

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re  
DENNIS J. O'CONNOR and  
DEBBIE ANN O'CONNOR,  
Debtors.

Case No. 01-27039-L  
Chapter 7

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Congress Financial Corporation,  
Plaintiff,

v.

Adv. Proc. No. 01-0862

Dennis J. O'Connor and  
Debbie Ann O'Connor,  
Defendants.

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Edward Montedonico, Trustee,  
Plaintiff,

v.

Adv. Proc. No. 01-0872

Dennis J. O'Connor,  
Defendant.

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**OPINION**

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BEFORE THE COURT are motions filed by the defendants in these related adversary proceedings seeking dismissal of the complaints or, in the alternative, partial judgment on the pleadings or for a more definite statement. The complaint of Congress Financial Corporation ("Congress") seeks denial of the discharge of both debtors pursuant to 11 U.S.C. §§ 727(a)(2), (3), (4), (5), and (7), or, in the alternative, a nondischargeable money judgment against the debtors pursuant to 11 U.S.C. § 523(a)(2), (4), and (6) in an unspecified amount. The complaint of Edward Montedonico, the Chapter 7 trustee, seeks only the denial of the discharge of Dennis J. O'Connor.

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For the reasons set forth below, the court will deny the motions for judgment on the pleadings, grant in part the motion of Dennis J. O'Connor for dismissal, grant the motion of Dennis J. O'Connor for a more definite statement and grant the motion of Debbie Ann O'Connor to dismiss the complaint without prejudice. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I) and (J).

## **I. ISSUES PRESENTED**

The following issues are presented for decision:

- (1) Whether plaintiffs are entitled to judgment on the pleadings before answers have been filed;
- (2) Whether some or all of the counts of the complaint should be dismissed for failure to state a claim for relief;
- (3) Whether plaintiffs should be compelled to submit a more definite statement in some or all of the counts of the complaints; and
- (4) Whether Congress's complaint against Debbie Ann O'Connor should be dismissed for failure to state a claim for relief.

## **II. FACTUAL BACKGROUND**

The debtors filed their voluntary joint Chapter 7 petition on May 11, 2001. Each of the debtors owns fifty percent of the outstanding stock of Flying O Enterprises, Inc. ("FOE"), a business

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which filed its own voluntary Chapter 7 petition on May 17, 2001. Dennis J. O'Connor served as president and director of FOE, while his wife served as secretary and director. FOE was in the business of purchasing, processing, and selling salvaged cotton.

Congress alleges that on October 31, 1996, FOE entered into a borrowing arrangement with Congress whereby Congress agreed to lend up to \$6,000,000 pursuant to a revolving loan; \$385,000 pursuant to a term note; and up to \$1,000,000 pursuant to a loan and security agreement. Congress further alleges that on May 26, 1998, the term note was increased and amended, and that the note and security agreement were amended numerous times. Congress alleges that these notes were secured, in part, by the cotton inventory of FOE, and that the amount of credit available to FOE at any time depended upon the levels of its accounts receivable and inventory. In connection with these loans, Congress alleges that the debtors provided limited guaranties of the obligations of FOE in an amount up to \$2,000,000 in the aggregate. In connection with the loans, FOE was obligated to provide weekly inventory reports to Congress. Congress alleges that these weekly reports were signed by Dennis O'Connor on behalf of FOE. Congress alleges that when it took control of its collateral on February 5, 2001, it discovered that FOE's representations of the grade and value of the cotton inventory were materially false. The trustee, after repeating many of the allegations of Congress's complaint, alleges that as late as November 2000, Dennis O'Connor caused FOE to

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represent that its cotton inventory was primarily composed of raw cotton with a value in excess of \$20,000,000, when in fact on May 7, 2001, it was determined by an expert hired by Congress to be composed of a low grade re-gin cotton, motes, pills, and mill waste with a value of less than \$1,000,000. Congress alleges that the debtors undertook themselves and caused FOE to undertake a number of actions to carry out and conceal the fraudulent valuations including: “failing to keep and destroying and deleting Fiber Inventory records and other records; providing Congress with false Fiber Inventory records while keeping a secret second set of Fiber Inventory records; misrepresenting to Congress and outside auditors the value and grade of the Fiber Inventory.” The trustee alleges that “Dennis O'Connor and FOE would have had to undertake” these actions. Congress further asserts that “[d]ebtors have given false oath in this case and further have failed to explain the discrepancies between the actual makeup of the Fiber Inventory with their prior representations concerning the Inventory.” The trustee alleges that Dennis O'Connor “has apparently given false oath in this case and has at the very least” failed to explain the inventory discrepancies.

### **III. ANALYSIS**

The debtors have moved pursuant to FED. R. BANKR. P. 7012(b), (c) and (e) to dismiss the complaints, and, alternatively, for judgment on the pleadings and/or for a more definite statement. A motion under Rule 7012(c) for judgment on the pleadings may be filed after the pleadings are

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closed but not so as to delay trial. Rule 7007(a) provides that pleadings are closed upon the filing of a complaint and answer, unless a counterclaim, cross-claim or third-party claim is filed. The debtors' motions under Rule 7012(c) are premature as neither of them has answered, and thus must be denied.

A motion under Rule 7012(b)(6) tests the legal sufficiency of the pleading under Rule 7008(a). In considering a motion to dismiss for failure to state a claim, the court construes all of the allegations of the pleading in the light most favorable to the pleader. *See* WRIGHT AND MILLER, 5A FEDERAL PRACTICE AND PROCEDURE, § 1363, pp. 460-61 (West, second ed. 1990). The Rule 7012(b)(6) motion is directed to the sufficiency of the claim, not to mere vagueness or lack of detail in the pleading, which is properly the subject of a motion under Rule 7012(e) for a more definite statement. Rule 7008 sets forth general rules of pleading. A pleading which sets forth a claim for relief must contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim . . . , and (3) a demand for judgment. Certain matters, however, must be pled with more specificity. Rule 7009(b) requires that averments of fraud or mistake include a particular statement of the circumstances constituting fraud or mistake. Rule 7009(f) states that, for purposes of testing the sufficiency of a pleading, averments of time and place are material. "When a federal court reviews the sufficiency of a complaint, before the reception of

any evidence either by affidavits or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims . . . ‘[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Schuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1957) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-56, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)).

**A. Dennis J. O'Connor’s Motions to Dismiss or for a More Definite Statement**

Dennis J. O'Connor moves the court to dismiss the complaints, or failing that, to require the plaintiffs to make a more definite statement of their claims. The court will consider each count of the complaints in turn.

**1. Count I, Section 727(a)(2)**

Mr. O'Connor moves the court to dismiss Count I of the complaints insofar as it is concerned with alteration or destruction of the inventory records of FOE. Mr. O'Connor argues that section 727(a)(2) only could apply if he had altered or destroyed his own records.

Both complaints allege that Mr. O'Connor transferred property of the estate to his daughter within one year of the filing of the petition with the intent to hinder, delay, and defraud “the estate.” Mr. O'Connor has conceded the sufficiency of this claim. The allegation does not precisely track

the language of section 727(a)(2), however, and could have been more artfully drawn. If in fact the transfer occurred after the filing of the petition, as the language of the complaint seems to indicate, then indeed it was a transfer of property of the estate, and could prevent the debtor's discharge if the debtor's intent was to hinder, delay, or defraud, "an officer of the estate charged with custody of property" under title 11 (*i.e.*, the chapter 7 trustee). If, however, the transfer occurred prior to the filing of the petition, then it was a transfer of property of the debtor, and must have occurred within one year before the filing of the petition, with the intent to hinder, delay, or defraud a creditor. Because Mr. O'Connor has conceded the sufficiency of this claim, the court will recommend, but will not require, a clarifying amendment of the allegation related to the transfer of real property.

The remaining allegation under Count I of the complaints, however, should be dismissed. Bankruptcy Code subsection 727(a)(2) deals specifically with property of the debtor or the estate, as distinguished from subsection (a)(3) which is concerned with the debtors' records.<sup>1</sup> The

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<sup>1</sup> **§ 727. Discharge.**

(a) The court shall grant the debtor a discharge, unless—

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

\* \* \*

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

distinction between these is that the items contemplated in subsection (a)(2) presumably have some intrinsic value, a value that is lost to the estate as the result of the activities of the debtor, while the items contemplated in subsection (a)(3) do not. The allegations of Count I assert the alteration and/or destruction of the inventory records of FOE, and, in the trustee's complaint, the failure to explain material discrepancies in these records. Neither of the allegations is addressed to property, either of the debtor or of the estate. If the allegations concerning alteration and/or destruction of records were concerned with records of the debtor, then they would state a cause of action under section 727(a)(3). Likewise the trustee's claim that the debtor has failed to explain material discrepancies in the records of FOE, if it concerned the records of the debtor, would state a claim under section 727(a)(3), for it appears to be a polite claim that Dennis O'Connor falsified the records of FOE. Neither of these causes of action, however, states a claim under section 727(a)(2) and, therefore, should be dismissed.

**2. Count II, Section 727(a)**

Turning now to the claims made under section 727(a)(3), the question raised by the defendants is whether concealment, destruction or falsification of records of a corporation by an individual debtor-owner is actionable. Congress and the trustee argue that the discharge of Mr. O'Connor should be denied (and Congress argues that the discharge of Mrs. O'Connor should also



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be denied) because he or they concealed, destroyed and/or falsified the records of FOE, based upon the fact that the debtors guaranteed the obligation to Congress and based upon the assertion that FOE's records are records from which the debtors' business transactions might be ascertained.

Mr. O'Connor cites three cases in support of his position that a failure to maintain or preserve FOE records is irrelevant to the determination of whether the discharge of the individual debtors should be denied. Two of the decisions were authored by Bankruptcy Judge Alexander L. Paskay, *Bacon v. Hyers (In re Hyers)*, 70 B.R. 764 (Bankr. M.D. Fla. 1987) and *Meadowbrook Mall Co. v. Vetri (In re Vetri)*, 155 B.R. 782 (Bankr. M.D. Fla. 1993). Both of these cases indicate that there is no requirement that corporate records be maintained with respect to an individual case. The third opinion, *Arney v. Moran (In re Moran)*, 120 B.R. 379 (Bankr. W.D. Va. 1990), was written by Bankruptcy Judge Ross W. Krumm. In that case evidence was presented that there were insufficient corporate records to determine a corporation's financial condition, but there was no evidence that the individual debtors failed to keep their own records or that the corporation's records were necessary to determine the individual's financial condition. *Id.* at 390. Congress relies on two cases. In *Bell v. Collins (In re Collins)*, 137 B.R. 754 (Bankr. E.D. Ark. 1992), the plaintiff's allegation that the debtor kept inadequate records from which his financial business transactions could be ascertained survived a motion to dismiss, but there is nothing in the opinion that indicates that the

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records complained about were corporate rather than individual records. The second decision relied upon by Congress, *In re Esposito*, 44 B.R. 817 (Bankr. S.D. N.Y. 1984), indicates that the unjustifiable destruction of corporate records from which an individual debtor's financial condition or business transactions might be ascertained would support denial of discharge under section 727(a)(3). The third decision referenced by Congress, *In re Liu*, 1999 WL 507445 (Bankr. E.D. N.Y. 1999), does not address section 727(a)(3).

These cases read together with the language of the statute itself indicate that in order to establish the section 727(a)(3) exception to discharge, a plaintiff ultimately must prove the following: (1) that the debtor had a duty to maintain and keep recorded information; (2) that the recorded information has been concealed, destroyed, mutilated, falsified or not kept or preserved; (3) that the recorded information is information from which the debtor's present financial condition or business transactions might be ascertained. The language of the statute does not limit the ownership of the recorded information to that of the debtor. On the other hand, the absence of records must substantially prevent the ascertaining of the debtor's financial condition or business transactions. If the debtor's financial condition or business transactions can be ascertained from other resources, discharge should not be denied an individual who failed to keep corporate records. Further, the debtor may defend by demonstrating that the act or failure to act was justified.

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The complaints in this case allege that the debtors served as officers of FOE. As officers, it is fair to infer that one or both of them had a duty to keep corporate records, including inventory records. It is alleged that Mr. O'Connor signed weekly inventory reports that "systematically misrepresented the grade or type of a significant portion of the FOE inventory." It is not alleged how these weekly inventory reports are necessary to ascertain the debtors' financial condition or business transactions. The allegations fail to meet Rule 7008(a)'s requirement that the pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief because the complaints fail to allege that the weekly inventory reports are necessary to determine the debtors' financial condition or business transactions. Nevertheless, it cannot be said that the plaintiffs can prove no set of facts in support of their claims. Therefore, dismissal of Count II is not appropriate. Rather, plaintiffs will be required to plead with more particularity how the alleged falsification of FOE inventory records prevents the trustee from ascertaining the debtors' current financial condition or past business transactions for a reasonable period of time.

**3. Count III, Section 727(a)(4)**

Count III of the complaints alleges that Mr. O'Connor (or the debtors in Congress's complaint) "in furtherance of his scheme to misrepresent the value of Fiber Inventory, has made false oath in this case." This clearly is insufficient as a matter of pleading. As pointed out

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in the memorandum filed by Mr. O'Connor, section 727(a)(4) requires proof of fraudulent intent, thus allegations concerning false oaths must be pled with particularity. At a minimum, the debtors must be informed what sworn statements made in connection with this bankruptcy case the plaintiffs claim to be false. It is not sufficient to plead that the debtors' schedules are false, or even that one of the debtors made a false statement in a Rule 2004 examination. The complaint should indicate, for example, that the debtors' schedule A declares that they own no real property, when in fact the property records of Shelby County indicate that they do, or debtors gave a sworn statement on a date certain indicating that they owned real property. The plaintiffs will be directed to give a more definite statement with respect to Count III of the complaints.

**4. Count IV, Section 727(a)(5)**

Count IV of the complaints contains multiple allegations. One of the allegations is that the debtors, as guarantors of the obligation to Congress, have failed to satisfactorily explain the loss of the value of the fiber inventory of FOE which otherwise would have been available to satisfy the claim of Congress. The debtors argue that diminution in the value of corporate assets may not be the basis for denial of discharge of the individual corporate shareholders. The debtors are correct. Loss in value of corporate assets does not state a cause of action in the

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individual shareholders' case because corporate assets would not have been available to satisfy the individuals' liability. This allegation should be dismissed.

The second allegation in Count IV of the complaints is that Mr. O'Connor (or the debtors) has failed to explain the loss or deficiency of the value of other assets listed by the debtors in pre-petition financial statements. This allegation will survive dismissal, but should be re-pled to indicate at least which pre-petition financial statements are referred to. That is, the complaints fail to plead the loss of any particular asset and fail to demonstrate a loss in the value of any particular asset. This defect could be remedied by pleading, for example, that the debtors issued a financial statement of a date certain within reasonable proximity to the date of the petition indicating ownership of cash in the amount of \$100,000, three motorcycles having a value of \$30,000, two cars having a value of \$50,000, and furnishings having a value of \$50,000, and that the debtors' bankruptcy schedules list cash of only \$20,000, no motorcycles, one car, and furnishings having a value of \$10,000.

The trustee's Count IV contains a third more specific allegation that Mr. O'Connor has failed to explain the loss in value of the stock of FOE. This allegation is sufficient to escape dismissal as it is directed to a loss in the value of an asset that is available to meet the debtor's liabilities, but should be pled with more particularity, indicating what pre-petition statements the trustee relies upon that indicate a loss in value of the stock.

As a cautionary note, it seems that the complaints themselves supply the explanation for the loss in the value of the fiber inventory, and presumably, therefore in the loss in value of the FOE stock. According to the complaints these losses are not actual losses of assets or value, but are apparent losses that resulted from Mr. O'Connor's falsification of inventory records. In order to avoid a denial of discharge under section 727(a)(5), the debtor need only provide a satisfactory explanation of the loss; he or she need not provide a meritorious explanation. *See* 3 NORTON BANKRUPTCY AND PRACTICE, 2D, § 74:15, p. 74-33. Thus, although the counts based upon section 727(a)(5) may proceed (except as specifically noted), this should not be understood as implying that the plaintiffs will ultimately succeed on the merits.

**5. Count V, Section 727(a)(7)**

Count V of the complaints reincorporates all previous allegations of the complaints and then adds one conclusory allegation to the effect that Mr. O'Connor (or the debtors in the case of Congress's complaint) committed acts prohibited by 11 U.S.C. § 727(a)(2-5) in connection with the bankruptcy case of FOE within one year of the filing of the petition. Section 727(a)(7) provides:

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(a) The court shall grant the debtor a discharge unless

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(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case in connection with another case under this title or under the Bankruptcy Act, concerning an insider.

The complaints do allege that “FOE filed a ‘no asset’ voluntary petition for relief under chapter 7 on May 17, 2001, in the Bankruptcy Court for the Western District of Tennessee, Case Number 01-27730-dsk.” FOE appears to be an insider of both of the debtors as that term is defined at 11 U.S.C. § 101(31)(iv) as it is a corporation of which the debtors are directors and officers. The complaints contain no other allegations, however, concerning any act taken by either of the debtors in connection with the FOE bankruptcy case. It appears from the complaints that Congress’s loan to FOE was secured by substantially all the assets of FOE and that Congress took control of the assets of FOE at some point in time between November 2000 and May 7, 2001. FOE’s bankruptcy case was filed May 17, 2001, when the debtors were no longer in control of its assets. Thus it is difficult to believe that any of the acts complained of in either complaint occurred in connection with the bankruptcy case of FOE. Nevertheless, the plaintiffs will be given the opportunity to re-plead

setting forth with particularity the acts alleged to have been taken by the debtors in connection with the bankruptcy case of FOE.

**6. Count VI, Section 523(a)(2)(A) and (B)**

Bankruptcy Code section 523(a)(2)(A) and (B) provide:

(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;

(B) use of a statement in writing

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive.

Count VI of Congress's complaint alleges that:

41. Plaintiff incorporates by reference the allegations of paragraph 1 through 40.



42. Debtors obtained an extension, renewal or refinancing of credit from Congress through Debtors' negotiation and execution of the Loan Documents and Guarantee.
43. To obtain that extension, renewal or refinancing of credit, Debtors, with an intent to deceive, materially misrepresented that they and their company FOE were willing, able, and intended to satisfy the obligations set forth in the Loan Documents and Guarantee.
44. With an intent to deceive, Debtors made materially false representations, including materially false statements in writing, regarding their financial condition upon which Congress reasonably relied.
45. When making such material misrepresentations, Debtors knew they were false or they made them with gross recklessness as to the truth.
46. Plaintiff reasonably relied upon Debtors' material representations and such reliance proximately caused Plaintiff's loss.
47. The debt owing to Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A)(B).

Congress's pleading is inadequate for a number of reasons. First the allegation that the debtors "materially misrepresented that they and their company FOE were willing, able, and intended to satisfy the obligations set forth in the Loan Document and Guarantees" does not relate to a statement of fact, but rather to a statement of intent. If anything, Congress complains of promissory fraud, which is actionable under section 523(a)(2)(A), but must be pled with sufficient particularity for the defendant to determine the circumstances constituting the fraud. For example, Congress

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should state whether it relies merely upon the promise to repay the obligations set forth in the loan documents, or upon some other statements of the debtors. Further, Congress must allege that despite their representations, the debtors never intended to repay the obligation to Congress.

Second, if Congress alleges that the debtors made false statements in writing concerning their financial condition, the complaint should identify the written statements relied upon, and state how Congress believes the statements to have been false.

Third, if Congress alleges that the debtors obtained an extension, renewal or refinancing of credit based upon some other false representation or actual fraud, then Congress must state with particularity the “time, place and content of the misrepresentation(s) upon which [it] relied. *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6<sup>th</sup> Cir. 1984). Congress must allege what statements made by whom were materially false, when they were made and how they were false. While it is true that Rule 9(b) must be read in harmony with Rule 8's requirement of simplicity in pleading, the complaints in this case fail to put the defendants on notice of the claim being made such as would reasonably permit them to respond. Congress must re-plead Count VI of its complaint.

**7. Count VII, Section 523(a)(4)**

Bankruptcy Code section 523(a)(4) excepts from discharge debts “for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny.” Congress’s complaint

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alleges that “Debtors fraudulently appropriated Congress’s property and Collateral for their exclusive use and control and have made use of those funds without explanation of reason or purpose thereby engaging in embezzlement or larceny.”

The debtor must “hold funds in trust for a third party to satisfy the fiduciary relationship element of the defalcation provision of § 523(a).” *R. E. America, Inc. v. Garner (In re Garner)*, 116 F.3d 176, 179 (6<sup>th</sup> Cir. 1997). In other words, the plaintiff must demonstrate the existence of an express trust. *See Chapman v. Pomainville (In re Pomainville)*, 254 B.R. 699, 702 (Bankr. S.D. Ohio 2000). “Embezzlement” is defined for purposes of determining dischargeability as “the fraudulent appropriation of property by a person to whom such property has been entrusted and into whose hands it has lawfully come.” *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6<sup>th</sup> Cir. 1996) (quoting *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr. M.D. Tenn. 1982)). Embezzlement differs from larceny in that the debtor’s original acquisition of possession of the property was lawful. *Pomainville*, 254 B.R. at 705. Congress has made no allegation that the debtors’ acquisition of any property was unlawful, nor has Congress alleged that the debtors acted in a fiduciary capacity vis-a-vis Congress. These claims should be dismissed.

At best, Congress appears to claim that debtors embezzled something, but the complaint is deficient in describing the alleged embezzlement with particularity. Congress may replead this

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portion of the complaint, specifying what property was placed in the possession of the debtors, how and when it was misappropriated, and circumstances indicating fraud.

**8. Count VIII, Section 523(a)(6)**

Congress alleges that “Debtors intentionally converted Congress’s property and collateral for their personal use by, among other things, directing FOE to make cash payments to Debtors or on behalf of Debtors.” Section 523(a)(6) excepts from discharge a debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” Congress further alleges that “Debtors were aware of Congress’s security interest in the Collateral and knew that the transfer of property was wrongful and certain to cause financial harm to Congress.” Mr. O’Connor asserts that he is unable to respond to Congress’s claim because it is not supported by factual allegations. Pursuant to Rule 7012(e), Mr. O’Connor asks that Congress submit a more definite statement. The debtor’s motion is well taken. Congress should specify whether it alleges a specific act of conversion (sale of cotton inventory out of trust) or the mere use of proceeds from sales of cotton in the ordinary course of the business of FOE, including the payment of salaries to and expenses of the debtors.

**B. Debbie Ann O’Connor’s Motion to Dismiss**

Debbie Ann O’Connor moves the court to dismiss Congress’s complaint in its entirety because it fails to state a claim as to her. Mrs. O’Connor correctly states that Congress’s complaint

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and  
*Edward Montedonico, Trustee v. Dennis J. O'Connor*  
Adv. Proc. No. 01-0872  
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contains no specific factual allegations concerning her other than that she was an officer and director of FOE and that she executed a limited guaranty of the indebtedness of FOE to Congress. Neither of these allegations is sufficient to support denial of Mrs. O'Connor's discharge or exception of Mrs. O'Connor's debt to Congress from discharge. The balance of the allegations of the complaint with respect to Mrs. O'Connor are merely conclusory, lumping her in with allegations about Mr. O'Connor. The complaint should be dismissed as to Mrs. O'Connor, but this dismissal shall be without prejudice to Congress's filing an amended complaint. Any complaint shall set forth specifically and with particularity the acts of Mrs. O'Connor upon which Congress bases its claims.

#### **IV. CONCLUSION**

The court will enter separate orders in each of these adversary proceedings consistent with this opinion.

BY THE COURT

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JENNIE D. LATTA  
United States Bankruptcy Judge

Dated: March 13, 2002

cc: Debtors  
Attorneys for Debtors  
Plaintiffs  
Attorney for Plaintiffs