by a bankruptcy judge. *Id.* at 1939.

Finally, after the Motion to Dismiss was filed and before *Wellness* was decided, this Court issued a decision in the case of *3N Int'l v. Carrano (In re Carrano)*, 530 B.R. 540 (Bankr. D. Conn. 2015). *Carrano* involved state law claims of statutory theft, conversion, and CUTPA, and the application of the state law causes of action to nondischargeability claims. In *Carrano*, this Court held that state law causes of action were properly before the Court because they were core proceedings. In so holding, this Court agreed that "'the issues of liability. . . and

dischargeability are so intertwined that. . . a separation of issues in the context of Section 523(a)(2), (4), and (6) of the Bankruptcy Code' is not feasible." *In re Carrano*, 530 B.R. at 547 (quoting *Trinity Christian Ctr. of Santa Ana, Inc. v. Koper (In re Koper)*, 516 B.R. 707, 719, 721 (Bankr. E.D.N.Y.2014)). Uva's lack of jurisdiction argument is not compelling because the claims are either: (i) core proceedings; or (ii) if *Stern* claims, the parties have consented to the adjudication of the claims by this Court. Under *Wellness* and *Stern*, this Court has both the constitutional and statutory authority to enter a final judgment on all counts of the Complaint. Therefore, Counts Two, Four, and Five state a claim upon which relief can be granted.

D. Fourth ground in support of Motion to Dismiss: Count Two fails to sufficiently allege a CUTPA violation and CUTPA does not apply to an employer-employee relationship.

Uva asserts that even if a CUTPA claim can be the basis of a nondischargeability claim, Count Two fails to sufficiently allege a CUTPA violation with particularity. Uva further argues CUTPA does not apply to claims arising out of an employer-employee relationship.

i. Pleading with particularity requirements under CUTPA

Uva asserts that "the CUTPA claim incorporates and relies upon the same factual averments pled in support of the fraud claim." Because Uva asserts the fraud claims were not pled with particularity, he also asserts that the CUTPA claim was not pled with particularity. Motion to Dismiss at 12. Although the Connecticut Supreme Court has held that there is no heightened pleading requirement for a CUTPA claim in a state court action, *Macomber v. Travelers Prop. & Cas. Corp.*, 261 Conn. 620, 644, 804 A.2d 180, 196 (2002), Uva correctly argues that the United States District Court for the District of Connecticut has affirmed that the heightened pleading requirements of Fed. R. Civ. P. 9(b) apply to CUTPA claims based on fraud brought in federal court. *Tatum v. Oberg*, 650 F. Supp. 2d 185, 195 (D. Conn. 2009); *see also*

Lentini v. Fid. Nat. Title Ins. Co. of New York, 479 F. Supp. 2d 292, 298 n. 2 (D. Conn. 2007), *Aviamax Aviation Ltd. v. Bombardier Aerospace Corp.*, No. 3:08-CV-1958(CFD), 2010 WL 1882316, at *9 (D. Conn. May 10, 2010). As previously explained, to plead fraud in accordance with Fed. R. Civ. P. 9(b), the complaint must provide: (1) the statements alleged to be fraudulent, (2) the identity of the speaker, (3) where and when the statements were made, and (4) an explanation of why the statements were fraudulent. *Rombach v. Chang,* 355 F.3d 164, 170 (2d Cir. 2004) (quoting *Mills*, 12 F.3d at 1175).

As outlined in Section III, Part B, *supra*, the Complaint alleges facts to satisfy the particularity pleading requirements for fraud. Such facts apply to Count Two of the Complaint, which is a CUTPA claim based on fraud, and need not be reiterated here. Therefore, Count Two contains allegations alleged with sufficient particularity under CUTPA that state a claim upon which relief can be granted.

ii. The Employer-Employee Relationship under CUTPA

Uva also asserts that the CUTPA cause of action must fail because CUTPA does not apply to an employer-employee relationship. Motion to Dismiss at 12-13. In response, New Country alleges that Uva's "efforts to defraud New Country and improperly compete with it falls outside the scope of New Country's employment relationship with Uva." Objection to Motion to Dismiss at 12. In support of this claim, New Country cites to the case of *Ostrowski v. Avery*, 243 Conn. 355, 379 (1997). *Ostrowski* held that "[a]lthough purely intracorporate conflicts do not constitute CUTPA violations, actions outside the scope of the employment relationship designed 'to usurp the business and clientele of one corporation in favor of another . . . fit squarely within the provenance of CUTPA.'" *Ostrowski*, 243 Conn. at 379 (quoting *Fink v. Golenbock*, 238 Conn. 183, 212, 680 A.2d 1243 (1996)). New Country alleges

that Uva created MGD as a means to sell the automobiles to export buyers and allow MGD, and therefore Uva, to retain profits from those sales. Complaint at 3, ¶¶7-11. Such facts as alleged state a claim upon which relief can be granted under CUTPA.

Viewed in the light most favorable to New Country, the CUTPA cause of action in Count Two is pled with particularity and contains sufficient allegations that Uva's actions were outside the scope of his employment relationship with New Country. Therefore, Count Two states a claim upon which relief can be granted.

E. Fifth ground in support of Motion to Dismiss: Count Three fails to allege that Uva owed a fiduciary duty to New Country under Sections 523(a)(2)(A) and 523(a)(4).

Uva asserts Count Three should be dismissed because it does not allege the existence of a technical or express trust resulting in a fiduciary duty. New Country responds to Uva's claim by asserting that an employee acts in a fiduciary capacity if that employee occupies a position of trust within the scope of his employment, regardless of whether there is a technical or express trust.

i. Breach of Fiduciary Duty Under Connecticut Law

Even in the absence of a technical or express trust, the Connecticut Supreme Court has broadly stated that "[a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other." *Falls Church Grp., Ltd. v. Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 108-09, 912 A.2d 1019, 1034-35 (2007). The Court acknowledged in *Falls Church* that it has not defined a fiduciary relationship "in precise detail and in such a manner as to exclude new situations, choosing

instead to leave the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other." *Id.* at 108.

In addition, it is a well-settled equitable rule that any one acting in a fiduciary capacity "shall not be permitted to make use of that relation to benefit his own personal interest." *State v. Culhane*, 78 Conn. 622, 638, 63 A. 636 (1906); *see Murphy v. Wakelee*, 247 Conn. 396, 721 A.2d 1181 (1998). The rule is strict in its requirements and extends to all transactions where the individual's personal interests may be brought into conflict with his acts in the fiduciary capacity, regardless of whether there was fraud or good intentions. *Id.* In *Culhane*, the court emphasized that the rule to uphold one's fiduciary duty applied "alike to agents, partners, guardians, executors and administrators." *Id.*

The Complaint alleges that because of his responsibilities as a sales representative and manager, Uva owed a fiduciary duty to New Country to sell New Country's automobiles. New Country further alleges that Uva's superior knowledge as a sales representative and manager enabled him to learn New Country's business, identify opportunities to profit, and form a company that could usurp profits from New Country. Finally, New Country alleges that its written policies imposed a duty upon Uva to ensure that the automobiles: (i) may not be sold to any individual who will export the automobile; (ii) may not be sold to any individual who the New Country sales staff suspects will export the automobile; and (iii) may only be sold to an ultimate consumer. Complaint at 2, ¶¶6-9. Therefore, Count Three alleges a breach of fiduciary duty under Connecticut law and states a claim upon which relief can be granted.

ii. Breach of Fiduciary Duty Under Section 523(a)(2)(A)

New Country argues that because Uva owes a fiduciary duty to New Country and breached this duty, New Country's debt should be deemed nondischargeable under Section 523(a)(2)(A). In order to survive a motion to dismiss under a Section 523(a)(2)(A) claim, a plaintiff must "generally plead the requisite intent of a fraud claim, [and provide] the circumstances of the alleged fraud be pled with particularity and assert facts that give rise to a strong inference of fraudulent intent." *Master-Helco, Inc. v. Picard (In re Picard),* 339 B.R. 542, 551 (Bankr. D. Conn. 2006) (quoting *Cmty. Mem'l Hosp. v. Gordon (In re Gordon),* 231 B.R. 459, 466 (Bankr. D. Conn. 1999)). A plaintiff is not required to prove the elements of fraud in a complaint at the motion to dismiss stage, but only needs to provide a factual background and circumstances from which a fraudulent intent may be inferred. *In re Gordon,* 231 B.R. at 466.

The Complaint alleges that Uva, acting in his fiduciary capacity on behalf of New Country, made representations in the Bills of Sale in order to sell the automobiles to export buyers. Complaint at 7, ¶35. New Country further alleges that Uva knew the information on the Bills of Sale was false at the time he completed them because he knew the automobiles were ultimately going to be sold to an export buyer. Complaint at 7, ¶35. New Country also alleges that Uva intended to deceive New Country by ultimately facilitating the sale of the automobiles to export buyers. Complaint at 5, ¶¶21-24; at 7, ¶35. Furthermore, New Country alleges that Uva deceived New Country by concealing the fact that he created MGD so that New Country would not suspect he was personally profiting from the sale of the automobiles. Complaint at 7, ¶35.

In addition, New Country alleges that it relied on Uva's representations on the completed Bills of Sale that the automobiles were being sold to MGD and not to export

buyers. Complaint at 7, ¶35. New Country also alleges that it relied on Uva's signed acknowledgement of New Country's policies to ensure that the automobiles: (i) may not be sold to any individual who will export the automobile; (ii) may not be sold to any individual who the New Country sales staff suspects will export the automobile; and (iii) may only be sold to an ultimate consumer. Complaint at 2, ¶¶6-9. New Country alleges that as a result of Uva's false representations on the Bills of Sale, New Country was assessed penalties and charge backs by the United States Distributor of Audi Automobiles and Audi of America (collectively "Audi"), due to the violation of Audi's policies. Complaint at 2-3, 8. For the reasons set forth above, Count Three contains allegations with sufficient particularity to state a claim that New Country's debt was obtained by false pretenses, a false representation, or actual fraud under Section 523(a)(2)(A).

iii. Breach of Fiduciary Duty Under Section 523(a)(4)

New Country also alleges that its debt should be deemed nondischargeable under Section 523(a)(4) due to Uva's alleged gross misconduct while acting in a fiduciary capacity. Complaint at 6-8, ¶¶ 33-37. In order to sustain a claim of fiduciary defalcation under Section 523(a)(4), New Country must allege the existence of a fiduciary relationship between it and Uva, and allege that a defalcation was committed by Uva in the course of the relationship. *In re Nofer*, 514 B.R. 346 (Bankr. E.D.N.Y. 2014); *In re McDermott*, 434 B.R. 271, 280 (Bankr. N.D.N.Y. 2010); *Econ. Dev. Growth Enterprises Corp. v. McDermott*, 478 B.R. 123 (N.D.N.Y. 2012); *see also In re Eberhart*, 283 B.R. 97, 101 (Bankr. D. Conn. 2002) subsequently aff'd, 124 F. Appx. 672 (2d Cir. 2005). The threshold issue in determining whether a defalcation has occurred is whether Uva acted in a fiduciary capacity. *Andy Warhol Found. for the Visual Arts, Inc. v. Hayes (In re Hayes)*, 183 F.3d 162, 170 (2d Cir.

1999). Although Count Three sufficiently alleges Uva acted in a fiduciary capacity under state law, "what constitutes a fiduciary relationship under Connecticut law is a separate issue from what constitutes a 'fiduciary' within the purview of Section 523(a)(4)." *In re Hall*, 483 B.R. 281, 292 (Bankr. D. Conn. 2012) (quoting *In re Hayes*, 183 F.3d at 166).

Much like the decision in *Falls Church Grp., Ltd. v. Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 108-09 (2007), the Second Circuit in *Hayes* determined that a fiduciary is not merely limited to trustees of an actual or technical trust and that "certain relationships not constituting actual [or technical] trusts are within the defalcation exception." 183 F.3d at 169. Further, courts in this district have held that "'fiduciary capacity' under Section 523(a)(4)" may include circumstances that involve "'a difference in knowledge or power between fiduciary and principal which ...gives the former a position of ascendancy over the latter.'" *In re Wood*, 488 B.R. 265, 276 (Bankr. D. Conn. 2013) (quoting *Hayes*, 183 F.3d at 167 (ellipsis in original)).

Count Three of the Complaint contains sufficient factual allegations that Uva was acting in a fiduciary capacity and owed a fiduciary duty to New Country. As noted above, the Complaint alleges that Uva was a sales representative and manager of New Country, completed many Bills of Sale, and approved the sale of automobiles, including those sold to MGD. Complaint at 3, ¶¶7-10. Therefore, the allegations asserted in Count Three sufficiently plead that Uva owed a fiduciary duty to New Country under Section 523(a)(4).

Having determined that the Complaint sufficiently alleges the existence of fiduciary duty under Section 523(a)(4), the Complaint must also allege that a defalcation occurred while Uva was acting in a fiduciary capacity. A defalcation under Section 523(a)(4) is defined as "a failure to produce funds entrusted to a fiduciary and applies to conduct that does

not necessarily reach the level of fraud, embezzlement or misappropriation." *In re Hall*, 483 B.R. 281, 294 (Bankr. D. Conn. 2012). The United States Supreme Court also recently ruled that a defalcation involves a "culpable" mental state, comprising either knowledge or gross recklessness regarding the improper nature of the relevant fiduciary conduct. *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1757, 185 L. Ed. 2d 922 (2013).

Count Three alleges that Uva possessed a culpable state of mind based on his: (i) written acknowledgement of the policies governing the sale of automobiles to export buyers; (ii) creation of MGD; (iii) completion of the Bills of Sale for the automobiles to MGD; and (iv) facilitating the ultimate sale of the automobiles to export buyers. Complaint at 2, and 7. Therefore, the allegations in Count Three sufficiently allege a defalcation while acting in a fiduciary capacity under Section 523(a)(4).

IV. CONCLUSION

For the foregoing reasons, the Motion to Dismiss is **DENIED** and the Motion to Amend is **GRANTED**. New Country shall file an Amended Complaint on or before October 29, 2015.

IT IS SO ORDERED.

Dated at New Haven, Connecticut this 29th day of September, 2015.

Julie A. Manning
Chief United States Bankruptcy Judge