IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: WELLPATH HOLDINGS, INC., *et al*., Debtors,	§	
	§	Case No. 24-90533 (ARP)
	§	Chapter 11
	§	(Jointly Administered)
THOMAS J. FREEMAN, Plaintiff	§	
	§	Adv. No. 25-03049
VS.	§	
WELLPATH LLC, Defendant.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Plaintiff THOMAS J. FREEMAN ("Plaintiff"), and files this his Response to Defendant's Motion to Dismiss and respectfully shows the Court as follows:

I. INTRODUCTION

Plaintiff respectfully opposes the motion of WELLPATH LLC ("Defendant" or "Wellpath") to dismiss his Adversary Complaint under Rule 12(b)(6), Fed. R. Civ. P. Plaintiff states a viable claim under 11 U.S.C. § 523(a)(2)(A) for fraudulent inducement of a settlement agreement rendering Wellpath's $75,000.00 debt to Plaintiff nondischargeable. Defendant's Motion rests on four (4) main arguments, each of which is flawed: (1) that Plaintiff's claim is based solely on statements "respecting the debtor's financial condition" and thus is barred, (2) that an integration clause extinguishes any fraud claim, (3) that the fraud allegations are not pled with

the specificity required by Rule 9(b), and (4) that Plaintiff suffered no actionable damages because any payment would have been recoverable as a preferential transfer in the bankruptcy.

As shown below, each of these arguments fails. Plaintiff's fraud theory centers on Wellpath's material omissions and deceptive conduct, not any affirmative misrepresentation about its finances. Fifth Circuit law recognizes that fraudulent omissions and false pretenses can render a debt nondischargeable under 11 U.S. Code § 523(a)(2)(A). The alleged omission here--that Wellpath never intended to make the payment--has nothing to do with Wellpath's overall financial condition. Further, there is no "statement" at issue but an omission. The integration clause does *not* bar a party from claiming it was fraudulently induced to enter the contract, absent a specific disclaimer of reliance on outside representations. Moreover, Plaintiff is alleging that the promise is not an outside statement, but one made in the settlement agreement: the promise to make two payments. Plaintiff alleges Defendant never intended to make the payments. More than mere proximity (as Defendant asserts) exists, demonstrating Defendant's intent at the time of the omission and at the time it promised to make the payments. Further, Plaintiff's complaint satisfies Rule 9(b), Fed. R. Civ. P., by identifying the "who, what, when, where, and how" of the alleged fraud, albeit in the context of information that was withheld. Finally, Plaintiff plainly suffered damages as a result of the fraud**.** He relinquished his pending civil claims--including his claims against the individual co-defendant doctor--and is now left with only an unsecured pre-petition claim against a bankrupt entity. This forfeiture of claims and legal rights is a cognizable injury. Defendant's suggestion that Plaintiff was not harmed because any payment received would have been clawed back in bankruptcy is speculative. For these reasons, Defendant's Motion to Dismiss should be denied.

II. FACTUAL BACKGROUND

Plaintiff's Complaint alleges that, on October 10, 2024, Plaintiff mediated a lawsuit with Wellpath and Dr. Kim (one of its doctors, hereinafter "Kim") for medical malpractice and civil rights violations. Plaintiff executed the Settlement Agreement on October 24, 2024, and simultaneously provided a stipulation of dismissal. The Court entered its order dismissing the case with prejudice on October 25, 2024.

Plaintiff further alleges that the Settlement Agreement required Wellpath to pay Plaintiff a total sum of $75,000.00 in two (2) equal installments: $37,500.00 within thirty (30) days of both the dismissal and execution of the Settlement Agreement and $37,500.00 within ninety (90) days of both the dismissal and execution of the Settlement Agreement.

Plaintiff's Adversary Proceeding further alleges that, in executing the Settlement Agreement and stipulation of dismissal, Plaintiff relied on Defendant's express representations and promises to make the agreed-upon payments. Based on these representations, Plaintiff dismissed all claims with prejudice and provided complete releases to both Defendant and Kim.

On November 11, 2024--just 18 days after the settlement became effective--Wellpath filed Chapter 11 in the U.S. Bankruptcy Court for the Southern District of Texas. No settlement payments were ever made. Plaintiff was left with only a general unsecured claim in the bankruptcy (for which he filed a proof of claim), and no recourse against the co-defendant Kim (who had been released from liability as part of the settlement).

III. ARGUMENT

A. Section 523(a)(2)(A) Applies to Debtor's Fraudulent Omissions and False Pretenses; *Lamar v. Appling* Does Not Immunize Wellpath's Conduct

Section 523(a)(2)(A) excepts from discharge any debt for money or property obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the

debtor's or an insider's financial condition." Wellpath argues that Plaintiff's claim is based solely on non-actionable statements about its "overall financial condition," pointing to the Supreme Court's decision in *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709 (2018). This argument fails because Plaintiff's fraud theory does *not* rest on any express "statement" by Wellpath about its finances; rather, the claim centers on *fraudulent omissions*, including that Defendant had no intention of ever making a payment, and *deceptive conduct* by Wellpath--a course of conduct designed to create a false impression of intent to perform. Such fraud falls squarely within §523(a)(2)(A)'s scope and *outside* the narrow "financial condition" exclusion. In *Husky*, the Supreme Court held that "actual fraud" in § 523(a)(2)(A) is a broad term that can encompass fraudulent schemes even without a misrepresentation. *Husky Int'l Electronics, Inc. v. Ritz*, 578 U.S. 355 (2016). As the Supreme Court has recognized, "actual fraud" includes deceptive conduct such as intentional concealment. *Id*. Here, Wellpath's scheme to induce a settlement and file for bankruptcy falls squarely within actual fraud as defined in *Husky*. *Id.* Further, Plaintiff is simply alleging that, when Wellpath entered the settlement agreement, it had no intention of making the promised payments. This has nothing to do with the overall financial condition of Wellpath. Plaintiff is not alleging Wellpath didn't have the financial means to make the payments, but that it never intended to make the payments. The promise is not an oral statement outside the agreement but the entire reason for entering the agreement--an agreement with which Wellpath never intended to comply at the time it entered it.

Plaintiff is not asserting a "statement" about financial condition was made. Section 523(a)(2)(A) excludes "statement(s)" of financial condition. In *Lamar*, the Supreme Court held that a debtor's specific oral misrepresentation about an asset (there, a statement about a pending tax refund) was indeed a "statement respecting the debtor's financial condition" and, because it

was not in writing, the creditor's claim could not proceed under § 523(a)(2)(A). The Court construed "statement respecting the debtor's financial condition" to include any statement with a "direct relation to or impact on the debtor's overall financial status," *i.e.*, an assertion about the debtor's ability to pay a debt. *Lamar* thus stands for the rule that a materially false oral statement about one's finances (solvency, assets, ability to pay) cannot form the basis of a nondischargeability claim under subsection (A); the creditor must meet the stricter requirements of § 523(a)(2)(B) (which requires such statements to be in writing). Here, there is a statement in writing--*Lamar* involved a statement about an asset. Plaintiff alleges here that there was no statement, and it does not involve an asset. Rather, Plaintiff asserts Defendant never intended to make the settlement payments it negotiated.

This case is different. Plaintiff does not allege that Wellpath made any express oral representation about its financial health. There is no claim that Wellpath falsely declared itself "solvent" or explicitly assured Plaintiff of its ability to pay; instead, the Complaint alleges that Wellpath promised to make the settlement payments in exchange for a release of Wellpath and Kim. The promise to pay is in writing and in the agreement; it is not external to it. Wellpath never intended to make the payments at all. Importantly, the promises to pay were in writing and not oral. The *Lamar* case determined that the statement concerning his "financial condition" was not in writing. In this instance, however, the statement of intention to pay is in writing and is not related to the financial condition of Wellpath or any asset, such as a tax return, as was the situation in *Lamar*.

Here, Wellpath's silence in the face of a duty to disclose--and its act of entering into a settlement it had no intention of honoring--was a deceptive practice that created a false impression of commitment and reliability. Such conduct fits comfortably within the meaning of "false

pretenses" or "actual fraud" under § 523(a)(2)(A). False pretenses can be established by "implied misrepresentations or conduct intended to create and foster a false impression," including material omissions. The Fifth Circuit has emphasized that omissions can give rise to nondischargeable fraud where they serve to perpetuate a false understanding between the debtor and creditor. For example, in *Clem v. Tomlinson*, the bankruptcy court found a debt nondischargeable based on the debtor's fraud by nondisclosure--the debtor had failed to inform the plaintiffs of critical facts during a transaction, thereby inducing them to proceed under false pretenses. 583 B.R. 329, 383 (N.D. Texas, Dec. 21, 2017). Although the Fifth Circuit ultimately reversed on collateral estoppel grounds in that case, it did not question that nondisclosure of material information could constitute "false representation" or "false pretenses" under § 523(a)(2)(A). *See, Clem v. Tomlinson*, 124 F.4th 341 (5th Cir. 2024). Likewise, in *Bates v. Selenberg (In re Selenberg)*, a debtor-lawyer's concealment of facts (in violation of a duty to disclose) when inducing a client to settle a malpractice claim was held to be a false representation under §523(a)(2)(A). 856 F.3d 393 (5th Cir. 2017). The district court in *Selenberg* expressly noted that a breach of a duty to disclose can amount to a false misrepresentation for §523(a)(2)(A) purposes, and it rejected the debtor's argument that no fraud was shown because he technically made no affirmative misstatement. *Id.* Further, in *Selenberg*, the court held that the debtor obtained an extension of credit (promissory note) from the creditor who had a malpractice claim by actual fraud. *Id*. As in this case, the plaintiff-creditor in *Selenberg* gave up her right to bring a malpractice claim against the debtor lawyer. *Id*. Here, not only did the debtor-defendant obtain an extension of credit and plaintiff-creditor give up his claims against the debtor, but he also gave up his claims against another third party (Kim) under the ruse.

To the extent Wellpath argues that its only "representation" was the promise to pay $75,000.00 (which implicitly asserted ability and intent to pay), that promise is actionable under §523(a)(2)(A) as long as Plaintiff can prove it was made with no intent to perform. A promise of future action, made with the present intention not to fulfill it, can constitute "actual fraud" under § 523(a)(2)(A). The actual fraud component of § 523(a)(2) is satisfied by a debtor's promises of future action which, when made, it had no intention of fulfilling. *In re Bonanno*, 2016 WL 3597891, at *3 (Bankr. E.D. La. June 27, 2016). This subjective component is determined by looking at the totality of the circumstances. *Id*. Here, Plaintiff alleges precisely that scenario: at the time of the mediation and settlement, Wellpath "knew it would not" make the payments and had no intention of doing so. If proven, that is *actual fraud*, and nothing in § 523(a)(2)(A) or *Lamar* shields such conduct simply because the deceit concerned an inability to pay. *Lamar* does not license a debtor to lie or conceal material facts about a planned bankruptcy and then discharge the induced debt; it merely requires creditors to get such promises in writing if they amount to an explicit assertion about financial position.

Importantly, Plaintiff's claim is founded on more than just the proximity of the bankruptcy filing to the settlement. Unlike cases cited by Defendant where timing alone was deemed insufficient (*e.g.*, debts incurred "one month" or "three months" before filing with no other indicia of fraud), the Complaint here details a range of "badges of fraud." For example, Plaintiff alleges that, by the time of the settlement, (1) Wellpath had already retained counsel and was making plans to file; (2) Wellpath was in default on its senior debt and operating under a lender forbearance agreement, a fact later publicly reported by Moody's and Bloomberg News; (3) Wellpath had engaged in a failed attempt to sell off a major division to raise cash, signaling that Chapter 11 was likely inevitable; and (4) Wellpath deliberately timed the settlement payments to fall after the

anticipated bankruptcy date, ensuring Plaintiff would not be paid outside of bankruptcy and Defendant Kim would be released. These are not asserted as facts concerning the overall financial condition of the debtor but as evidence of intent. Defendant misrepresents that Plaintiff is only asserting mere proximity to the filing of the bankruptcy, which is clearly erroneous.

Defendant's reliance on the *Lamar* "financial condition" exception is misplaced. Plaintiff's claim does not hinge on any oral statement about Wellpath's balance sheet or solvency. It hinges on Wellpath's *conduct*--the deception of entering into a settlement under false pretenses and concealing its true intentions. Section 523(a)(2)(A) was designed to prevent exactly this sort of debtor misconduct from benefiting from discharge. As the Fifth Circuit has noted, while exceptions to discharge are narrowly construed, they are meant to target "frauds involving moral turpitude or intentional wrong" where the debtor's conduct is blameworthy. Taking Plaintiff's allegations as true, Wellpath's conduct crosses that line. The debt at issue was "obtained by … false pretenses" (implied misrepresentations via omission) and "actual fraud" (a consciously devised plan not to pay), making § 523(a)(2)(A) squarely applicable. There is no statement of overall financial condition that is the subject of Plaintiff's claims. It is omissions--and only omissions--what Defendant did not say and the written promise to make two payments--on which Plaintiff's claims are founded. The Supreme Court has held that nondischargeability under §523(a)(2)(A) of the Bankruptcy Code for fraudulent misrepresentations "other than a statement respecting the debtor's or an insider's financial condition" means that creditors in bankruptcy are barred from claiming oral misrepresentations that have "a direct relation to or impact on the debtor's overall financial status." *Lamar* at 1755. "It is well-established that subsections 523(a)(2)(A) and (a)(2)(B) are mutually exclusive, and that if a 'statement respecting the debtor's

or an insider's financial condition' is communicated orally, the creditor's claim will fail and the underlying debt will be discharged." *In re Ransford,* 202 B.R. 1, 3 (Bankr. D. Mass. 1996).

The Court should reject Defendant's attempt to recast Plaintiff's Complaint as merely complaining about Wellpath's financial condition. Plaintiff is complaining about Wellpath's fraudulent inducement of a contract--a classic scenario for nondischargeability under §523(a)(2)(A). *See, Matter of Allison*, 960 F.2d 481, 484 (5th Cir. 1992) (debtor's knowing concealment of material information can bar discharge of the debt if it leads the creditor into a detrimental transaction). Whether Wellpath was insolvent or not is relevant as background, but the crux is that Wellpath lied by silence about a pending bankruptcy filing to trick Plaintiff into signing away his claims. That is actionable "actual fraud" and "false pretenses" not shielded by *Lamar*.

B. The Settlement Agreement's Integration Clause Does Not Bar Plaintiff's Fraudulent Inducement Claim

Defendant next contends that Plaintiff's fraud claim is foreclosed by the Settlement Agreement's integration clause, which provides that the written agreement "embod[ies] the entire understanding of the parties" and that there are "no further or other agreements or understandings, written or oral, in effect between [the parties] relating to the subject matter." According to Wellpath, this clause "expressly disclaims the existence of any other agreements or understandings" and thereby prevents Plaintiff from asserting he relied on any outside representations or omissions. This argument misconstrues Plaintiff's argument and misapprehends the law.

First, Plaintiff's core allegation is not outside the agreement at all. Plaintiff asserts that Defendant never intended to make the payments it expressly agreed to in the settlement agreement. Defendant not only secured a release for itself but also secured a release for Kim by entering into

the agreement. It never intended to pay the two payments; it simply secured a release days before filing bankruptcy in order to obtain a release for Kim and provide Plaintiff with an unsecured debt. The fraud in the inducement is that, had Plaintiff been offered to be a creditor claimant and release both parties, and had Defendant been up front that it never intended to pay the two payments, Plaintiff would not have entered into the settlement agreement.

Under Fifth Circuit and Texas law, a standard merger or integration clause does *not* automatically preclude a fraudulent inducement claim, especially one based on intentional concealment of material facts. Only a clear and specific contractual disclaimer of reliance on extra-contractual representations can defeat a fraud-in-the-inducement claim and, even then, public policy imposes limits. The clause in question lacks any explicit disclaimer of reliance by Plaintiff, and nothing in it addresses--let alone excuses--intentional omissions of material fact.

It is well established that a party cannot contractually immunize itself from liability for its own fraud unless the contract contains a sufficiently clear waiver or disclaimer of reliance. The Texas Supreme Court's decision in *Italian Cowboy Partners, Ltd. v. Prudential Insurance Co.*, 341 S.W.3d 323 (Tex. 2011), is instructive. In that case, a commercial lease contained a merger clause stating that the written lease constituted the "entire agreement" of the parties and that no other promises had been made. The tenant later sued for fraudulent inducement. The landlord argued that the merger clause barred any reliance on oral representations or omissions, much like Wellpath argues here. The Texas Supreme Court squarely rejected that argument, holding that a "bare merger clause" that does not clearly disclaim reliance on representations will not bar a fraudulent inducement claim. The Court distinguished a simple, more robust "no-reliance" clause. The latter, if clearly and unequivocally stated, might negate the element of reliance; but the former, which merely states that the contract is the complete agreement, does not say anything about

whether one party relied on representations or omissions in deciding to enter into the contract. *Id.* at 331-37. Because the lease in *Italian Cowboy* did not contain a clear disclaimer of reliance (for example, language like "Tenant acknowledges that it is not relying on any representations not contained in this lease"), the tenant's fraud claim was allowed to proceed. The Court emphasized that parties must use explicit "magic words" to disclaim reliance if they intend to waive fraudulent inducement claims.

The Fifth Circuit's decisions are in accord. Texas courts hold that "a merger clause can be avoided based on fraud in the inducement and that the parol evidence rule does not bar proof of such fraud." *Armstrong v. American Home Shield Corp.*, 333 F.3d 566 (5th Cir. 2003). For instance, the Fifth Circuit in *Armstrong* noted that the contract contained an integration clause and also an express acknowledgment by the plaintiff that she was not relying on any representations not contained in the agreement. It was this "clear and unequivocal disclaimer[] of reliance" that led the Fifth Circuit to reject the fraud claim in *Armstrong*. By contrast, where a contract lacks an explicit no-reliance clause, Fifth Circuit law does not automatically bar a fraudulent inducement claim. *See, e.g., U.S. Quest Ltd. v. Kimmons*, 228 F.3d 399, 403-04 (5th Cir. 2000) (affirming that, absent a specific disclaimer of reliance, a party may pursue fraudulent inducement even if an integration clause is present); *accord, Italian Cowboy*, 341 S.W.3d at 334 ("merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, will not bar fraud claims").

Illinois law, which arguably governs the Settlement Agreement, similarly holds that a general integration clause does not preclude a fraudulent inducement claim, absent a clear disclaimer of reliance. An integration clause of a contract states that a contract represents the entire agreement between the parties and "prevents a party to a contract from basing a claim of

breach of contract on agreements or understandings, whether oral or written, that the parties had reached during the negotiations *** but that they had not written into the contract itself." *Vigortone A.G. Products, Inc.*, 316 F.3d at 644. A no-reliance clause, unlike an integration clause, precludes fraud actions because "reliance" is an element of fraud. *Tirapelli v. Advanced Equities, Inc.*, 351 Ill. App. 3d 450 (Ill.-App. 1st Dist. 2004). Thus, whether under Texas or Illinois law, the integration clause here, which contains a no-reliance disclaimer, does not immunize Wellpath from allegations that it procured the contract by fraud.

Here, the Settlement Agreement's clause is a garden-variety integration clause. It says the written document is the entire understanding and that there are no other agreements between the parties on the subject. Crucially, it does not say that Plaintiff disclaims reliance on any representations or that he has not been induced by any outside statements or omissions. There is no mention of "reliance" at all. This stands in stark contrast to the clauses in cases like *Armstrong*, which specifically stated that the plaintiff had not relied on any representations not contained in the contract. Because the clause here lacks the requisite no-reliance language, under *Italian Cowboy*, it "does not disclaim reliance or bar a claim based on fraudulent inducement." *341 S.W.3d at 336*.

Moreover, even aside from the reliance aspect, the nature of the fraud alleged here is not one that an integration clause could ever shield. Plaintiff is not alleging that Wellpath promised him something outside the written agreement or that there was some additional oral side agreement. If that were the case, an integration clause would indeed negate the existence of any such side agreement. Instead, Plaintiff alleges that Wellpath lied about its intent to perform the very promises that are in the agreement. In other words, Plaintiff doesn't claim there were "further … agreements or understandings" outside the contract; he claims the contract itself was obtained

by fraud. Integration clauses do not bar proof that the contract itself was procured by fraudulent inducement. *See Dallas Farm Mach. Co. v. Reaves*, 307 S.W.2d 233, 239-40 (Tex. 1957) (recognizing that a merger clause does not bar a party from claiming they were fraudulently induced to sign the contract in the first place). This principle is widely accepted because a contrary rule would essentially allow contracting parties to exonerate themselves for intentional fraud by inserting boilerplate merger language. Courts refuse to enforce contracts so as to reward fraud, absent a very clear contractual waiver by the victim (and, even then, public policy imposes some limits).

Notably, the cases Wellpath cites are distinguishable. *In re Clem*, 583 B.R. 329 (Bankr. N.D. Tex. 2017) involved an integration clause that also contained an explicit disclaimer of reliance, and the court found the creditors' fraud claim failed because of a "clear and unequivocal disclaimer of reliance" in the contract. Likewise, *Hobbs v. Alcoa, Inc.*, 501 F.3d 395 (5th Cir. 2007), on which Wellpath relies, dealt with a no-reliance clause broader than the clause at issue in this case. Irrespective, Plaintiff's pleadings and the main crux of Plaintiff's argument and claim are not that there were separate agreements or understandings, but that the written agreement itself and the promise to make the payments written in the agreement was a false representation because the debtor, at the time it made the representation, never intended to make the promised payments. It is that omission that is the heart of Plaintiff's case--not that there were other promises or understandings. This main allegation is not addressed by the debtor. Instead, Defendant mischaracterizes Plaintiff's allegations, claiming they are all connected with its overall financial condition.

If and to the extent *Hobbs* suggested an integration clause alone suffices, that approach has since been clarified by decisions like *Italian Cowboy* and the Fifth Circuit's acknowledgment that a merger clause "entire agreement" provision alone is not enough to waive fraud claims.

In summary, Plaintiff's fraudulent inducement claim is not barred by the integration clause in the Settlement Agreement. The clause does not contain a disclaimer of reliance and, under settled law, it therefore does not negate the essential element of Plaintiff's justifiable reliance on Wellpath's misleading conduct. Plaintiff has adequately alleged that he justifiably relied on the false impression Wellpath created (*i.e.*, that Wellpath would perform as promised). *See, e.g., In re Chivers*, 275 B.R. 606 (Bankr. D. Utah 2002) (debtors induced creditors to invest and then filed bankruptcy; court found nondischargeability for false pretenses). Whether that reliance was justified in light of all the facts is a question for trial, but the integration clause does not foreclose the issue as a matter of law. To hold otherwise would contravene Fifth Circuit and Texas precedent and effectively sanction deliberate fraud by silence in contract negotiations. This Court should decline Defendant's invitation to do so.

C. Plaintiff's Fraud Claim is Adequately Pled with Particularity Under Rule 9(b)

Defendant argues that Plaintiff has not met the heightened pleading standard of Fed. R. Civ. P. 9(b), which requires that "the circumstances constituting fraud" be stated with particularity. In the context of § 523(a)(2)(A), the Fifth Circuit indeed demands particularity--the complaint should allege the specific misrepresentations or fraudulent conduct, when and where it occurred, and the identity of those involved. Plaintiff's complaint meets this standard. While it is true that fraud by omission has to be pled a bit differently (since the "misrepresentation" is an omission of fact), Plaintiff's complaint expressly identifies the who, what, when, where, and how of the fraud, satisfying Rule 9(b)'s objectives of fair notice and definite statement of the claim.

The "who": Plaintiff's Complaint makes clear that Defendant, through its representatives and attorneys at the October 10, 2024, mediation, is the party that perpetrated the fraud. The individuals who negotiated and executed the settlement on Wellpath's behalf had a duty to speak truthfully about any facts that would materially affect the settlement, and they are identified generally as "the attorneys and representative at the mediation" who possessed the undisclosed information and who agreed to make the settlement payments when they knew, but omitted to state, that Defendant would not be making them. If necessary, Plaintiff can name specific individuals (such as Wellpath's counsel who attended the mediation and the representative from Wellpath present) in an amended complaint, but there is no mystery to the "who" element here--it is *Wellpath*, acting through its agents. Moreover, Wellpath obviously has had no trouble understanding that it is the accused fraudulent actor, and it knows the representative who attended mediation.

The "what": The complaint painstakingly enumerates the specific information that Wellpath concealed and the simple fact that it agreed to payments it knew it would never make. Paragraph 22 of the Complaint (as quoted in Defendant's motion) lists at least six (6) distinct facts Wellpath failed to disclose:

- its imminent bankruptcy filing;
- its defaults under credit facilities;
- its retention of bankruptcy professionals;
- a failed sale process;
- ongoing restructuring negotiations; and
- its lack of intent to pay Plaintiff post-petition.

Plaintiff's Complaint alleges that Wellpath "deliberately structured the settlement payments to be due after its bankruptcy filing" so that Plaintiff's claim would become dischargeable. This further details the *method* of the fraud—*i.e.*, how Wellpath executed its scheme by timing the payment schedule to coincide with its bankruptcy strategy and obtain a

release for Wellpath and Kim while only obligating Wellpath to the payment obligation. By only obligating Wellpath, there is some evidence that Wellpath knew it was filing bankruptcy and wanted a release for Kim as well and structured the settlement so that Plaintiff released Kim and dismissed the suit with prejudice. In short, the Complaint clearly identifies what was concealed and how the overall deception was carried out.

The "when" and "where": Plaintiff's Complaint pinpoints the time and setting of the fraudulent conduct. The omissions occurred during the October 10, 2024, mediation and by the time of negotiating and executing the Settlement Agreement on October 24, 2024. These dates and events are expressly referenced (Compl. ¶¶ 8-13) and further emphasized in the narrative of the fraud (Compl. ¶¶ 22-26). Thus, Wellpath is on notice that the fraudulent inducement took place in the context of the settlement discussions in October 2024, culminating in Plaintiff's execution of the agreement in Illinois on October 24, 2024. The bankruptcy filing date (November 11, 2024) is also given, which ties into the allegation of fraudulent intent at the formation of the contract (*i.e.*, "as evidenced by [Wellpath's] bankruptcy filing just 32 days later" (Compl. ¶23)). There is no ambiguity about when and where Wellpath's misrepresentations by omission occurred: *at the mediation table and in the course of bargaining for the settlement.*

The "how" and "why": Plaintiff's Complaint explains how Wellpath's silence deceived Plaintiff and why it was wrongful. Paragraph 28 of the Complaint is especially detailed on this point: it spells out that the parties' relationship and settlement talks "gave rise to a duty to speak by Defendant," triggered when Wellpath made promises of payment and entered into the settlement. It specifies the general content of the information withheld (the imminent bankruptcy filing) and its materiality (Plaintiff would not have settled had he known). It identifies those who failed to disclose (Wellpath's attorneys and representative at the mediation) and what Wellpath

gained by withholding the information (a release of Kim and the relegation of Plaintiff's claim to a dischargeable debt). It further explains why Plaintiff's reliance on the omission was reasonable and how it was detrimental (the promised payments were the only inducement to settle, and Plaintiff gave up his claims as a result). Few fraud pleadings could be more specific. Essentially, the Complaint walks through each element of fraudulent inducement by omission in a structured manner--which is exactly what Rule 9(b) seeks--giving Defendant a roadmap of the alleged fraud.

Defendant criticizes the Complaint for not specifying which "path" of § 523(a)(2)(A) (false pretenses/representation vs. actual fraud) Plaintiff is pursuing. But the law does not require a plaintiff to pigeonhole his claim at the pleading stage, especially when the same nucleus of facts could support multiple theories of fraud. Courts have found that, where the allegations are sufficient to show fraudulent conduct, a dismissal for "shotgun pleading" of multiple legal theories is not warranted as long as the defendant is fairly apprised of the misconduct (*In re Ozcelebi*, 635 B.R. 467, 476-77 (Bankr. S.D. Tex. 2021) (discouraging shotgun pleading but focusing on whether the complaint gives adequate notice of the alleged fraud)). Here, Plaintiff's theory is clearly articulated: Wellpath induced the settlement by creating a false impression (through omissions) of its intent to honor the settlement payments. Whether one labels that "false pretenses" or "actual fraud" or both, the factual allegations remain the same and are clearly set forth. Defendant's Motion to Dismiss itself demonstrates that Wellpath fully understands the allegation--it devoted pages to arguing there was no intent to deceive and no misrepresentation outside of financial condition. Thus, any contention that the Complaint is impermissibly vague about the theory is meritless; Plaintiff has one coherent theory of fraud, albeit one that implicates both *false representation* (by omission) and *actual fraud* (intent not to perform).

To the extent Rule 9(b) requires pleading *scienter* (fraudulent intent) with particularity, Plaintiff has done so to the degree possible at this stage. Rule 9(b) permits intent and knowledge to be averred generally, but a plaintiff still must plead enough facts to support a plausible inference of intent. As discussed above in Section I, Plaintiff has pled a compelling sequence of events and insider knowledge that permits the inference that Wellpath knew its payment promise was false and intended to deceive. Plaintiff's Complaint cites the tight timing of the bankruptcy, Wellpath's extensive preparations beforehand, and even identifies two (2) specific motives Wellpath had for the fraud (protecting Kim and delaying payment into bankruptcy). These factual allegations distinguish this case from ones like *In re Veale* or *In re Fatone,* where the court found the plaintiff relied solely on the timing of bankruptcy and nothing more. Here, Plaintiff has laid out a context that makes Wellpath's fraudulent intent not just possible but plausible: Wellpath faced mounting creditor pressure in October 2024, had no ability to pay Plaintiff without preferentially paying him, and saw an opportunity to settle "on the cheap" by using the forthcoming bankruptcy as a shield. Taking those facts as true, it is certainly plausible (indeed likely) that Wellpath never intended to pay Plaintiff at the time it made the settlement. Nothing more is required at the pleading stage.

D. Plaintiff Has Adequately Pled Damages Caused by the Fraud, and the Possibility of a Preference Clawback Does Not Negate His Injury

Defendant's final argument is that Plaintiff "fails to plead damages" because, had Wellpath paid the $75,000.00 before bankruptcy, that payment could have been recovered as a preferential transfer under 11 U.S.C. §547. This argument misperceives the nature of Plaintiff's damages and misapplies the law. Plaintiff has clearly pled that he suffered harm by entering into the settlement and giving up his claims based on Wellpath's misrepresentations. Plaintiff's Complaint states that "Plaintiff relied upon Defendant's representations in entering into the settlement … to his detriment and suffered harm as a result" (Compl. ¶ 27), and it specifies that the damages caused

by the fraud included "giving up his claims against Defendants Wellpath and Kim" (Compl. ¶ 28). These allegations are sufficient to plead the damages element of fraud. Indeed, the loss of a legal claim or cause of action due to fraudulent inducement is a recognized form of damage. For example, in the *Selenberg* case discussed earlier, the creditor (Mrs. Bates) lost her right to pursue a malpractice lawsuit because she was fraudulently induced to take a promissory note; the court held that she "suffered a loss based on her reliance" in foregoing the lawsuit. Similarly here, Plaintiff's relinquishment of his pending lawsuit (and particularly the release of the co-defendant) is a concrete detriment he incurred due to Wellpath's alleged fraud.

Defendant's preference-clawback theory does not undermine the fact that Plaintiff was damaged at the moment he settled. The proper measure of damages in a fraudulent inducement case is to put the plaintiff in the position he would have been in had he not been defrauded (often measured by the "benefit of the bargain" or "out-of-pocket" loss). Here, had Plaintiff known the truth, he would not have settled for a $75,000.00 unsecured promise--he either would have refused to settle at all or insisted on different terms (such as an upfront payment or secured obligation) that could withstand bankruptcy. Because of Wellpath's omissions, Plaintiff lost the opportunity to pursue his claims to judgment or to negotiate a safer settlement structure. Moreover, Plaintiff released Kim, and that lost opportunity is a real, quantifiable damage at the very least.

Defendant's suggestion that Plaintiff was not harmed because any payment would be clawed back is flawed for several reasons: First, it is speculative. Second, it is disingenuous for Wellpath to say, "We could have paid you and then taken the money right back in bankruptcy." If Plaintiff knew Defendant never intended to pay, he would not have settled. Further, there is no guarantee that the trustee would have clawed back the settlement funds. But all of this is speculative because, had Wellpath indicated that it never intended to make the payments, Plaintiff

would not have resolved the case without additional protections or settlement provisions and would not have been in the position of dismissing Kim for payments Wellpath never intended to make.

In any event, Defendant's argument asks the Court to assume facts not in the Complaint—namely that any paid funds would have been recovered as a preference. This is a factual defense that cannot be resolved on a Rule 12(b)(6) motion. At this stage, the Court must accept that Plaintiff suffered damages when he gave up his claims for an illusory promise. What might have hypothetically happened under a different set of facts is irrelevant.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss in its entirety. Plaintiff's Complaint states a valid claim under 11 U.S.C. §523(a)(2)(A) for debt obtained by false pretenses, false representation, or actual fraud. Wellpath's arguments—whether based on the financial-condition exception, the integration clause, Rule 9(b), or a lack of damages—do not withstand scrutiny when the allegations are taken as true and applicable law is applied. Plaintiff has adequately alleged that Wellpath fraudulently induced him to settle and give up claims in omitting its lack of intent to pay and that, as a result, Plaintiff suffered the loss of his claims and expected payment. Such a debt, if proven, is exactly the kind that should not be discharged in bankruptcy ("Exceptions to discharge are strictly construed, but 'designed to prevent a debtor's abuse of the bankruptcy process by relief from debts fraudulently obtained'").

Plaintiff therefore prays that Defendant's Motion to Dismiss be DENIED. In the alternative, Plaintiff requests an Order permitting the filing of an amended complaint within a specified time and for such other and further relief as is just and proper. Plaintiff looks forward to

proving his case and demonstrating that the debt in question arises from Defendant's "very specific and serious" infraction, warranting nondischargeability.

Dated: May 8, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on May 8, 2025, he caused the foregoing Motion foregoing to be served upon the counsel of record through the electronic filing notification system.

/s/ Damon Mathias
Damon Mathias