

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: ROBERT PACHECO and
MARIA PACHECO,

No. 19-10733-j7

Debtors.

MICHAEL ALARID, JR.,

Plaintiff,

v.

Adversary No. 19-1054 J

ROBERT PACHECO,

Defendant.

**MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS,
IN PART, AND GRANTING MOTION TO DISMISS, IN PART,
WITH LEAVE TO AMEND COMPLAINT**

THIS MATTER is before the Court on Defendant Robert Pacheco's Motion to Dismiss Complaint of Michael Alarid Re Dischargeability of Debt, or for More Definite Statement by Plaintiff ("Motion to Dismiss"). *See* Docket No. 4. Plaintiff's Complaint for Determination Excepting Debt Evidenced by State Court Judgment from Discharge ("Complaint") contains two counts: 1) non-dischargeability under 11 U.S.C. § 523(a)(2)(A)¹ premised on "false pretenses, a false representation, or actual fraud;" and 2) non-dischargeability under § 523(a)(6) premised on "willful and malicious injury." 11 U.S.C. § 523(a)(2)(A) and (a)(6). Defendant Robert Pacheco asks the Court to dismiss the Complaint because it fails to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).² Alternatively, Defendant requests the Court to order Plaintiff to file a more definite statement pursuant to Fed. R. Civ. P. 12(e).³ Plaintiff Michael

¹ All future statutory references in this Memorandum Opinion and Order are to Title 11 of the United States Code.

² Rule 12(b)(6) is applicable to this adversary proceeding under Fed. R. Bankr. P. 7012.

³ Rule 12(e) is applicable to this adversary proceeding under Fed. R. Bankr. P. 7012.

Alarid, Jr. filed a response to the Motion to Dismiss, and Defendant Robert Pacheco filed a reply. *See* Docket Nos. 5 and 6. Having reviewed the Complaint, the Motion to Dismiss, the response, and the reply, the Court concludes for the reasons explained below that the Plaintiff has alleged facts to state a plausible non-dischargeability claim under § 523(a)(2)(A), but has failed to allege facts sufficient to state a plausible non-dischargeability claim under § 523(a)(6).

Notwithstanding Plaintiff's failure to state a non-dischargeability claim under § 523(a)(6), a more definite statement is not the appropriate remedy. Instead, the Court will fix a deadline for Plaintiff to amend the Complaint to add factual allegations in support of Plaintiff's contention that Defendant's actions were both willful and malicious within the meaning of § 523(a)(6). If Plaintiff fails to timely amend the Complaint, the Court will dismiss Plaintiff's non-dischargeability claim under § 523(a)(6).

A. Rule 12(b)(6) Standards

When considering a motion to dismiss, the Court examines whether the Plaintiff has alleged facts sufficient to "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 697 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The alleged facts must "nudge[] the[] claims across the line from conceivable to plausible[.]" *Twombly*, 550 U.S. at 570. A claim is plausible when it has a "reasonable prospect of success, but also . . . inform[s] the defendants of the actual grounds of the claim against them." *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1276 (10th Cir. 2009) (citation and quotation marks omitted). As the Tenth Circuit explained,

plausibility in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible. The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief.

Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) (citation and internal quotation marks omitted).

For the purposes of ruling on a motion to dismiss, the Court “must accept as true all of the allegations contained in a complaint[.]” *Iqbal*, 556 U.S. at 678. The Court may also consider exhibits attached to a complaint in evaluating the sufficiency of the alleged facts. *See* Fed. R. Civ. P. 10(c), made applicable to adversary proceedings by Fed. R. Bankr. P. 7010 (“A copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes.”); *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (“In evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits . . . and documents incorporated into the complaint by reference.”) (citations omitted).⁴ Finally, the Court construes the Complaint’s factual allegations in the light most favorable to the Plaintiff.

Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1178 (10th Cir. 2012).

B. Factual Allegations in the Complaint

The Complaint includes factual allegations regarding Plaintiff’s sale of certain real property (the “Property”) to the Defendant under a wrap around real estate contract (“REC”); subsequent litigation between the parties that resulted in a settlement agreement (the “Settlement Agreement”); Defendant’s breach of the Settlement Agreement; a foreclosure action concerning the Property; and the entry of a state court judgment (the “Judgment”)⁵ in favor of the Plaintiff and against the Defendant which included a finding that Defendant “engaged in intentional, malicious, wanton and willful conduct toward Michael Alarid, Jr. that may deprive him of his home.” *See* Complaint, ¶¶ 6, 7, 11, 12, 15, 19, and 20. The Complaint also alleges that Defendant

⁴ *See also Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) (“[I]n deciding a motion to dismiss pursuant to Rule 12(b)(6), a court may look both to the complaint itself and to any documents attached as exhibits to the complaint.”) (citations omitted).

⁵ A copy of the Judgment is attached to the Complaint.

entered into the Settlement Agreement under false pretenses and falsely represented that “he was capable of and/or would timely make payments” to the underlying lienholders against the Property; that Plaintiff justifiably relied on Defendant’s representations; and that Plaintiff suffered injury as a result of those false representations and false pretenses through the loss of Plaintiff’s home and the loss of payments to Defendant under the REC. *See* Complaint, ¶¶ 26 – 29.

The Complaint also includes allegations that Defendant “acted intentionally, wantonly, and maliciously” in connection with the initial sale of the Property and by failing to notify Plaintiff that Defendant was not making the mortgage payments as required under the Settlement Agreement, and that Defendant’s actions caused Plaintiff the loss of his home and real property for which he had already paid Defendant more than \$80,000. *See* Complaint, ¶¶ 32, 34, and 35. The Complaint also alleges that debt evidenced by the Judgment resulted from Defendant’s “willful, wanton, intentional and malicious acts and conduct.” *See* Complaint, ¶ 36.

The Judgment, attached as an exhibit to the Complaint, includes the following additional factual allegations: 1) Plaintiff relied on Defendant’s representations in the Settlement Agreement in agreeing to dismiss the underlying lawsuit; and 2) Defendant immediately breached the promises and agreements made in the Settlement Agreement. *See* Judgment, ¶¶ 3 and 4.

Based on these factual allegations, Plaintiff contends that a particular debt is non-dischargeable under one or both of the following non-dischargeability sections: § 523(a)(2)(A) and § 523(a)(6).⁶ The Court will measure the sufficiency of the allegations in the Complaint with respect to the required elements of each type of non-dischargeability claim.

⁶ It is not entirely clear from the Complaint whether Plaintiff bases his non-dischargeability claims on the alleged misrepresentations at the time of the sale of the Property, or whether Plaintiff’s claims are based

1. Non-dischargeability under § 523(a)(2)(A)

Under § 523(a)(2)(A) a monetary debt procured by “false pretenses, a false representation, or actual fraud” is non-dischargeable. 11 U.S.C. § 523(a)(2)(A). A non-dischargeability claim under this section based on false pretenses or a false representation has four required elements: 1) a false representation or false pretense made by the debtor to the creditor; 2) made with the intent to deceive the creditor, 3) upon which the creditor justifiably relied; and 4) that caused injury to the creditor. *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996) (stating the elements of a non-dischargeability claim under § 523(a)(2)(A)); *Field v. Mans*, 516 U.S. 59 (1995) (establishing the justifiable reliance standard under § 523(a)(2)(A)); *Penix v. Parra (In re Parra)*, 483 B.R. 752, 768 (Bankr. D.N.M. 2012) (non-dischargeability false representation claim under § 523(a)(2)(A) requires the following: “1) the debtor made a false representation; 2) the debtor made the false representation with the intent to deceive the creditor; 3) the creditor relied on the false representation; 4) the creditor's reliance was justified; and 5) the creditor was damaged as a result.”) (citations omitted). “False pretenses under §523(a)(2)(A) are implied misrepresentations intended to create and foster a false impression . . . [and] include conduct and material omissions.” *Bank of Cordell v. Sturgeon (In re Sturgeon)*, 496 B.R. 215, 223 (10th Cir. BAP 2013) (citations omitted). A promise to pay a debt made with no intention to pay the debt is a false representation that can support a non-

on the Defendant’s immediate breach of the Settlement Agreement, or both. *See, e.g.*, Complaint, ¶ 25 (alleging false representations regarding the condition of the Property) and Complaint, ¶ 26 (alleging false representations in connection with the Settlement Agreement and his ability and commitment to timely make payments to the lienholders). Plaintiff’s response to the Motion to Dismiss focuses solely on the alleged misrepresentations and false pretenses in connection with the Settlement Agreement rather than the initial sale of the Property. *See* Docket No. 5. For purposes of evaluating the Motion to Dismiss, the Court will consider whether the factual allegations concerning the Settlement Agreement support a non-dischargeability claim.

dischargeability claim under 11 U.S.C. § 523(a)(2)(A). *See Bank One Columbus, N.A. v. Schad (In re Kountry Korner Store)*, 221 B.R. 265, 272 (Bankr. N.D. Okla. 1998) (“The Court does recognize a species of . . . fraud in which a promise to perform some act in the future is made without the present intent to ever perform[.]”) (citations omitted); *Wagner v. Wagner (In re Wagner)*, 492 B.R. 43, 51 (Bankr. D. Colo. 2013) (“[W]hen a promise of future performance is made by one who has no present intention of performing the promise, it is a misrepresentation that may be found to be fraudulent.”) (citing RESTATEMENT (SECOND) OF TORTS § 530 (1977) (remaining citation omitted)). In addition, because a debtor rarely admits that he or she intentionally deceived the creditor, “the debtor’s intent to deceive the creditor in making false representations to the creditor, may be inferred from the totality of the circumstances[.]” *Young*, 91 F.3d at 1375 (citations and quotation marks omitted).

In support of dismissal under Rule 12(b)(6), Defendant contends that the Judgment cannot serve as evidence in a non-dischargeability action because it is a default judgment, and cannot serve as evidence of any debt. These arguments confuse the issues. Whether the Judgment conclusively establishes the elements of Plaintiff’s non-dischargeability claim would be relevant if Plaintiff were seeking summary judgment based on the Judgment, but is not at issue on a motion to dismiss. Consequently, whether the Judgment was entered by default is of no consequence for purposes of applying Rule 12(b)(6). As for the debt, that term “as used in § 523(a)(2)(A) is not restricted to a debt established under any particular theory of recovery.” *Hatfield v. Thompson (In re Thompson)*, 555 B.R. 1, 9 (10th Cir. BAP 2016). Defendant points out that the Judgment is not a final judgment because Defendant has filed a motion to reconsider the Judgment in the state court action. The Judgment, even if not final, is some evidence of the existence of a debt. In addition, Plaintiff has alleged that he has suffered an injury as a result of

Defendant's false representations and false pretenses in connection with the Settlement Agreement. Plaintiff will have an opportunity to prove up the amount of the alleged non-dischargeable debt at trial.⁷ Plaintiff has alleged that he has suffered damages including the loss of his home and the loss of payments of at least the \$80,000 that Plaintiff paid to Defendant under the REC. *See* Complaint, ¶ 29. All that is required to establish the validity of the debt for purposes of § 523(a)(2)(A) is to “establish that the debtor is liable on an enforceable obligation under applicable law[.]” *Thompson*, 555 B.R. at 9.

The factual allegations contained in the Complaint and the attached Judgment are sufficient to state a plausible non-dischargeability claim under § 523(a)(2)(A). The allegations, if taken as true, demonstrate that Plaintiff and Defendant entered into a Settlement Agreement to resolve their disputes (Complaint ¶ 12); that Defendant made implied representations that constitute false pretenses in connection with the Settlement Agreement regarding his ability and promise to timely make the payments to lienholders as required under the Settlement Agreement (Complaint ¶ 26); that Defendant immediately breached the Settlement Agreement (Judgment, ¶ 4); that Defendant failed to pay the lienholders on the Property as promised in the Settlement Agreement (Complaint ¶¶ 14, 17); that Defendant failed to notify Plaintiff that he did not make the payments to the lienholders (Complaint ¶ 18, Judgment ¶ 5); that Plaintiff justifiably relied on Defendant's false pretenses (Complaint ¶ 28 and Judgment ¶ 3 – Plaintiff agreed to dismiss the lawsuit in reliance on the promises in the Settlement Agreement); and that Plaintiff was

⁷ The Complaint requests judgment for “actual damages to be proved at trial, plus punitive damages, together with pre-judgment and post-judgment interest, costs incurred herein, [and] attorney's fees.” Complaint, p. 6. Defendant asserts that Plaintiff offered no legal or factual support for punitive damages, pre- or post-judgment interest, costs, or attorney's fees, and, therefore, requests the Court to dismiss those requests for relief because they are not authorized under § 523(a)(2). *See* Motion to Dismiss, p. 5. There is no need for the Court to decide at this stage of the litigation whether these damages are recoverable because inability to recover a particular type of damages does not undermine the claim itself.

injured as a result of Defendant's false pretenses (Complaint, ¶ 29). Although the Complaint contains no direct factual allegation that Defendant intended to deceive Plaintiff at the time of the alleged false pretenses, the requisite intent to deceive may be established by the surrounding facts and circumstances. *See Columbia State Bank v. Davis* (*In re Davis*), 353 B.R. 674, 685 (10th Cir. BAP 2006) ("Intent to deceive under [§ 523(a)(2)(A)] may be inferred from the totality of the circumstances, and includes reckless disregard of the truth. Moreover, the scienter requirement . . . may be established by material omissions.") (citations omitted); *Copper v. Lemke* (*In re Lemke*), 423 B.R. 917, 922 (10th Cir. BAP 2010) (fraudulent intent may be inferred from the totality of the circumstances). In sum, the Complaint includes sufficient facts to withstand a Motion to Dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

2. Non-dischargeability under § 523(a)(6)

Section 523(a)(6) excepts from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). Non-dischargeability under this section requires proof of both the "willful" and "malicious" elements of the statute. *See Panalis v. Moore* (*In re Moore*), 357 F.3d 1125, 1129 (10th Cir. 2004) ("Without proof of *both* [willful and malicious elements under 523(a)(6)], an objection to discharge under that section must fail."); *Mitsubishi Motors Credit of America, Inc. v. Longley* (*In re Longley*), 235 B.R. 651, 655 (10th Cir. BAP 1999) ("In the Tenth Circuit, the phrase 'willful and malicious injury' has been interpreted as requiring proof of two distinct elements—that the injury was both 'willful' and 'malicious.'"); *Shirley v. Lopez* (*In re Lopez*), 566 B.R. 255, 260 (Bankr. D.N.M. 2017) ("Section 523(a)(6) requires proof of both a 'willful act' and 'malicious injury.'") (citing *Moore*, 357 F.3d at 1129).

As discussed below, to establish the willful injury component of § 523(a)(6), the creditor must show a deliberate or intentional injury, meaning that the debtor desired or intended that the resulting *consequences* of the act would occur. To establish the malicious injury component of § 523(a)(6), the creditor must show: (i) the degree of the debtor’s culpable conduct was more than that of a debtor acting with mere recklessness; and (ii) taking into account the debtor’s motives, the debtor did not have a sufficient justification or excuse for taking the action while desiring, knowing or intending that the action would cause the resulting harm.⁸

Willful Component of § 523(a)(6)

The “willful” component of § 523(a)(6) requires intent to injure. *Geiger*, 523 U.S. at 61. As the Supreme Court explained, “[t]he word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” *Id.* A deliberate or intentional injury requires that the actor desired or intended that the resulting *consequences* of the act occur, not simply that the actor intentionally engaged in the act itself.⁹ Without direct evidence of a deliberate or

⁸ Before the Supreme Court issued *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (discussed below), the Tenth Circuit articulated the standard for non-dischargeability under § 523(a)(6) as follows:

“willful and malicious injury” occurs when the debtor, without justification or excuse, and with full knowledge of the specific consequences of his conduct, acts notwithstanding, knowing full well that his conduct will cause particularized injury.

Door, Bentley & Pecha, CPA’s, P.C. v. Pasek (In re Pasek), 983 F.2d 1524, 1527 (10th Cir. 1993).

⁹ The Supreme Court elaborated further:

Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead “willful acts that cause injury.” Or, Congress might have selected an additional word or words, *i.e.*, “reckless” or “negligent,” to modify “injury.” Moreover, as the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyer’s mind the category “intentional torts,” as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend “the consequences of an act,” not simply “the act itself.”

Geiger, 523 U.S. at 61–62 (citing Restatement (Second) of Torts § 8A, Comment a, p. 15 (1964)).

intentional injury, the creditor must prove facts from which the court makes that inference. A court may infer that the debtor intended the consequent injury from a showing that the debtor undertook the act with the belief that the consequences of the act were substantially certain to occur.¹⁰ The Court measures intent under the “willful” component using a subjective standard of the debtor’s belief. *Burris v. Burris (In re Burris)*, 598 B.R. 315, 334–35 (Bankr. W.D. Okla. 2019) (citations omitted); *Utah Behavior Servs., Inc. v. Bringhurst (In re Bringhurst)*, 569 B.R. 814, 823 (Bankr. D. Utah 2017).

Malicious Component of § 523(a)(6)

The “malicious” component of § 523(a)(6) requires that the Court examine the debtor’s motives and any claimed justification or excuse for taking the action while desiring, knowing or intending that the action will cause the resulting harm. *See Pasek*, 983 F.2d at 1527 (“[T]he debtor’s motives, including any claimed justification or excuse, must be examined to determine whether the requisite ‘malice’ in addition to ‘willfulness’ is present.”) (citations omitted). *See also Schupbach*, 500 B.R. at 36 (discussing the “malice” element and quoting *Pasek*). The “malicious” component of § 523(a)(6) requires conduct more culpable than recklessness. *Sailor Music v. Walker (In re Walker)*, 514 B.R. 585, 589 (8th Cir. BAP 2014) (“Malice requires more than just reckless behavior by the debtor”) (citation omitted); *MarPad, L.L.C. v. Seevers (In re*

¹⁰ *See In re Jensen*, BAP No. CO-18-089, 2019 WL 2403105, at *11 (10th Cir. BAP June 7, 2019) (“[A] creditor must prove facts that support a reasonable inference that a debtor deliberately or intentionally caused injury to the creditor. (citation omitted); *Bank of Commerce & Trust Co. v. Schupbach (In re Schupbach)*, 500 B.R. 22, 35–36 (Bankr. D. Kan. 2013) (Willful injury under § 523(a)(6) may be established by “direct evidence of specific intent to harm” or “indirectly by evidence of . . . the debtor’s knowledge that the conduct will cause particularized injury.”) (citations and internal quotation marks omitted). *Cf. Moore*, 357 F.3d at 1129 (citing cases that hold that the “willful” component is satisfied if the debtor believed that the consequences of the act are substantially certain to result from the action taken); *Shaw v. Osborne (In re Osborne)*, 604 B.R. 582, 591 (Bankr. M.D. Ga. 2019) (willfulness is shown if the debtor acted with the desire to cause the resulting harm, with knowledge that the injury would occur, or in the belief that harm was substantially certain to result) (citations omitted); *Burris v. Burris (In re Burris)*, 598 B.R. 315, 334 (Bankr. W.D. Okla. 2019) (The “willful” component requires that the debtor desired to cause injury or believed the injury was substantially certain to occur).

Seevers), 574 B.R. 832, 859 (Bankr. D. Neb. 2017) (same); *D'Angelo v. McKean (In re McKean)*, AP 12-6018, 2014 WL 184983, at *5 (Bankr. D. Kan. Jan. 15, 2014) (“Malicious conduct is more culpable than recklessness.”) (citation omitted); *Deluxe Motor Co. Inc. v. Hardman (In re Hardman)*, AP 10-2015, 2011 WL 5153868, at *4 (Bankr. D. Wyo. Oct. 28, 2011) (“Negligent or reckless acts do not suffice to establish that a resulting injury is willful and malicious.”) (citation omitted).

§ 523(a)(6) Includes Willful and Malicious Intentional Breaches of Contract

It is possible to sustain a non-dischargeability claim under § 523(a)(6) based on an intentional breach of contract provided the defendant’s actions satisfy the willful and malicious requirements of § 523(a)(6). *See, e.g., WLC Enterprises, Inc. v. Rylant (In re Rylant)*, 594 B.R. 783, 789 (Bankr. D.N.M. 2018) (holding that “there is nothing in the language of the Bankruptcy Code, including § 523(a), preventing a breach of contract judgment from being declared nondischargeable under § 523(a)(6), so long as the requirements of that subsection are met” and determining that judgment for breach of contract was non-dischargeable under § 523(a)(6)); *Solar Systems and Peripherals, Inc. v. Burress (In re Burress)*, 245 B.R. 871, 881 (Bankr. D. Colo. 2000) (debt arising from debtor’s intentional misappropriation of creditor’s business opportunities contrary to the parties’ settlement was non-dischargeable under § 523(a)(6) where defendant admitted that his conduct was “motivated by an intent to injure Plaintiff.”). *See also In re Jercich*, 238 F.3d 1202, 1205 (9th Cir. 2001) (“[A]n intentional breach of contract . . . accompanied by tortious conduct which results in willful and malicious injury” establishes that the resulting debt is non-dischargeable under § 523(a)(6).).

However, an intentional and knowing breach of contract, without more, is insufficient to satisfy the requirements of § 523(a)(6). *See Hernandez v. Musgrave (In re Musgrave)*, BAP CO-

10-049, 2011 WL 312883, at *11 (10th Cir. BAP Feb. 2, 2011) (“Generally, an intentional breach of contract, without more, is not the type of injury addressed by § 523(a)(6).”) (citation omitted); *Hasalia v. Walker (In re Walker)*, 416 B.R. 449, 468 (Bankr. W.D.N.C. 2009) (“A simple breach of contract . . ., even if intentional, would not give rise to a § 523(a)(6) violation”).

The Complaint Does Not State a Claim under § 523(a)(6)

Plaintiff appears to base his non-dischargeability claim under § 523(a)(6) primarily on the Judgment, which includes a finding that Defendant “engaged in intentional, malicious, wanton and willful conduct” towards the Plaintiff that “may deprive him of his home.” *See* Judgment, ¶ 7. Plaintiff’s Complaint similarly alleges that Defendant “acted intentionally, wantonly, willfully, and maliciously.” *See* Complaint ¶¶ 32, 33, 34, 35, and 36. However, the factual allegations in the Complaint fail to establish that Defendant’s failure to pay the lienholders as required by the Settlement Agreement and failure to notify Plaintiff that he did not make those payments are both willful and malicious within the meaning of § 523(a)(6). The Plaintiff has not alleged that Defendant intended by his actions for Plaintiff to lose his home. Further, the factual allegations in the Complaint are insufficient for the Court to make that inference. Consequently, the factual allegations are insufficient to satisfy the willfulness component of § 523(a)(6).

The Plaintiff has not alleged that the Defendant failed to make the required payments without justification or excuse. Nor does the Complaint include sufficient factual allegations from which the Court can make that inference, necessary to satisfy § 523(a)(6)’s malice requirement. For example, were the payments Plaintiff made to Defendant under the REC sufficient to pay the other lienholders? If so, that fact could support an inference that Plaintiff had no justification or excuse in failing to make the required payments. The Complaint also alleges that Defendant misrepresented his ability to make the payments under the Settlement

Agreement, which helps support Plaintiff's claim under § 523(a)(2)(A) that the Defendant entered into the Settlement Agreement with no intention of performing it. But if that factual allegation is taken as true, it could also undermine Plaintiff's assertion that Defendant acted with malice in failing to make the payments since the inability to make the required payments could suggest that Defendant had a justification or excuse.

A mere formulaic recitation of the elements of a claim is insufficient to withstand a motion to dismiss. *Iqbal*, 556 U.S. at 678 (a pleading that contains only "labels and conclusions," a "formulaic recitation of the elements of a cause of action," or "naked assertions devoid of further factual enhancement" is insufficient to withstand a motion to dismiss) (citation and additional internal quotation marks omitted). Similarly, when testing the sufficiency of a plaintiff's claim, the Court disregards legal conclusions couched as factual allegations. *See Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

Here, the allegations in the Complaint and the "intentional, malicious, wanton and willful conduct" finding in the Judgment merely track the "willful and malicious" language of the non-dischargeability statute and are, therefore, insufficient to serve as factual allegations that state a plausible non-dischargeability claim under §523(a)(6). The Complaint contains insufficient factual allegations to support these legal conclusions. Consequently, dismissal of this count of the Complaint, in its current form, is appropriate. However, because dismissal is a "harsh remedy, which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleadings but also to protect the interests of justice[,]'" the Court will grant leave to Plaintiff to amend the Complaint. *Dias v. City and Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir. 2001)).

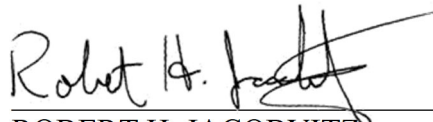
C. Rule 12(e) Standards

Under Fed. R. Civ. P. 12(e), made applicable to adversary proceedings by Fed. R. Bankr. P. 7012, a party may request “a more definite statement of a pleading to which a responsive pleading is allowed.” Fed. R. Civ. P. 12(e). In other words, a defendant can ask a plaintiff to provide additional factual details to a complaint so the defendant can formulate an answer. A defendant is entitled to a more definite statement of a plaintiff’s claims when the complaint “is so vague or ambiguous that the party cannot reasonably prepare a response.” *Id.* Even if the complaint is sufficient to withstand a motion to dismiss for failure to state a claim, a more definite statement may nevertheless be appropriate. *eSoft, Inc. v. Astaro Corp.*, No. 06-cv-00441-REB-MEH, 2006 WL 2164454, at *1 (D. Colo. July 31, 2006). However, a motion for more definite statement is an appropriate remedy only for unintelligible pleadings and should not be used to correct lack of detail. *See Coffey v. McKinley Cnty.*, No. CIV 09-0028 JB/LFG, 2009 WL 3208209, at *1 (D.N.M. Sept. 11, 2009) (“A motion for a more definite statement is used to provide a remedy only for an unintelligible pleading rather than a correction for lack of detail.”) (citation omitted); *Martinez v. Naranjo*, 328 F.R.D. 581, 593 (D.N.M. 2018) (stating that a Rule 12(e) motion should not be used to “correct inaccurate assertions, add precision, or flesh out a lack of detail.”) (citations omitted).

Here, the allegations in the Complaint and the attached Judgment are sufficient to give Defendant notice of the factual allegations Plaintiff contends support a non-dischargeability claim under § 523(a)(2)(A). Even though some of the alleged facts cover two different time periods, *i.e.*, the time of the initial sale of the Property to Plaintiff and the time surrounding the Settlement Agreement, the allegations are not so vague or ambiguous that Defendant would be unable to determine the issues and formulate a response.

Based on the foregoing, it is ORDERED that the Motion to Dismiss is GRANTED, in part and DENIED in part as follows:

1. By October 25, 2019, Plaintiff may file an amended complaint to allege additional facts in support of Plaintiff's non-dischargeability claim under § 523(a)(6). If Plaintiff fails to timely file an amended complaint the Court will DISMISS Plaintiff's non-dischargeability claim under § 523(a)(6) with prejudice, without further notice or a hearing.
2. Defendant's Motion to Dismiss is DENIED in all other respects.


ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: October 10, 2019

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