

**SO ORDERED**



*Michelle M. Harner*  
MICHELLE M. HARNER  
U.S. BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MARYLAND  
at Baltimore**

In re:	*	
	*	
Thomas E. Sulser,	*	Case No. 19-18710-MMH
	*	
Debtor.	*	Chapter 7
* * * * *	*	* * * * *
Maryland Department of Labor,	*	
	*	
Plaintiff,	*	
v.	*	Adversary No. 19-00355-MMH
	*	
Thomas E. Sulser,	*	
	*	
Defendant.	*	
* * * * *	*	* * * * *

**ORDER DENYING MOTION TO DISMISS**

The U.S. Bankruptcy Code<sup>1</sup> offers many debtors a fresh start; an opportunity to extinguish much of their prepetition debt and to start over, at least financially. A debtor's fresh start is achieved largely through the bankruptcy discharge, and debtors often file for bankruptcy protection to obtain a discharge. The bankruptcy discharge is not, however, without limits. For example, if a debtor engaged in some kind of fraud, misrepresentation, or other wrongful conduct, the Code may deny the debtor's discharge in its entirety or with respect to a particular debt. Indeed, such alleged conduct underlies the relief requested in this adversary proceeding.

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<sup>1</sup> 11 U.S.C. §§ 101 et seq. (the "Code").

The Plaintiff submits that a debt arising from the Defendant's underreporting of income for purposes of unemployment benefits, which the relevant state agency determined to be fraudulent, is nondischargeable under section 523(a)(2)(A) of the Code. The Plaintiff's argument is persuasive in that the law generally penalizes fraudulent conduct, including when a debt is incurred through fraudulent means. Nevertheless, in balancing the competing interests at play in a bankruptcy case, Congress chose to subject certain kinds of fraudulent debt to more intense scrutiny. For example, under section 523(a)(2), a debt "for money, property, or services ... to the extent obtained by ... false pretenses, a false representation, or actual fraud" that is a "statement respecting the debtor's ... financial condition" is nondischargeable only if the statement is in writing and satisfies the other requirements of section 523(a)(2)(B).

The Defendant argues that his under- and overreporting of income in connection with his request for unemployment benefits was, among other things, a statement respecting his financial condition. The Defendant further argues that, under the U.S. Supreme Court's holding in *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752 (2018), his income is an asset and that statements concerning even a single asset fall within the scope of section 523(a)(2)(B). The Plaintiff disagrees with the Defendant's position, relying primarily on dicta in *Appling* that certain debts, such as those arising from fraud in the context of social security benefits, remain subject to the lower standard of section 523(a)(2)(A). The Court finds this matter particularly difficult given the significant interests of the Plaintiff in matters such as this adversary proceeding, the critical role of the bankruptcy discharge, and the Supreme Court's holding in *Appling*.

The Court has scrutinized the statutory language, the facts of this matter, and the reasoning of courts considering both social security benefits and unemployment benefits under section 523(a)(2) of the Code. The critical issue concerns whether the Defendant made "a

statement respecting [his] financial condition” when he submitted his employment and wage information to the Plaintiff. This issue requires the Court to consider both whether the Defendant’s submission was a statement versus an omission and, if a statement, whether it implicated the Defendant’s financial condition.

The Defendant’s act of providing information to the Plaintiff constitutes a “statement” according to common usage and the *Applying* decision. The Court further acknowledges that, under *Applying*, a debtor’s statement about a single asset may implicate the debtor’s “financial condition” for purposes of section 523(a)(2). Based on the record before the Court, and at this early stage of the litigation, however, the Court cannot conclude that the Defendant’s alleged reporting of his wages was in the context of providing information regarding his overall financial condition. The Defendant may offer evidence during this proceeding that supports such a determination, but it is not evident from the current record. The Complaint thus states a plausible claim for nondischargeability under section 523(a)(2)(A) of the Code that withstands challenge under Federal Rule of Civil Rule 12(b)(6). The Court will deny the Motion on that basis.

#### **I. Relevant Background**

The Maryland Department of Labor (“Plaintiff”) is tasked with overseeing and enforcing, among other things, Maryland’s unemployment benefits law. ECF 1, Complaint. Thomas Sulser, the above-captioned Debtor and Defendant (the “Defendant”), filed claims for unemployment benefits in 2007. In so doing, the Defendant reported the wages he earned during each of the relevant time periods. The Plaintiff determined that the Defendant’s reports were inaccurate and that, in many instances, the Defendant underreported his wages. *Id.* at ¶¶ 14–17. These inaccuracies, in turn, resulted in the Defendant allegedly receiving an overpayment of unemployment benefits.

The Plaintiff notified the Defendant of the overpayment in January 2008 and then sued the Defendant for those amounts in the District Court of Maryland for Baltimore City in March 2012. *Id.* at ¶¶ 17–18. The state court subsequently entered a judgment against the Defendant in the amount of \$7,363.00 (overpayment principal of which \$6,683 was fraud principal and \$680 was non-fraud principal), plus pre-judgment interest of \$5,013.00, plus \$28 costs. *Id.*, Ex. 4. It does not appear that the Defendant made any payments to the Plaintiff on account of the overpayment or the state court judgment.

The Defendant filed his chapter 7 case on June 26, 2019. Case No. 19-18710-MMH, ECF 1. The Defendant complied with all of his obligations under chapter 7 of the Code, and on October 2, 2019, the Court entered an Order of Discharge. *Id.*, ECF 21. The Order of Discharge granted the Defendant a discharge from most of his prepetition debt. Prior to the entry of that Order, the Plaintiff commenced this adversary proceeding. In its complaint, the Plaintiff argues that its claim against the Defendant is nondischargeable under section 523(a)(2)(A) of the Code. ECF 1. The Plaintiff thus seeks a determination that approximately \$9,419.12 of its claim is nondischargeable under section 523(a)(2)(A) of the Code.<sup>2</sup>

## **II. Jurisdiction and Legal Standards**

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(a), and Local Rule 402 of the United States District Court for the District of Maryland. This proceeding is a “core proceeding” under 28 U.S.C. § 157(b)(2).

Civil Rule 12(b) permits the filing of a motion to assert certain defenses, including that the complaint “fails to state a claim upon which relief may be granted.” Fed. R. Civ. P. 12(b)(6). A

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<sup>2</sup> In paragraph 18 of the Complaint, the Plaintiff concedes that the accumulated postjudgment legal interest and the \$28 in costs described above are dischargeable in the Defendant’s chapter 7 case. ECF 1.

motion to dismiss under Civil Rule 12(b)(6) “tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim; ‘it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.’” *Hall v. Greystar Management Servs., L.P.*, 637 Fed. App’x 93, 99 (4th Cir. 2016) (quoting *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)). The Court must “accept the well-pled allegations of the complaint as true, and [] construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff.” *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). To survive a motion to dismiss under Civil Rule 12(b)(6), the complaint must plead facts that surpass speculation and “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

### **III. Analysis**

The critical question before the Court is whether the Plaintiff has pled facts sufficient to support its claims under applicable law at this stage of the litigation. In the Complaint, the Plaintiff asserts that the Defendant engaged in false pretenses, false representations, or actual fraud in reporting his wages for purposes of unemployment benefits under Maryland law. ECF 1, ¶ 20. The Plaintiff further states that it relied on the Defendant’s wage reporting in assessing the Defendant’s eligibility for unemployment benefits. *Id.* ¶ 21. To support its claim that the Defendant’s reporting was inaccurate, the Plaintiff attached to the Complaint the results of the agency’s nonmonetary determination inquiry, which reads in relevant part:

[The Defendant] received wages from his/her employer ... which total less than his/her weekly benefit amount. He/she failed to disclose these wages in order to increase benefits as defined within section 8-1301 of the Maryland Unemployment Insurance Law. Therefore the Claimant is not entitled to full benefits as provided by section 8-803 of the Maryland Unemployment Insurance Law and is held overpaid for the full amount received ....

ECF 1.<sup>3</sup> The Plaintiff also includes copies of the agency’s benefit overpayment reports, fact finding reports, and the state court docket (evidencing the amount of the judgment entered against the Defendant). *Id.*

The Plaintiff argues that the allegations set forth in the Complaint, as supported by the related exhibits, state a plausible claim for nondischargeability under section 523(a)(2)(A) of the Code. That subsection reads,

A discharge under section 727 ... 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.

11 U.S.C. § 523(a)(2)(A). The Defendant does not necessarily dispute specific allegations in the Complaint. Rather, he contends that the Plaintiff’s claim does not fall under section 523(a)(2)(A). The Defendant grounds his position in the language at the end of the subsection, which carves out an exception. Specifically, the Defendant posits that his weekly wage reports were “statement[s] respecting [his] ... financial condition” and, consequently, outside the scope of section 523(a)(2)(A). If the Defendant’s position is correct, the Plaintiff would need to assert a claim for nondischargeability under section 523(a)(2)(B) of the Code and satisfy the higher burden

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<sup>3</sup> Maryland law provides, “A person, for that person or another, may not knowingly make a false statement or false representation or knowingly fail to disclose a material fact to receive or increase a benefit or other payment under this title or an unemployment insurance law of another state, the federal government, or a foreign government.” MD. CODE ANN., LAB. & EMPL. § 8-1301. Moreover, section 8-803 of the Maryland Labor & Employment Code sets forth the schedules and calculations for determining the payment of a claimant’s full or partial unemployment benefits claim. *Id.* at § 8-803.

of proof set forth in that section.<sup>4</sup> The Plaintiff's Complaint does not seek a nondischargeability determination under section 523(a)(2)(B).<sup>5</sup>

In *Appling*, the Supreme Court examined the nature of the exception in section 523(a)(2)(A) for statements respecting a debtor's financial condition. 138 S. Ct. 1752 (2018). The Supreme Court held that a debtor's oral remarks concerning a single asset (e.g., a tax refund) could constitute a statement respecting the debtor's financial condition. As Justice Sotomayor explained,

[A] statement is "respecting" a debtor's financial condition if it has a direct relation to or impact on the debtor's overall financial status. A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally, then, a statement about a single asset can be a "statement respecting the debtor's financial condition."

*Id.* at 1761. Thus, the creditor in *Appling* could not meet its burden under section 523(a)(2)(A) because the debtor's representations regarding the status of his tax refund were oral and not in writing.

The Defendant highlights several similarities between this case and *Appling*. For example, the Defendant focuses on his wages being an asset, perhaps one of the most important assets of an

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<sup>4</sup> Section 523(a)(2)(B) provides:

A discharge under section 727 ... 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—

(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 ....

11 U.S.C. § 523(a)(2)(B).

<sup>5</sup> At the Hearing, the Plaintiff asserted that, even if section 523(a)(2)(B) applied, the Plaintiff could establish a writing and satisfy its burden. The Plaintiff has not, however, moved to amend the Complaint.

individual debtor.<sup>6</sup> He asserts that the weekly wage reports he submitted to the Plaintiff were not in writing. He therefore draws the conclusion that, as in *Appling*, his representations concerning his wages implicated his financial condition for purposes of section 523(a)(2).

The Plaintiff opposes the Defendant's position but adopted a more high-level analysis of *Appling*. According the Plaintiff, *Appling* does not apply to the facts of this adversary proceeding because of a footnote in the *Appling* decision. The sentence that precedes the relevant footnote reads, "Section 523(a)(2)(A) has been applied when a debt arises from 'forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation.' *Husky Int'l Electronics, Inc. v. Ritz*, 578 U.S. —, —, 136 S.Ct. 1581, 1586, 194 L.Ed.2d 655 (2016)." *Appling*, 138 S.Ct. at 1763. The footnote (note 4) then provides the following additional citations:

*In re Tucker*, 539 B.R. 861, 868 (Bkrcty.Ct.D. Idaho 2015) (holding nondischargeable under § 523(a)(2)(A) a debt arising from the overpayment of social security disability benefits to an individual who failed to report changes to his employment despite a legal duty to do so); *In re Drummond*, 530 B.R. 707, 710, and n. 3 (Bkrcty.Ct.E.D. Ark. 2015) (same, and concluding that "the requirement of the debtor to notify [the Social Security Administration] if she returns to work is not a statement that respects the debtor's financial condition").

*Id.* The Plaintiff argues that, just like social security benefits, unemployment benefits are different and outside the scope of *Appling*.<sup>7</sup>

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<sup>6</sup> At least one court has focused on the significance of an individual's income as an asset in finding a claim for unemployment benefits outside the scope of section 523(a)(2)(A). See *Colorado Dep't of Labor and Emp't v. Martinez (In re Martinez)*, 609 B.R. 351, 370 (Bankr. D. Colo. 2019) ("In the context of bankruptcy, most consumer debtors (like the Debtor in this Adversary Proceeding) lack significant assets. So, employment and income often are the most important aspects of a debtor's financial condition.").

<sup>7</sup> The Court observes that the above quoted language and footnote from *Appling* appear to be based on an amicus brief filed by the United States in the case. The relevant portion of the amicus brief is discussing an *omission* as being within section 523(a)(2)(A), regardless of whether the oral statement in *Appling* was respecting the debtor's financial condition. That brief reads, in relevant part,

In any event, regardless of how this Court resolves the question presented here, Section 523(a)(2)(A) will apply when a debt does not arise from an affirmative representation by the debtor. Section 523(a)(2)(A) "encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Int'l Elecs. Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016) (interpreting "actual fraud"). And a fraud committed through "omission" can also give rise to a debt that is nondischargeable under Section 523(a)(2)(A). Pet. App. 11a. That is true even if the omitted information pertains to the debtor's financial condition. For example, the Social Security Administration (SSA) and other federal



The Court appreciates each party's position and understands the analogies that each tries to draw between the facts of this case and different aspects of *Appling*. The Court further understands the kind of public policy argument that might link social security benefits and unemployment benefits.<sup>8</sup> The Court must, however, be guided by the plain language of the Code and the holding of *Appling*.

Based on the allegations in the Complaint, the Defendant submitted weekly wage reports to the Plaintiff that underreported his earned income. These facts, if ultimately established at trial or through dispositive motion, might warrant a finding that the Defendant made false representations on which the Plaintiff relied in assessing the Defendant's unemployment benefits. Unlike a social security benefits case (in which a claimant does not have a weekly reporting obligation and generally fails to report, or omits, material information),<sup>9</sup> the Defendant here

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agencies frequently invoke Section 523(a)(2)(A) in opposing discharge of debts arising from the overpayment of benefits to persons who fail to notify the government of relevant changes in their financial condition (e.g., increased income from work) despite having a legal duty to do so. *See, e.g., In re Tucker*, 539 B.R. 861, 867-868 (Bankr. D. Idaho 2015); *In re Hall*, 515 B.R. 515, 520-521 (Bankr. S.D. W. Va. 2014); cf. *In re Drummond*, 530 B.R. 707, 710 & n.3 (Bankr. E.D. Ark. 2015) (agreeing that such objections are governed by Section 523(a)(2)(A) rather than by Section 523(a)(2)(B)).

Brief for the United States as Amicus Curiae Supporting Respondent at \*20, *Lamar, Archer & Cofrin, LLP v. Appling*, 2018 WL 1666419 (2018) (No. 16-1215).

<sup>8</sup> The Court further recognizes that at least one court in this district has drawn similarities between the social security benefits cases and the facts at issue before that court in determining that the state's claim for the overpayment of unemployment benefits was nondischargeable under section 523(a)(2)(A) of the Code. *See State of Maryland Central Collection Unit v. Johnson (In re Johnson)*, No. 19-00183, 2019 WL 4164860, at \*5 (Bankr. D. Md. Aug. 30, 2019) ("Because the court has determined, based on *Lamar*, that statements concerning employment status are not statements respecting the debtor's financial condition, the court need not resolve the issue."). The Court appreciates and respects the court's analysis in *Johnson*. Given the Court's disposition of the Defendant's Motion, however, the Court need not address the holding of *Johnson* as it might apply to the ultimate facts proven by the parties in this adversary proceeding. !

<sup>9</sup> Recipients of only Social Security disability insurance benefits are exempt from the annual reporting requirement under which the Social Security Administration collects self-reported income from beneficiaries. 20 C.F.R. pt. 404.452. However, a recipient who is exempt from the annual reporting requirement must still notify the Agency when he or she returns to work. 20 C.F.R. pt. 404.1588. Bankruptcy courts have held that a debt incurred by failing to report income to the Agency are nondischargeable under section 523(a)(2)(A). *See, e.g., United States v. Tucker (In re Tucker)*, 539 B.R. 861, 863-64 (Bankr. D. Idaho 2015) (focusing on the debtor's intention to withhold information from the Agency); *see also United States v. Drummond (In re Drummond)*, 530 B.R. 707, 710 (Bankr. E.D. Ark. 2015) (holding that the debtor's requirement to notify the Agency if she returned to work is the representation—or lack thereof).

affirmatively reported wages to the Plaintiff. The Supreme Court defined “statement” as used in section 523(a)(2)(A) as follows: “A ‘statement’ is ‘the act or process of stating, reciting, or presenting orally or on paper; something stated as a report or narrative; a single declaration or remark.’ Webster’s Third New International Dictionary 2229 (1976) (Webster’s).” *Appling*, 138 S. Ct. at 1759. The Defendant’s weekly wage reports thus constitute a statement. Moreover, as noted above, the Supreme Court held that a statement about a single asset can be respecting the debtor’s financial condition.

The remaining issue is perhaps the most challenging for the Court at this stage of the litigation. That issue is whether the Defendant’s statements about his wages were respecting his financial condition. The Supreme Court defined “financial condition” as “one’s overall financial status.” *Id.* The term financial condition often is connected to an extension of credit and a debtor’s ability to repay the loan. In that context, a statement regarding one’s wages—for example, if made during discussions with a loan officer—certainly could be respecting one’s financial condition. Indeed, a lender often makes credit decisions based on the debtor’s overall financial position and not just her level of income. The Plaintiff’s claim is not, however, a claim resulting from an extension of credit. Here, the Plaintiff paid a benefit (i.e., money) to the Defendant in accordance with applicable state law and the Defendant’s weekly wage reports. It is the Defendant’s alleged lack of eligibility for a portion of those payments that gives rise to the Plaintiff’s claim.

The Court is not suggesting that fact patterns involving the provision of money or services based on false representations regarding a single asset are always outside the scope of *Appling*’s holding. Although the *Appling* decision speaks of “ability to repay” in discussing whether a single asset respects the debtor’s financial condition, that language does not appear limiting in nature. *Id.* at 1761. It is, rather, consistent with the facts that were before the Supreme Court in *Appling*. The

language of section 523(a)(2)(B) also incorporates debt “for money, property, or services,” suggesting perhaps a broader reading of financial condition than just ability to repay. For example, if a debtor’s overall financial condition was a factor in determining the debtor’s eligibility for a public benefit, reduced payment program, or reduced fee services, then the reasoning of *Appling* and the language of the Code might support the conclusion that section 523(a)(2)(B) (and not (a)(2)(A)) applied.

Considering the foregoing, the Plaintiff’s Complaint sets forth facts that, on their face, state a plausible claim under section 523(a)(2)(A). *See Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018) (finding that plaintiffs’ complaint contained allegations that plausibly established liability for sex discrimination under Title IX); *see also Sher v. JPMorgan Chase Funding (In re TMST, Inc.)*, 610 B.R. 807 (Bankr. D. Md. 2019) (finding that the chapter 7 trustee’s allegations support a plausible claim to relief even if some allegations may have been inconsistent); *cf. K&M Elec., Servs. V. Vito (In re Vito)*, 598 B.R. 809 (Bankr. D. Md. 2019) (finding that allegations in complaint could not satisfy the technical requirements of section 523(a)(4)). The Complaint alleges that the benefits decision was based on the inaccurate wage reports and that the agency’s findings indicated fraud in the reporting. *See infra* Part I. The Defendant’s argument that his submission of the weekly wage reports respected his overall financial condition is a factual argument not yet supported by the record before the Court. If the Defendant produces evidence, for example, that shows a more thorough financial evaluation by the Plaintiff—either in practice or by statute—than the facts set forth in the Complaint, the Defendant’s arguments may have merit. Nevertheless, at this stage of the litigation and construing the alleged facts in the light most favorable to the Plaintiff, the Defendant’s Motion under Civil Rule 12(b)(6) must fail.

Accordingly, it is, by the United States Bankruptcy Court for the District of Maryland,  
**ORDERED**, that the Motion is denied.

**Copies to:**

Plaintiff's Counsel

Defendant/Debtor

Defendant's/Debtor's Counsel

**END OF ORDER**