Dated: June 14, 2022
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
Jacob Braxton Herring Case No. 20-20967
Debtor Chapter 7

Pace Financial, LLC,
Plaintiff,

v. Adv. Proc. No. 20-00094

Jacob B. Herring,
Defendant.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT, DISMISSING ADVERSARY PROCEEDING AND DENYING PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES

This matter is before the Court on the Motion [DE 23] of Plaintiff Pace Financial, LLC ("Plaintiff") for a default judgment against Defendant Debtor Jacob B. Herring ("Defendant"), filed after Defendant failed to respond to Plaintiff's dischargeability Complaint [DE 1] based on the exceptions to discharge set forth in 11 U.S.C. § 523(a)(4) and (a)(6). Neither Defendant nor his attorney responded to the Plaintiff's Motion. Pursuant to FED. R. BANKR. P. 7055, incorporating FED. R. CIV. P. 55 into the Bankruptcy Rules, Counsel for the Plaintiff and witness Mr. Kevin Boyer, Plaintiff's General Manager, appeared for a "prove-up" evidentiary hearing before the Court on May 18, 2022, at which time the Court took the Plaintiff's Motion under advisement.

Proceedings to determine the dischargeability of a debt are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (I). Accordingly, the Court has both the statutory and constitutional authority to hear and determine these proceedings subject to the statutory appellate provisions of 28 U.S.C. § 158(a)(1) and Part VIII ("Bankruptcy Appeals") of the Federal Rules of Bankruptcy Procedure. This decision constitutes the Court's findings of fact and conclusions of law under FED. R. CIV. P. 52, made applicable to this contested matter by FED. R. BANKR. P. 9014 and 7052. Regardless of whether or not specifically referred to in this decision, the Court has examined the bankruptcy case docket, the pleadings, statements of counsel, and reviewed the entire record of the case. Based upon that review, the Court finds that the Plaintiff's Motion is denied and that this adversary proceeding is accordingly dismissed. The Court further finds that Plaintiff is not entitled to recover its attorney's fees incurred in bringing this adversary proceeding.

DISCUSSION OF BACKGROUND FACTS AND PROCEDURAL HISTORY OF THE CASE

The facts of this case as presented by the Plaintiff are undisputed. Mr. Boyer testified that Defendant purchased a 2005 Lexus RX300 vehicle in February, 2019 for approximately $13,000 pursuant to an installment sales contract, and soon thereafter the contract was assigned to Plaintiff. Defendant made payments on the car for a while, but then defaulted on the note and ultimately filed a Chapter 7 bankruptcy case on February 4, 2020. When Plaintiff learned of the bankruptcy case, the parties agreed to a reaffirmation of the debt remaining on the loan. Plaintiff sent two reaffirmation agreements to Defendant, which were never returned. As the deadline for filing a reaffirmation agreement with the Bankruptcy Court was approaching, Plaintiff contacted Defendant's attorney in May, 2020 and learned that Defendant had abandoned the car at a car dealership on March 7, 2020, at which time the Defendant purchased a new vehicle.[1] Plaintiff then contacted the car dealership to arrange for repossession of the car, but the car dealership demanded payment of storage fees of $35 per day for the car's release, which totaled approximately $2200.[2] After negotiations with the car dealership over payment of the storage fees and no resolution reached, Plaintiff commenced this adversary proceeding on July 1, 2020, naming both Mr. Herring and also DWBGMC FT, LLC d/b/a Darrell Waltrip GMC ("car dealership"), as Defendants. Defendants were served with a copy of the Complaint on July 10, 2020 via U.S. Mail. [DE 6 and DE 7]

Mr. Boyers testified that once the adversary proceeding was commenced, the car dealership agreed to release the car to Plaintiff without payment of the storage fees. Plaintiff thereafter

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[1] The Complaint filed in this adversary proceeding asserts that the 2005 Lexus was not part of a trade-in for the Defendant's new vehicle. [DE 1, ¶ 11(b)].

[2] The Complaint states the amount asserted by the car dealership was $2,885, accruing over 71 days of storage. [DE 1, ¶ 11(c)].

dismissed the car dealership from this adversary proceeding, leaving Mr. Herring as the only remaining Defendant. *See* DE 29. Plaintiff then retrieved the car from the dealership in November, 2020, and discovered that the car was inoperable. After incurring expenses for repossession of the vehicle, Plaintiff sold the car for its fair market value of $3,935. *See* Memorandum of Fact and Law, DE 28, Exh. EOA. In Mr. Boyer's opinion, if Defendant had instead surrendered the car at the time it was abandoned in March, 2020, the value of the vehicle would have been approximately $10,000.

The Complaint [DE 1] filed July 1, 2020 alleges that the deficiency balance on Defendant's loan, plus Plaintiff's costs incurred in recovering the vehicle, is a debt nondischargeable in Defendant's Chapter 7 bankruptcy pursuant to the exceptions to discharge set forth in Bankruptcy Code § 523(a)(4) and (a)(6).[3] Specifically, Plaintiff argues that the Defendant's abandonment of the vehicle at the car dealership, without notifying Plaintiff, was a breach of Defendant's fiduciary duty resulting in Plaintiff's financial harm, and that Defendant's willful and malicious acts resulted in a financial loss for Plaintiff and caused Plaintiff to forego its opportunity to repossess the car in March, 2020 when it had greater value. The amount of the nondischargeable default judgment requested in Plaintiff's Memorandum of Fact and Law in support of its Motion [DE 28] is $10,590.87, but at the prove-up hearing, Plaintiff's counsel stated that Plaintiff is seeking the (approximate) $6,000 difference between the asserted $10,000 value of the car at the time it was abandoned and the (approximately) $4,000 Plaintiff received at the sale, in addition to attorney's fees incurred for bringing this action.

[3] The Plaintiff also asserts that the acts alleged in the Complaint prohibit the granting of the Defendant's general discharge under Code §727(d), although the prayer for relief and arguments of counsel were not focused on and did not assert a denial of Defendant's general discharge [DE 23, ¶ 3]. In addition, the Code section cited by Plaintiff pertains to revocation of discharge, and Defendant's pending bankruptcy case has not resulted in a discharge to date.

Defendant failed to file an answer or other responsive pleading to the Complaint, and on October 13, 2021, Plaintiff filed a Request for Clerk's Entry of Default Against Jacob Herring [DE 11] pursuant to FED. R. BANKR. P. 7055 and FED. R. CIV. P. 55(b), and a second Request on March 10, 2022 [DE 17]. The Clerk of Court accordingly entered an Entry of Default on April 15, 2022 [DE 21] and Plaintiff filed the instant Motion for Default Judgment on April 18, 2022 [DE 23]. Defendant, again, failed to respond to the Motion. The Court set the Motion for hearing on May 18, 2022, according to the directives of FED. R. CIV. P. 55(b)(2), at which time Plaintiff presented its proof.

LAW AND ANALYSIS

I. Default Judgment

Default judgments in bankruptcy adversary proceedings are governed by FED. R. BANKR. P. 7055, which incorporates FED. R. CIV. P. 55 and provides the procedure for a court to enter a default judgment when a party has failed to plead or otherwise defend an action. FED. R. CIV. P. 55(a)-(b). Rule 55 provides, in pertinent part:

> (a) **Entering a Default.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.
> (b) **Entering a Default Judgment.**
> (1) **By the Clerk.** If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk – on the plaintiff's request, with an affidavit showing the amount due – must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.
> (2) **By the Court.** In all other cases, the party must apply to the court for a default judgment. . . . If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals – preserving any federal right to a jury trial – when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;
(B) determine the amount of damages;
(C) establish the truth of any allegation by evidence; or
(D) investigate any other matter.

FED. R. CIV. P. 55(a) – (b). There are five procedural requirements that must be met before a default judgment may be entered: (1) the plaintiff must properly serve the defendant with notice of the complaint (*see* DE 7); (2) the plaintiff must seek entry of a default by showing that the defendant has failed to answer or otherwise respond to the complaint (*see* DE 11, DE 17); (3) if the defendant has entered an appearance, the defendant must be served with notice at least seven days before the hearing; (4) the plaintiff must submit an affidavit stating that the defendant is not an infant or incompetent person (*see* DE 23, Exh. 1 Affidavit SCRA); and (5) plaintiff must submit an affidavit stating whether the defendant is in the military service, or if plaintiff is unable to determine defendant's military status, stating so in the affidavit. (*see* DE 23, Exh. 1 Affidavit SCRA). *Bowers v. Banks (In re McKenzie)*, No. 08-16378, Adv. No. 11-1169, 2013 WL 1091634 at *5 (Bankr. E.D. Tenn. March 5, 2013). The Plaintiff in this case has complied with these procedural requirements.

Defendant's failure to answer or otherwise respond to the Complaint does not, however, entitle Plaintiff to a default judgment as a matter of right. *Nyman v. de Montfort (In re de Montfort)*, No. 16-33111, Adv. Pro. No. 17-3009, 2017 WL 4582171 at *6 (Bankr. N.D. Ohio Oct. 12, 2017)(citing cases). As the *de Montfort* Court noted:

> In determining whether a default judgment is appropriate, "the court should [accept] as true all of the factual allegations of the complaint, except those relating to damages" and afford plaintiff "all reasonable inferences from the evidence offered." Yet the court must still decide whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law. The court may conduct a hearing requiring proof of the facts that must be established in order to determine a defendant's liability. *See* Fed. R. Civ. P. 55(b)(2)(C). Where the

> claim sounds in fraud, the court must evaluate the evidence presented to assure that the plaintiff has presented a prima facie case.

Id. (internal citations omitted); *see also Irby v. Fashion Bug (In re Irby),* 337 B.R. 293, 294 (Bankr. N.D. Ohio 2005) ("[N]ot all injuries are legally compensable; a tenet which may not be bypassed simply because a party fails to respond to a complaint . . . . [The court must consider] whether there exists a sufficient basis in the pleading for the judgment's entry; or . . . whether a viable cause of action is alleged.") (citations omitted).

The default judgment standard governing the bankruptcy court's determination under Rule 55(b)(2) is one of *plausibility*. *USAMERIBANK v. Strength*, No. 2:16-CV-995-WKW, 2017 WL 4767694 at *7 (M.D. Ala. Oct. 20, 2017) (finding the bankruptcy court abused its discretion when it applied a preponderance of the evidence standard to a default judgment proceeding, as the *pleading* requirement for the complaint is merely *plausibility*. "[A]n evidentiary hearing to determine liability under Rule 55(b)(2) does not change the default judgment standard to anything more demanding than plausibility.") (emphasis added).

> In this way, an uncontested default judgment hearing on plausibility might be thought of as a free throw shot in basketball – the net is unguarded, but the shooter still has to get the ball in the hoop (*i.e.,* the facts must still be plausible). The damages hearing, however, might be more akin to soccer's penalty kick: there is a goalie (judge) ensuring the plaintiff can prove damages.

Id. The Court looks now to the allegations of the Plaintiff's Complaint and other pleadings.

II. **Fraud or Defalcation While Acting in A Fiduciary Capacity 11 U.S.C. § 523(a)(4)**

Section 523(a)(4) excepts debts from discharge that were obtained by "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." While the Plaintiff's Complaint cites as a basis for relief Bankruptcy Code § 523(a)(4), there appear to be no facts alleged in the Complaint nor in the Motion for Default Judgment that would plausibly support such

a claim. The Plaintiff's Memorandum of Fact and Law filed in support of the Motion does, however, contain the following assertion:

> Defendant acted with conscious disregard to his duties to Pace under the retail installment sales contract by misleading Pace about his intention to reaffirm this debt. Defendant's acts were also a violation of the good faith shown to [D]ebtor, his attorney, and the decorum of this Court when Pace was beguiled into not seeking the lifting of the automatic stay to immediately recover the vehicle/collateral. Defendant's [sic] Pace relied upon those misrepresentations to its detriment.

Plaintiff's Memorandum of Law and Fact, DE 28, ¶ 6. Plaintiff also argued at the hearing that Defendant's actions in abandoning the vehicle may rise to the level of conversion. It is well-established within this Circuit that, in order to come within the discharge exception of § 523(a)(4), a debtor "'must hold funds in trust for a third party to satisfy the fiduciary relationship element of the defalcation provision.'" *The Strait & Lamp Group v. Moldovan (In re Moldovan),* 636 B.R. 491, 505 (Bankr. S.D. Ohio 2021) (quoting *Commonwealth Land Title Co. v. Blaszak (In re Blaszak),* 397 F.3d 386, 390 (6th Cir. 2005)). "The Sixth Circuit limits the scope of § 523(a)(4) solely to 'trustees who misappropriate funds held in trust, and not to those who fail to meet an obligation under a common law fiduciary relationship.'" *Id.* Further, "[t]he fiduciary relationship must turn on the existence of a pre-existing express or technical trust arising from placement of a specific res in the hands of the debtor." *Id.*, citing *In re Blaszak* at 391. The Plaintiff has failed to establish or even plausibly plead that the contractual agreement between the parties indicates "an intent of the parties to create a trust, nor that a trust has been created, nor that the Defendant served as a fiduciary." *In re Moldovan*, 636 B.R. at 505-06. *Accord Coughlin Chevrolet, Inc. v. Thompson (In re Thompson),* 458 B.R. 409 (Bankr. S.D. Ohio 2011) ("The 'fiduciary capacity' component of § 523(a)(4) has been interpreted by the Sixth Circuit . . . to apply only to those situations involving an express or technical trust; establishing . . . such a trust requires the creditor to show

'(1) an intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary.'") (citations omitted). The Court finds that Plaintiff failed to plead facts sufficiently plausible to establish the existence of a fiduciary relationship or a trust as contemplated by § 523(a)(4).

Nor has Plaintiff sufficiently alleged a claim under the embezzlement or larceny prongs of §523(a)(4). "Many courts have held 'a mere lien or security interest does not rise to the level of ownership sufficient to support a claim under § 523(a)(4)'s embezzlement provision.'" *Kraus Anderson Capital, Inc. v. Bradley (In re Bradley),* 507 B.R. 192, 200 (B.A.P. 6th Cir. 2014)(collecting cases and noting, "'As owner of the collateral, the debtor remained the owner of its proceeds, even though both the collateral and its proceeds were subject to a security interest. No person can embezzle from himself.'") (*Id.* quoting *Deere & Co. v. Contella (In re Contella),* 166 B.R. 26, 30 (Bankr. W.D.N.Y. 1994)). Likewise, Plaintiff cannot establish larceny of property that it does not own. *In re Moldovan*, 636 B.R. at 507.

For these reasons, a viable cause of action under § 523(a)(4) has not been plausibly alleged by Plaintiff. The Court turns now to the Plaintiff's allegations under §523(a)(6).

III. **Willful and Malicious Injury 11 U.S.C. § 523(a)(6)**

The crux of Plaintiff's allegations and arguments are focused on the exception to discharge set forth in Bankruptcy Code § 523(a)(6), which excepts from discharge debts incurred "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). Before delving into a "willful and malicious" analysis, the Court looks first to whether Plaintiff has plausibly alleged a compensable injury and determines that the answer is "no." Plaintiff alleges that it forwent filing a motion for termination of the automatic stay because it relied on the Defendant's agreement to enter into a reaffirmation of the debt. However, Plaintiff ultimately repossessed the car and disposed of its collateral – the same actions it would have taken,

incurring the same expenses - if the Plaintiff had filed and the Court had granted such a motion.[4] If the Defendant had surrendered the car to Plaintiff instead of leaving it at the car dealership, the same result would have been reached. Plaintiff did not ultimately pay any dealership storage fees, and sold the car at auction for $3,935 [DE 28, Exh. EOA]. The costs incurred by Plaintiff for repossession and sale of the car were contractual fees anticipated by the parties, and were not a result of Defendant's actions in abandoning the vehicle, because the costs would have arisen whether Plaintiff was granted relief from the stay, or whether Defendant chose to surrender the car – the only other options for Plaintiff in the Chapter 7 case once Defendant elected not to reaffirm the debt.

Mr. Boyer testified that on March 7, 2020 when Defendant abandoned the vehicle, it had a value of approximately $10,000, but when Plaintiff repossessed the car in November, 2020, it was inoperable and its value was less than $4,000. Plaintiff failed to establish how it arrived at the $10,000 value, or even how it knew the condition of the car at that time, and how or why the car lost approximately $6,000 in value while it sat on the dealership lot. The Court notes that many cars remain on car lots for months without any apparent loss in value, and unfortunately, many car lenders are unable to repossess vehicles for months after being granted relief from the automatic stay – Plaintiff is not unique in this regard. After sale of its collateral and the attendant costs incurred, Plaintiff is left with an unsecured claim for the deficiency amount of $10,590.87. *Id.*

Plaintiff relies on *In re Bradley,* 507 B.R. 192, in support of its willful and malicious argument, but the facts of that case are distinguishable and the case does not support the Plaintiff's position. In the *Bradley* case, the Defendant sold the lender's collateral to a third party without paying the proceeds to its secured lender, and the lender was unable to repossess the collateral at

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[4] Mr. Boyer testified that the car payments were in default, thus cause existed to petition the Court for a termination of the automatic stay under Bankruptcy Code § 362(d).

issue. That is not the case before this Court. Based on the foregoing, Plaintiff has not plausibly alleged an injury sufficient to warrant excepting this debt from discharge under § 523(a)(6).

IV. **Attorney's Fees**

Plaintiff's Affidavit [DE 31] in support of an award of attorney's fees is based on its contractual agreement with Defendant, which provides on page 2, ¶ 6 as follows:

> **REMEDIES.** In the event of default, Creditor can exercise all or any of the following rights without waiving the right to pursue one or more of the others listed below or allowed by law:
>
> - repossession of the Vehicle through means that do not breach the peace
> - conduct a commercially reasonable resale of the Vehicle and after applying all proceeds against the then existing account balance, then the payment of repossession and sale expenses, and any attorney's fees and court costs permitted by law and related to the repossession and sale expenses, and then distributing any excess proceeds to you [Defendant]
> - declare you in breach and sue for damages, including your obligation to pay for creditors [sic] attorneys fees and collection costs

Complaint to Declare a Certain Debt Non-dischargeable and/or for Turnover of Property, DE 1, Exh. RIC at p. 2. Like the costs incurred in repossession and sale of the collateral, the Plaintiff's attorney's fees constitute an unsecured claim in the Defendant's Chapter 7 bankruptcy case and are not excepted from discharge. Plaintiff's request for attorney's fees is therefore denied.

CONCLUSION

This Court exercises "'broad discretion' over entry of [a] default judgment includ[ing] the discretion to require the plaintiff to prove its case with competent, admissible evidence, to assess matters in accordance with substantial justice, and to make reasonable inferences against the plaintiff." *In re Lonny Laramie McGee, Jr.*, No. OR-06-1065-MaHK, Bankr. L. Rep. P. 80817, 2006 WL 8210255 (B.A.P. 9th Cir. Dec. 6, 2006). In this case, Plaintiff failed to plausibly allege in its pleadings, or to establish at the hearing, that Defendant's debt to Plaintiff falls within the

exceptions to discharge set forth in Bankruptcy Code § 523(a)(4) or (a)(6). Plaintiff's Motion for Default Judgment and request for attorney's fees is accordingly DENIED and this adversary proceeding is hereby DISMISSED.

The Bankruptcy Court Clerk shall serve a copy of this Opinion and Order on the following interested parties:

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