IT IS ORDERED as set forth below:

Date: December 22, 2011

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 11-61754
Mohamed Mahmoud Ahmed,	CHAPTER 11
Debtor.	JUDGE MASSEY
Todd Traylor,	
Plaintiff,	
v.	ADVERSARY NO. 11-5392
Mohammed Ahmed,	
Defendant.	

ORDER GRANTING MOTION OF DEFENDANT FOR JUDGMENT ON THE PLEADINGS

In this adversary proceeding, Plaintiff Todd Traylor seeks a judgment against Defendant and Debtor Mohammed Ahmed determining that debts allegedly owed by Defendant to Plaintiff are not dischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6) and denying Defendant's

discharge. He further contends that this Court lacks jurisdiction to "adjudicate" the alleged debts and hence must "remand" the proceeding to a state court for a jury trial. (Complaint, Doc. No. 1, p. 22). Debtor filed his bankruptcy case on April 19, 2011, shortly before a case in a state court involving him and Plaintiff was to go to trial. Plaintiff filed the complaint in this court initiating this adversary proceeding on July 25, 2011.

Plaintiff's jurisdictional argument misperceives the nature of this proceeding and confuses "remand" of a case, which comes into play where a case is removed from state court to the bankruptcy court, 28 U.S.C. § 1441, et seq., with abstention, 11 U.S.C. § 1334(c). The latter section provides:

> (c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

In support of abstention (which is really what he was getting at), Plaintiff asserts that debts owed to Plaintiff are "private rights under common law and/or claims for personal injury" that cannot be tried in this Court and that Plaintiff has a right to a jury trial as to such issues. Complaint, Doc. 1, p. 22. This argument misses the point that his complaint seeks relief only with respect to dischargeability of debts under section 523(a)(2), (a)(4) and (a)(6) and discharge, which are matters of federal law with respect to which the bankruptcy court has exclusive jurisdiction. 11 U.S.C. §523(c)(1); *In re Chew,* 496 F.3d 11, 18 (1st Cir. 2007); *In re Leggett,*

2011 WL 2838121, 1 (Bankr. N.D.Ga. 2011); *Matter of McDaniel* 217 B.R. 348, 353fn8 (Bankr.N.D.Ga. 1998); 11 U.S.C. § 727. Hence, the issues at stake here cannot be adjudicated in state court.

Deciding Defendant's motion for judgment on the pleadings does not require this Court to make factual determinations (including the amount of damages) about the claims asserted against Defendant in the state court litigation. Instead, the issue raised by Defendant's motion is whether the complaint in this adversary proceeding has stated enough facts that, if true, would make the claims for relief asserted by Plaintiff concerning the dischargeability of debt and the objection to Defendant's discharge plausible on the face of the complaint.

Plaintiff has had ample opportunity to respond to the motion and has not chosen to move to file an amended complaint. If his complaint does not allege facts sufficient to show that there is a debt owed by Defendant that would be nondischargeable if Plaintiff could prove those facts, further litigation in state court would be pointless. For these reasons, the Court declines to abstain.

Based upon the facts alleged in the complaint, Plaintiff asserts in Count One that debt owed to Plaintiff by Defendant is not dischargeable under 11 U.S.C. § 523(a)(2), (a)(4) and (a)(6). In Count Two, he asserts a claim for breach of contract. In Count Three, he contends that Defendant induced "an expectation he [Plaintiff] would be employed with it for at least a full two years," that he "reasonably relied" on that "expectation," and that he "suffered detriment" as a result of that reliance. Finally, in Count Four, titled "Witness Interference," Plaintiff alleges that Defendant, believing that Plaintiff might divulge information adverse to his interest in other litigation pending against him in 2009, attempted to deter Plaintiff from providing testimony in a

case pending in federal court in violation of 42 U.S.C. § 1985(2), retaliated against Plaintiff for providing such testimony in violation of 42 U.S.C. § 1985(2), retaliated against Plaintiff for "supporting" workers' FSLA claims in violation of 29 U.S.C. § 219(a)(3), and engaged in a conspiracy to deter him from testifying in violation of O.C.G.A. § 16-14-3(9)(A)(xiv).

Count Four, like Counts Two and Three, does not specifically address dischargeability, but that defect can be overlooked because the issue of the dischargeability of the claims asserted is implicit in the prayer for relief and earlier sections of the complaint.

Plaintiff moves for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), made applicable by Fed. R. Bankr. P. 7012. For purposes of this motion only, the Court assumes that the facts alleged by Plaintiff, though some of them Defendant denies, are true. For the reasons explained below, the complaint fails to state a claim that any debt owed by Defendant to Plaintiff is not dischargeable and fails to state a claim that Defendant's discharge should be denied.

I. Assumed Facts

The facts stated below are taken verbatim from the complaint, which was the first document filed in this adversary proceeding. The paragraph numbers are those in the complaint, and the page numbering begins with the first page in the document, which is the adversary proceeding cover sheet, even though it is not a part of the complaint. Although there are references to exhibits, no exhibit was attached to the complaint. The document filed as the complaint contains two copies of the complaint, which are not entirely identical but appear to be substantially the same. The factual allegations were copied from the first instance of the complaint. Conclusions of law asserted in paragraphs containing factual allegations are marked in bold after the notation **[C/L]**, and the Court has disregarded these conclusions in assessing the

merits of Defendant's motion. Paragraphs not containing at least one allegation of fact have been omitted, as denoted by ellipses.

For purposes of Defendant's motion, the Court assumes that the following facts are true:

> 3. Defendant Mohamed Ahmed is a 50% (or greater) shareholder, CEO, and operator of the following corporations or businesses: (a) Athens Ahmed Family Restaurant, Inc. d/b/a IHOP, (b) 4402, Inc. d/b/a IROP, (c) Adam Ahmed Investments, LLC d/b/a IROP, (d) Sarah Ahmed Investments, LLC d/b/a IROP, (e) Stone Mountain Family Restaurant, LLC d/b/a IROP, (f) Bosami, LLC d/b/a IHOP (hereinafter "IHOP-LoganviIle"), and (g) Georgia Restaurant Group, LLC.
>
> 4. Defendant Mohamed Ahmed, along with his wife Jay Lynn Ahmed, owns and operates the foregoing corporate entities, which are affiliated with six IHOP franchises in various locations (Athens, Monroe, Scenic Highway, Lilburn, Loganville, and Conyers).
>
> 5. Plaintiff was hired to be the Vice President of Operations over all of the Ahmeds' IHOPs.
>
> 6. Plaintiffs duties included overseeing all of the Ahmed IHOPs and tending to various business matters including negotiating with vendors and insurance carriers, setting employee policies, managing budgets and costs, training managers regarding payroll procedures, etc.
>
> 7. Plaintiffs salary was usually paid as a combination from each of the restaurant corporations' operating funds. Sometimes it was paid from GRG's account.
>
> 8. From May 16,2008 until they were reinstated on September 9, 2008, four of the restaurant corporations were dissolved: 4402, Bosami, Stone Mountain Family Restaurants, and Adam Ahmed Investments.
>
> 9. The Ahmeds regularly used funds from some or all of the seven companies for personal expenditures.
>
> 10. In addition, the Ahmeds paid at least one of their relatives payroll checks even though this individual did not work for the companies.
>
> 11. Defendants Mr. and Mrs. Ahmed, in their individual capacities, disregarded the separateness of legal entities such that there is a unity of interest and ownership and **[C/L] the separate personalities of the companies and their shareholders no longer exist**.

12. The Ahmeds individually and jointly used their positions, their control over the corporations, and the corporate forms thereof **[C/L] to avoid contractual responsibility, perpetrate fraud, and defeat justice.**

...

14. Todd Traylor resigned a solid and progressive position with the International IHOP corporation to accept a position with Defendants' franchises to begin January, 2008.

15. In anticipation of this employment, Mr. Ahmed and Mr. Traylor entered into a written employment contract, a true and accurate copy of which is attached hereto as Exhibit A.

16. This agreement states, in part, "The starting date of employment will be January 1st, 2008. This agreement is for TWO years & it is renewable if both involved agree." (emphasis in the original).

17. This contract did not provide for unilateral early termination. Ahmed and Plaintiff had discussed the possibility of early termination and came to an understanding that the only way early termination would occur was in the event that both Ahmed and Traylor mutually agreed to discontinue the relationship. Their understanding was memorialized in the Agreement (Ex. A).

18. The contract reads, in relevant part: "The director of operations and the franchisee have to give a four week written notice before canceling this agreement." (emphasis added).

19. As part of the contract, Mr. Traylor was to receive a salary of $122,000 (including car and health insurance allowances), plus certain other benefits, including cell phone and internet service, paid vacation and sick leave, and fuel reimbursements. (See Ex. A).

20. In May, 2008, Mr. Ahmed communicated that he intended to decrease Mr. Traylor's salary amount to $100,000. Mr. Traylor resisted, and the decrease did not take place at that time.

21. However, in December, 2008, Mr. Ahmed unilaterally announced that Mr. Traylor's salary would be reduced by 15% to $103,700.

22. Mr. Ahmed stated that if Traylor did not accept this decrease then he could leave his employment.

23. In response, Mr. Traylor offered to modify the original contract on a temporary basis such that his salary would be reduced by 15%, with the 15% difference to

be repaid at a later date once profitability levels increased, if Mr. Ahmed would extend his contract to five years instead of two, or would enter into a partnership agreement with him.

24. Mr. Ahmed rejected the partnership proposal.

25. Mr. Ahmed and Mr. Traylor continued the discussion regarding the contract duration extension.

26. Mr. Ahmed and Mr. Traylor came to an agreement that the contract would be extended to three years in return for Mr. Traylor's acceptance of this temporary 15% salary reduction.

27. On December 18, 2008 Mr. Ahmed and Mr. Traylor exchanged the following emails (Exhibit B) memorializing this verbal agreement:

> TRAYLOR: Can we do a three year deal? ..
> AHMED: Yes, go for it
> TRAYLOR: How do we proceed my good man?
> AHMED: I will renew our agreement.

28. Beginning the payroll period of December 15, 2008, Mr. Ahmed did in fact reduce Mr. Traylor's salary by 15%.

29. Mr. Ahmed stated that he would pay Mr. Traylor back "and then some" once business bounced back.

30. On February 3, 2009, Mr. Ahmed verbally terminated Mr. Traylor's employment.

31. Mr. Traylor did not consent to the early termination of the agreement.

32. Mr. Ahmed stated that the reason for the termination was that he could not afford Mr. Traylor any more.

33. Mr. Traylor asked that Mr. Ahmed honor their agreement that he remain employed for three years. Mr. Ahmed refused.

34. In addition, Defendants failed to compensate Plaintiff for some portion of other promised benefits such as cell phone, internet, and fuel costs.

35. When Mr. Ahmed terminated Mr. Traylor's employment, Mr. Traylor indicated to Mr. Ahmed that he would be contacting the attorney representing certain

plaintiffs in a civil action pending against the Defendants (Dowling v. Athens Ahmed et al, Civil Action No. 3:08-CV-73(CDL), Middle District of Georgia).

36. Mr. Traylor intended to disclose only truthful facts which might be relevant and were not protected by attorney-client privilege.

37. On February 3, 2009, Mr. Traylor received a threatening letter from Defendants' attorney Rodney Eason stating, in part: (Exhibit C)

> .... you must continue to keep any confidential information regarding the companies, their managers and employees in the strictest confidence. This is a continuing obligation placed on you under Georgia law and any violation by you of this continuing obligation will be met with an immediate legal response.
>
> Once again, you must contact me immediately to arrange the return of company property if you wish to avoid adverse legal consequences. Govern yourself accordingly.

38. Much of the "company property," including a laptop and documents, would likely be relevant to the Dowling litigation. As Ahmed had access to and copies of the same documents, the only reason Ahmed and his counsel wanted such property returned was to prevent it from being used in the Dowling litigation.

39. Traylor signed a declaration which was filed by the Plaintiffs in the Dowling action on February 16,2009 (CM1ECF Dkt. 44-2).

40. Soon after Plaintiffs termination, Defendants initially promised Plaintiff that he would be receiving final pay, which would include at least four weeks of pay, two additional weeks of unused vacation, and backpay for the 15% differential.

41. On February 16, 2009, Defendants indicated that Traylor's final pay was being forwarded via express mail.

42. However, Defendants did not remit this check as stated.

43. The claims set forth herein were brought against Defendants in the Oconee County Superior Court in a Complaint filed on February7 27, 2009. These claims were scheduled to go to trial before a jury on April 25, 2011.

44. On Friday, April 15, 2011, the Judge presiding over these claims issued several ruling which were unfavorable to the Defendants in that case. On Monday, April 18, 2011, Defendant Ahmed filed the instant bankruptcy.

45. By correspondence dated April 18, 2011, Defendant Ahmed's counsel made the following assertions:

> Counsel,
>
> Be advised that Mr. Ahmed has filed a bankruptcy petition in the Northern District of Georgia. Below is electronic confirmation of the filing.
>
> We are instructed to vigorously enforce the automatic stay against all creditors and their attorneys who, following notice, continue adverse AP 11-05392-jem Doc #:1 Filed: 07/25/2011 Page 16 of 44 action against Mr. Ahmed and his bankruptcy estate. Toward this end, we consider the claims in the Traylor lawsuit to be based on Mr. Ahmed's involvement and any potential liability of the other defendants to be conditioned on a finding against Mr. Ahmed's interest. Accordingly, we contend that his bankruptcy estate includes the other defendants.

On the basis of these assertions, the Oconee County Superior Court stayed the proceedings against Ahmed and the corporations in question.

46. In his Amended Schedule B filed in the Chapter 11 Case on June 26, 2011, Ahmed stated the value of his ownership interest in the corporations identified in subparagraphs 3 (a-f), above, to be "unknown". **[L/C] In summarizing Schedule B, Defendant Ahmed quantified the "unknown" value of this ownership interest as equal to "zero" value.**

47. The Amended Schedules show that these same corporations paid Defendant Ahmed over $500,000 in income in 2010 and over $300,000 in income in 2009. **[L/C] Defendant Ahmed's representation that these corporations have zero value** was deliberately false and substantially understated his assets in the Amended Summary of Schedules.

48. Defendant Ahmed has failed to disclose corporate income or assets from the corporations in question to this Court, yet sought a stay of Plaintiff s claims against the corporations on the basis of an identity of interest among him and the corporations in question. In addition, Defendant Ahmed is, on information and belief, using income received by these corporations for his personal benefit, without disclosure to the Bankruptcy Court or Trustee.

...

54. In December, 2007, Plaintiff and Defendants entered into an employment agreement whereby Defendants agreed to employ Plaintiff for two years under certain terms.

55. This agreement was memorialized in the "Management Agreement" attached hereto as Ex.A

56. In December, 2008, Plaintiff and Defendants modified the contract so as to have a longer duration. Specifically, the modification called for the Defendants to employ Plaintiff for three years in return for a temporary reduction in salary, to be repaid at a later date.

57. Plaintiff abided by all applicable conditions precedent.

58. Defendant was not entitled to unilaterally terminate the employment relationship before the expiration of three years.

59. By terminating the agreement before the expiration of three years, **Defendants breached the contract**.

60. Because Defendants terminated his employment prematurely, **[C/L] it owes Mr. Traylor damages**.

61. Such damages include, but are not necessarily limited to, the following: salary, allowances for health insurance and car, internet and cell phone service, and fuel costs. It also includes interest and costs.

...

63. Plaintiff left another job which had more favorable compensation terms and advancement opportunities in order to accept the position with Defendants.

64. The Defendant acted and/or communicated with Plaintiff in such a way as to induce an expectation that he would be employed with it for at least a full two years.

65. The Plaintiff reasonably relied on this expectation.

66. The Plaintiff suffered detriment because of relying on this false expectation.

...

68. Defendants believed and feared that Plaintiff might divulge information adverse to their interests in the Dowling litigation.

69. Defendants attempted to deter Plaintiff from providing such testimony, **[C/L] in contravention of 42 U.S.C. § 1985(2)**.

70. Defendants **[C/L] retaliated** against Plaintiff for providing testimony in this federal lawsuit, **[C/L] in contravention of 42 U.S.C. § 1985(2).**

71. Defendants **[C/L] retaliated** against Plaintiff for supporting workers' Fair Labor Standards Act ("FLSA") claims against Defendants **[C/L] in contravention of the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3).**

...

II. Conclusions of Law

A.

The legal frameword for analyzing a motion for judgment on the pleadings is straight-forward.

> A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6). *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir.2004) (citing *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n. 8 (5th Cir.2002)). "[T]he central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." *Hughes*, 278 F.3d at 420 (internal quotations omitted). Although we must accept the factual allegations in the pleadings as true, *id*., a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).

Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008).

By contrast, legal conclusions alleged in a complaint are not accepted as true.

> [T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. [*Twombley*, 550 U.S.] at 555, 127 S.Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-1950 (2009).

Factual allegations must state a "plausible" claim for relief to survive either a motion to dismiss (prior to the filing of an answer) or a motion for judgment on the pleadings (after an answer is filed). The mere possibility of misconduct is not enough. *Id*. With these principles in mind, the Court turns to the specific claims asserted by Plaintiff to determine whether the complaint pleads sufficient facts to make the claims asserted plausible.

B.

Plaintiff asserts in Count One of the complaint that Defendant is not entitled to discharge debts "for money or property obtained by false pretenses, false representation or a statement in writing." Complaint, Doc. No. 1, p. 17, ¶ 50. What Plaintiff has tried to assert, not altogether accurately, is that the facts pleaded satisfy all of the elements of 11 U.S.C. § 523(a)(2)(A), which provides in relevant part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt– ...
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
> >
> > > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

Plaintiff returned to this contention in Count Three dealing with what he referred to as "detrimental reliance." Where a plaintiff has suffered damages as a result of actual fraud or a fraudulent misrepresentation, it is the act of fraud that creates the nondischargeable debt, as contrasted with an underlying debt arising from a breach of contract. See *McClellan v. Cantrell*, 217 F.3d 890, 895 (7th Cir. 2000) (Posner, C.J.).

The only conduct alleged in the complaint even tangentially related to any element in section 523(a)(2) is that alleged in Count Three (paragraphs 63-66). The Court assumes that

Defendant represented to Plaintiff by signing the contract on or about January 1, 2008 that the term of employment would be two years, that Plaintiff relied on that representation and that he suffered some damage as a result. Those facts alone, however, do not state a plausible claim under section 523(a)(2)(A).

To state a claim that a debt arises from a false representation, a plaintiff must plead facts that satisfy these elements:

> (1) the debtor made a false representation with intent to deceive the creditor; (2) the creditor relied on the representation; and (3) the creditor sustained a loss as a result of the representation. *St. Laurent*, 991 F.2d at 676-77. Moreover, the creditor's reliance must be justified. See *Field v. Mans*, 516 U.S. 59, ----, 116 S.Ct. 437, 445-46, 133 L.Ed.2d 351 (1995); *City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277, 281 (11th Cir.1995).

In re Bilzerian, 100 F.3d 886, 892 (11th Cir. 1996). There is no allegation that Defendant made any representation with the intent to deceive Plaintiff in late 2007 or early 2008 when the contract was allegedly made or at any other time.

Similarly, the allegation in paragraph 27 that Defendant agreed in an email to a three-year term of employment does not show a false representation within the meaning of section 523(a)(2)(A) merely because Defendant later fired Plaintiff. There are no allegations that in December 2008, when emails were allegedly exchanged, that Defendant knew his statement was false, that he made it with intent to deceive, that Plaintiff justifiably relied on that representation and that Plaintiff suffered any damages as a result of such a representation.

C.

The Court has included in its analysis of Defendant's motion the factual allegations in Count Two, which asserts a claim for damages arising from a breach of the employment contract. But a "breach of contract action does not, in the absence of some other act described, or

proscribed, by 11 U.S.C. § 523(a) give rise to a nondischargeable debt. *See In re Whiters*, 337 B.R. 326, 338 (Bankr.N.D.Ind.2006); *Cloyd v. GRP Records (In re Cloyd)*, 238 B.R. 328, 336 (Bankr.E.D.Mich.1999)." *In re Nunez*, 400 B.R. 869, 876 (Bankr.S.D.Fla. 2008). The elements of a claim of nondischargeability are prescribed by federal law, not state law. *Grogan v. Garner*, 498 U.S. 279, 284, 111 S.Ct. 654, 657 - 658 (1991) ("Since 1970, however, the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code. See *Brown v. Felsen*, 442 U.S. 127, 129-130, 136, 99 S.Ct. 2205, 2208-2209, 2211, 60 L.Ed.2d 767 (1979)."). The facts alleged in Count Two and elsewhere in the complaint do not satisfy the elements of any subsection of section 523(a)(2), (a)(4) or (a)(6) of the Bankruptcy Code.

D.

Plaintiff next contends that a debt owed to him by Defendant is not dischargeable because the debt arises from fraud or defalcation while acting in a fiduciary capacity. Complaint, Doc. No. 1, p. 17, ¶ 50. Section 523(a)(4) makes a debt arising "from fraud or defalcation while acting in a fiduciary capacity" nondischargeable. To succeed under this section, a plaintiff must show that the fiduciary duty arose from an express trust created before the alleged fraud or defalcation occurred or from the breach of a fiduciary duty imposed by statute; a trust creating a fiduciary duty may not be implied. Davis v. Aetna Acceptance Co., 293 U.S. 328, 333, 55 S.Ct. 151, 153 - 154 (1934)(Cardozo, J.); *Quaif v. Johnson*, 4 F.3d 950 (11th Cir. 1993). The complaint does not even hint, let alone allege, Defendant was a fiduciary under an express trust or pursuant to a statute for the benefit of Plaintiff. Hence, the facts alleged in the complaint do not state a plausible claim under section 523(a)(4).

E.

In Count Four of the complaint, entitled "Witness Interference," Plaintiff asserts claims against Defendant under three statutes. The Court will analyze these claims before turning in Part F below to the issue of whether they are dischargeable.

Plaintiff alleges that Defendant attempted to deter Plaintiff from testifying in a lawsuit pending in federal court and retaliated against Plaintiff for testifying in that lawsuit in violation of 42 U.S.C. § 1985(2) and retaliated against Plaintiff for "supporting workers' Fair Labor Standards Act ("FSLA") claims against Defendant" in violation of 29 U.S.C. § 215(a)(3). Complaint, Doc. 1, ¶¶ 69-71, p. 41. Plaintiff further alleges that "Defendants engaged in a conspiracy to deter Plaintiff from testifying in the Dowling litigation, by intimidation, in contravention of O.C.G.A. § 16-14-3(9)(A)(xiv)." Complaint, Doc. 1, ¶ 69-72, p. 41. The Dowling litigation is one filed in the U.S. District Court for the Middle District of Georgia.

42 U.S.C. § 1985(2) provides:

> (2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws[.]

The complaint fails to allege sufficient facts to show a conspiracy involving Defendant to engage in activity prohibited by this section.

> The principal elements of conspiracy are an "agreement between parties to inflict a wrong against or injury upon another, and an overt act that results in that damage." *Northrup v. Conseco Fin. Corp.*, 141 F.Supp.2d 1372, 1375 (M.D.Ga. 2001). The Eleventh Circuit requires a heightened pleading standard in conspiracy cases because a defendant must be informed of the nature of the conspiracy alleged. *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir.1984). "It is not enough to simply aver in the complaint that a conspiracy existed." *Id*. Thus, conclusory, vague, and general allegations of conspiracy may justify dismissal of a complaint. Id.

Burrell v. Infirmary West. 2010 WL 749332, 5 (S.D.Ala. 2010).

Count Four refers to "Defendants," but Mr. Ahmed is the only defendant in this adversary proceeding. The complaint does not identify any person or firm who is alleged to have conspired with Mr. Ahmed. Further, allegations of fact to show what acts Plaintiff did and what acts another person or entity did are missing from the complaint. The complaint parrots the words of the statute but alleges no facts from which one could conclude that a conspiracy existed, that an attempt was made to deter testimony, that acts occurred that constituted retaliation for either an agreement to testify or the fact of testifying or how Plaintiff was in any way threatened not to testify. Thus, all of the allegations in Count Four are conclusory and insufficient to withstand a motion to dismiss for failure to state a claim.

Further, to the extent that Plaintiff is asserting that the alleged conspiracy involved Defendant and corporations that he controls or that are his alter ego, his position could be construed as negating the existence of a conspiracy. See, e.g., *U.S. v. Stevens*, 909 F.2d 431, 432 (11th Cir. 1990) (holding that an individual cannot enter into a criminal conspiracy with a corporation which he alone owned and controlled).

Following Mr. Traylor's stated intention to contact an attorney in the pending litigation, the subsequent conduct attributed to Defendant is a so-called "threatening" letter dated February 3, 2009, the date on which Defendant was terminated, in which counsel for Defendant

told Plaintiff he had a duty not to disclose confidential information and instructed Plaintiff to "contact me immediately to arrange the return of company property to avoid adverse legal consequences." Complaint, Doc. No. 1, ¶ 37, pp. 33-34.

Informing a terminated employee that he or she should not disclose confidential information is not a threat. Informing a terminated employee that there would be adverse legal consequences for failing to return property of the employer in the possession of the employee simply states the legal right of the employer to regain possession of its property. The complaint contains no allegation of fact that would suggest that Defendant threatened Plaintiff with bodily harm or economic harm as a consequence of Plaintiff's announced intention to speak with the lawyers representing plaintiffs in the federal litigation. Rather, Plaintiff asserts that the "only reason" that Defendant wished to recover a laptop and documents was to prevent "it" from being used in the federal litigation. Complaint, Doc. 1, ¶ 38, p. 34.

Even if the laptop's contents and documents might have been relevant to, and used in, that litigation, telling Plaintiff to return what did not belong to him and to which he had no legal right to possess following the demand did not prevent Plaintiff from testifying in that lawsuit or could not be said to have to any degree discouraged him from doing so. Nor did it prevent him from testifying about the contents of the laptop and documents. There is no allegation that Plaintiff was asked to testify about the contents of the laptop or documents he was asked to return.

Plaintiff alleges that after he was terminated, "Defendants initially promised" he would be receiving final pay by express mail but that "Defendants did not remit this check as stated." Complaint, Doc. No. 1, ¶¶ 41-43, p. 15. This allegation, to the extent directed to the one Defendant here, asserts only that a promise to make a particular payment by express mail was not

kept. There is no allegation as to the reason for non-payment and no allegation that Plaintiff was never paid. The promise to pay was allegedly made just after the termination. There is no allegation that the failure to "remit this check by express mail" was in any way connected to any request that Plaintiff testify in the federal case or to any testimony that Plaintiff gave or was said to be about to give in the federal case. Hence, the allegations in these paragraphs are insufficient to show that Defendant attempted to intimidate Plaintiff or to deter Plaintiff from testifying by not paying him as promised.

In short, Plaintiff has failed to state a plausible claim under section 1985(2) and without such a claim cannot show that he holds a debt for damages caused by a violation of section 1985(2) so as to be nondischargeable under 11 U.S.C. § 523.

> 29 U.S.C. § 215(a)(3) makes it unlawful for an employer –
>
> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;
>
> The FLSA protects persons against retaliation for asserting their rights under the statute. See 29 U.S.C. § 215(a)(3). A prima facie case of FLSA retaliation requires a demonstration by the plaintiff of the following: "(1) she engaged in activity protected under [the] act; (2) she subsequently suffered adverse action by the employer; and (3) a causal connection existed between the employee's activity and the adverse action." *Richmond v. ONEOK, Inc*., 120 F.3d 205, 208–09 (10th Cir.1997).

Wolf v. Coca-Cola Co., 200 F.3d 1337, 1342 -1343 (11th Cir. 2000). As pointed out above, the complaint alleges that Plaintiff did not inform Defendant that he would be speaking to an attorney for plaintiffs in the federal litigation giving rise to Count Four until after he had been terminated. Termination ended Plaintiff's status as an employee. Section 215(a)(3) forbids discharge or discrimination against an employee while an employee, but it does not address ex-employees.

Any action taken by Defendant after the termination of Plaintiff was not one against an employee as required by the section 215(a)(3) of the FLSA.

The termination of Plaintiff could not have been caused by his engagement in activities protected by the FSLA because termination preceded the making of his statement that he would contact an attorney for one of the parties in the federal litigation. The complaint alleges no facts showing how Defendant "discriminated" against Plaintiff with respect to testimony given or about to be given in the federal litigation. Hence, Plaintiff has failed to state a plausible claim under the FSLA and without such a claim cannot show that he holds a debt for damages caused by a violation of the FSLA so as to be nondischargeable under 11 U.S.C. § 523.

Finally, Plaintiff alleges a conspiracy to deter Plaintiff from testifying "by intimidation" in violation of O.C.G.A. § 16-14-3(9)A)(xiv), which is a part of the Georgia statute dealing with Racketeer Influenced and Corrupt Organizations. Subsection (9)(A)(xiv) refers to a criminal statute that makes influencing witnesses a crime. This portion of Count Four also fails to state a claim because the statute cited is a definition of the term "racketeering activity" and not a statute that alone creates a cause of action. Plaintiff has not pleaded facts that would state a claim for a debt arising under the Georgia RICO statute because he has not asserted such a claim and has not alleged facts showing the existence of a conspiracy and showing that Defendant attempted to influence or intimidate Plaintiff with respect to testimony in the federal case. Without such a claim for damages under the subsection of the Georgia statute that he cited, Plaintiff cannot show a plausible claim that he holds a nondischargeable debt under 11 U.S.C. § 523.

F.

Plaintiff's last contention concerning dischargeability is that he holds a debt arising from a willful and malicious injury "to Plaintiff or the property of Plaintiff." Complaint, Doc. No. 1, p. 17, ¶ 50. Section 523(a)(6) of the Bankruptcy Code bars the discharge of a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." "[A] debtor is responsible for a 'willful' injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." *In re Walker,* 48 F.3d 1161, 1165 (11th Cir. 1995).

> As to the "malicious" prong, [the Eleventh Circuit has] defined that term as used in section 523 as "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *In re Latch*, 820 F.2d at 1166 n. 4 (citation omitted). We further refined that definition in *[Chrysler Credit Corp. v Rebhan* , 842 F.2d 1257 (11th Cir. 1988)]. As we held there, "malice for purposes of section 523(a)(6) can be established by a finding of implied or constructive malice." 842 F.2d at 1263. Special malice need not be proved, i.e., a showing of specific intent to harm another is not necessary. Id. Constructive or implied malice can be found if the nature of the act itself implies a sufficient degree of malice. *See United Bank of Southgate v. Nelson*, 35 B.R. 766, 769 (N.D.Ill.1983) (quoting *Tinker v. Colwell*, 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904)).

In re Ikner, 883 F.2d 986, 991 (11th Cir. 1989).

A determination of nondischargeability under §523(a)(6) must rest on 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). Thus, a claim based on a debt arising from a willful and malicious injury is necessarily based on a tort.

The conduct of Defendant alleged to have injured Plaintiff consists of (1) the breach of the employment agreement and (2) the alleged retaliation or attempt, acting alone or in a conspiracy, to deter or intimidate Plaintiff from testifying in a case in federal court.

As discussed above in Part C, a debt arising from mere breach of a contract is dischargeable. Nothing in the complaint suggests that Defendant's purpose in terminating Plaintiff's employment was to inflict financial injury on Plaintiff and not to achieve some legitimate business purpose. Indeed, Plaintiff took care to allege Defendant's statement that the reason for the termination was that the business could no longer afford Plaintiff's services, Complaint, Doc. No. 1, p. 13, ¶ 32, while he failed to allege that Defendant had any other purpose in terminating Plaintiff's employment.

As explained above in Part E, the complaint announces in conclusory fashion that Defendant attempted to deter him from testifying in the federal case, threatened him, retaliated against him and entered into a conspiracy to intimidate him into not testifying. These allegations merely mouth the words of the statutes relied on. The complaint does not contain a single allegation of fact to support any of those conclusions. The labeling of the letter sent by Defendant's counsel as "threatening" does not tie the perceived threat to an attempt to interfere with any testimony that Plaintiff might have provided in the federal case. The complaint implies that Plaintiff had yet to speak with anyone associated with the plaintiffs in that case and does not and could not allege that Plaintiff had been asked to testify or had volunteered to testify in the federal case. Similarly, the assertion that Defendant's motive for demanding the return of the laptop and documents was to prevent their use in the federal case is speculation and not an allegation of fact. Even if that speculation is assumed to be true, the demand to return property that did not belong to Plaintiff cannot be characterized as a threat or act of intimidation designed to discourage Plaintiff from testifying. There is no allegation tying the demand for the return of

property to some adverse consequence Plaintiff would suffer as a result of testifying contrasted with adverse consequences of converting property that did not belong to him.

In summary, because the complaint fails to allege facts that would make a claim under section 523(a)(6) plausible, the motion to dismiss is meritorious. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937 (2009).

G.

The complaint contains allegations of misconduct by Defendant directed to the denial of his discharge, though the prayer for relief beginning on page 22 of the complaint does not seek denial of Defendant's discharge.

Plaintiff's haphazard approach to an objection to discharge rests primarily on his reading of a letter from Defendant's counsel addressed to "counsel" in litigation in the Superior Court of Oconee County, Georgia. Complaint, Doc. No. 1, ¶ 45, pp. 15-16. Plaintiff treats that letter as an admission that corporations listed on amended Schedule B and Defendant are one and the same – alter egos. The Court disagrees and reads that letter as a statement of a legal conclusion as to the reach of the automatic stay with respect to Defendant's ownership interest in the corporations and not as an admission by Defendant that he is the owner of the assets of those corporations. The assumption of Plaintiff to the contrary is itself a legal conclusion.

In paragraphs 46-48 of the complaint, Plaintiff alleges that Defendant stated on amended Schedule B the value of certain corporations to be "unknown," that "[i]n summarizing Schedule B, Defendant Ahmed quantified the 'unknown' value of this ownership interest as equal to 'zero' value," and that "Defendant Ahmed's representation that these corporations have zero value was deliberately false and substantially understated his assets in the Amended Summary of Schedules."

The legal conclusion Plaintiff posits is that in preparing the summary of schedules and in adding the stated values of assets on a page of a schedule, a debtor represents the value of an asset as zero if he states he does not know the value of that asset but then fails to include a numerical value ofr that asset when adding up the known values of other assets. That assertion is ludicrous. To make up a value that proved incorrect could subject a debtor to a charge of perjury.

The Court takes judicial notice of the Amended Schedules and summary filed on June 6, 2011. Amended Schedule B listed interests in six corporations with a value of "unknown" and two others with stated values, contrary to the facts alleged by Plaintiff, which the Court nonetheless assumes are true.

In paragraph 48 of the complaint, Plaintiff asserts a legal conclusion that there is an "identity of interest" between those of Defendant and those of the corporations in question. No facts are alleged to support the legal conclusions implied, which is that Defendant is the alter ego of the corporations and had a duty to include corporate assets or earnings in his schedules. Plaintiff asserts that Defendant is using income from the corporations without disclosure to the Court or the Trustee. But a debtor in possession in a chapter 11 case is entitled to operate the business, which permits the use of the income of the business. 11 U.S.C. § 1107. Hence, this allegations does not provide a basis for denying Defendant's discharge. See 11 U.S.C. § 1141. The Court assumes the facts alleged are true, even though contradicted by Schedule I filed on April 30, 2011, in which Defendant disclosed monthly income of $8,750 from "Franchised Restaurants. ".

Plaintiff's assertion in paragraph 51 that Defendant "is not entitled to a discharge under 11 U.S.C. § 1129, as the plan was not filed in good faith" is without merit. Defendant had not filed a

plan when the complaint was filed. Plaintiff's assertion in paragraph 52 that Defendant is not entitled to a discharge because "he failed to meet the priority rule" is also without merit for the same reason. If a plan in a chapter 11 case violates the absolute priority rule, it may not be confirmed, which would result in no discharge, but an argument that a chapter 11 plan is not confirmable must be made in the main case in connection with the confirmation process, not in a complaint to deny discharge.

In short, Plaintiff has not alleged facts that would show that his claim that Defendant's discharge should be denied is plausible.

Based on the assumed facts and the conclusions of law stated above, Defendant's motion for judgment on the pleadings in his favor is GRANTED. The Clerk is directed to serve a copy of this order on counsel for each party.

END OF ORDER