IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
JASON WILLIAM COUTTS	§	Case No. 21-40528
	§	
	§	
Debtor	§	Chapter 7
	§	

HENDRICK HAN, ROYAL OAK CAL, LLC and ROYAL OAK II, LLC	§	
	§	
	§	
Plaintiffs	§	
	§	
v.	§	Adversary No. 21-04092
	§	
JASON WILLIAM COUTTS	§	
	§	
Defendant	§	

MEMORANDUM OF DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

ON THIS DATE the Court considered the "Motion for Summary Judgement" (the "Motion") filed by Defendant, Jason William Coutts, (the "Defendant") on November 5, 2021, Plaintiffs' objection to that Motion, and other related documents filed in the above-referenced adversary proceeding. Plaintiffs, Hendrick Han, Royal Oak Cal, LLC, and Royal Oak II, LLC (the "Plaintiffs") in this case seek to except from discharge under 11 U.S.C. § 523(a)(2)(A) a debt allegedly to owed them by Defendant. Defendant's Motion asks for summary judgement on the grounds that Plaintiffs lack standing,

that this case is barred by limitations, and is barred by collateral estoppel. Upon due consideration of the pleadings, the proper summary judgment evidence submitted by the parties, and the relevant legal authorities, the Court concludes for the following reasons that Defendant's Motion should be DENIED.

I. Jurisdiction

The Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334 and 157. The Court has authority to enter a final judgment in this adversary proceeding because it constitutes a statutorily core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), and (J), and meets all constitutional standards for the proper exercise of full judicial power by this Court.

II. Procedural Background

On April 12, 2021, Defendant initiated the main bankruptcy case associated with this adversary proceeding (the "Case") by filing his voluntary petition for Chapter 7 relief under Title 11 of the United States Code (the "Bankruptcy Code"). On July 13, 2021, Plaintiffs filed their Complaint initiating this adversary proceeding.[1]

On August 12, 2021, Defendant filed his "Motion to Dismiss Adversary Proceeding" to which Plaintiffs objected. This dismissal motion was denied

[1] Pl'.s Compl., ECF No. 1.

on September 20, 2021, and on September 21, 2021, Defendant filed his "Answer to Complaint" (the "Answer").[2] Defendant filed the Motion on November 5, 2021, and Plaintiffs then filed their "Objection" (the "Response") to the Motion on December 10, 2021.[3] Defendant also filed a "Reply to Response to Motion for Summary Judgment" (the "Reply Brief") on December 22, 2021.[4]

III. Factual Background[5]

This case concerns a real estate sale transaction. Plaintiffs previously owned condominium units located at 370 St. Andrews Drive, Pierce Township, Ohio 45245 (the "Property").[6] Plaintiffs sought to sell this property, and entered into a purchase sale agreement between Plaintiffs and a Utah corporation, Silver Creek Investments, Inc., on July 25, 2016 (the "PSA").[7] Defendant, Jason William Coutts, owns 100% of Silver Creek Investments, Inc. according to his Amended Schedules filed in Case No. 21-40528 (the "Main Case").[8] Defendant's schedules state that Silver Creek Investments, Inc. "was formed to invest in real estate and for other general

[2] Def.'s Answer, ECF No. 10.
[3] Pls. Obj. Def.'s Mot. Summ. J., ECF No. 22.
[4] Def.'s Reply to Def.'s Obj. to Pl.'s Mot. Summ. J., ECF No. 25.
[5] The facts presented are those which stand uncontested between the parties and are present only as a general factual background to the legal claims addressed by the Motion. This section is not intended to resolve any disputed or contested facts by and among the parties.
[6] Pls. Compl., ¶ 11, 3, ECF No. 1.
[7] *Id.* at 4.
[8] Case 21-40528, Amended Schedules, 5, ECF No. 24.

business ventures" and that "it stopped operating in 2020."[9] Defendant signed the PSA in his capacity as president of Silver Creek Investments, Inc.[10] Absent from the materials submitted by both parties is any type of personal guaranty of the PSA signed by Defendant.

Shortly after execution of the PSA, Silver Creek Investments, Inc., assigned its rights under that agreement to Caltex Management, LLC, a Texas limited liability company.[11] Defendant's schedules also reflect that he owns 100% of Caltex Management, LLC, that this "business was formed to purchase real estate" and that "it stopped operating in 2019."[12]

According to Plaintiff's description of its terms, the purchase price for the Property in the PSA was $5,300,000.00.[13] This price was to be paid through a combination of earnest money, a down payment payable at closing, assumption of certain preexisting indebtedness, and owner financing provided by Plaintiffs as sellers for payment of the remaining balance of the purchase price. [14] Plaintiffs calculate the remaining purchase price to be owner financed as the sum of $1,878,363.17.[15] Plaintiffs contend this owner financing was to be memorialized in a promissory note, though Defendant

[9] *Id.*
[10] Pls. Compl., Exhibit 1, pg. 16.
[11] Pls. Compl., ¶ 13, 4, ECF No. 1.
[12] *Id.*
[13] Pls. Compl., ¶ 15, 4, ECF No. 1.
[14] *Id* at exhibit 1, pg. 2-3.
[15] Pls. Compl., ¶ 15, 4, ECF No. 1.

may not agree with this contention. What both sides appear to agree on is that no such promissory note was ever executed by Silver Creek Investments, Inc., Caltex Management, LLC, or Defendant personally.[16] Despite this fact, at closing the Property was transferred to Caltex Management, LLC.[17] The remaining purchase price has not been paid by Silver Creek Investments, Inc., Caltex Management, LLC, or Defendant.[18]

Plaintiffs subsequently filed suit in Ohio state court against Caltex Management, LLC and Defendant personally on September 20, 2018, seeking to recover the remaining amount due under the PSA.[19] This first Ohio state court case was dismissed by Plaintiffs.[20] Plaintiffs then re-filed a second Ohio state court case on February 26, 2021, against both Caltex and Silver Creek. [21] This second Ohio suit was pending when Defendant filed bankruptcy on July 7, 2021, though the Ohio state court had dismissed some of Plaintiffs claims for failure to state a claim under Ohio law.[22] The legal effect of this ruling by the Ohio state court is disputed by the parties.

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[16] Id. at 5-6.
[17] Pls. Compl., ¶ 17, 5, ECF No. 1; Pls. Obj to Def. Mot. Summ. J., at exhibit 8, 9, ECF No. 22.
[18] Def. Resp. to Pls. Obj, at 5 ECF No. 25.
[19] Pls. Obj to Def. Mot. Summ. J., ¶ 9(d), 5, ECF No. 22.
[20] Pls. Compl., ¶ 26, 7, ECF No. 1.
[21] *Id*., ¶ 27, 7, ECF No. 1.
[22] Pls. Obj. to Def. Mot. Summ. J., at exhibit 5 ECF No. 22.

IV. Summary Judgement Standard

A court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)). Thus, if summary judgment is appropriate, the Court may resolve the case as a matter of law.

The moving party always bears the initial responsibility of informing the court of the basis for its motion and producing evidence which it believes demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. How the necessary summary judgment showing can be made depends upon which party will bear the burden of proof at trial. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1077 n.16 (5th Cir. 1994). "A fact is material only if its resolution would affect the outcome of the action . . ." *Wiley v. State Farm Fire and Cas, Co.*, 585 F.3d 206, 210 (5th Cir. 2009). "All reasonable inferences must be viewed in the light most favorable" to the nonmoving party, and "any doubt must resolved in favor of the nonmoving party." *In re Louisiana Crawfish Producers*, 852 F.3d 456, 462 (5th Cir. 2017) (citing *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

V. Analysis

A. Standing

The Court first addresses Defendant's contention that Plaintiffs lack standing to bring this case against him. Standing is a jurisdictional issue, and so must be addressed at the outset of a case. *United States v. Hays*, 515 U.S. 737, 742 (1995); *see also FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990) ("standing is perhaps the most important of the jurisdictional doctrines").

Defendant argues that because he was not individually a signer or guarantor of the PSA, he may only be liable to Plaintiffs through alter ego, veil piercing, or reverse veil piercing.[23] This raises a question of standing because causes of action for alter ego, veil piercing, or reverse veil piercing are generally owned by the estate leaving the trustee as the only party able to assert such claims.[24] A question thus exists: who owns and is entitled to assert Plaintiffs' causes of action? Determining whether standing exists can be difficult, and so the Court will review Fifth Circuit guidance which this Court is bound to follow.

Some years ago, this Court explored this area of law in the context of an individual Debtor sued in a § 727 discharge action for alter ego and/or veil

[23] Def. Mot. Summ. J., at 6, ECF No. 14.
[24] *Id.* at 7.

piercing. *In re Packer*, 520 B.R. 520, 523 (Bankr. E.D. Tex. 2014), subsequently aff'd, 816 F.3d 87 (5th Cir. 2016). In *Packer* this Court wrote the following:

> However, any evidence presented to support the alleged failure of the Defendant to observe corporate formalities or otherwise to maintain an identity separate from any of the companies, as a prelude to maintaining Count V, must be disregarded and Count V must be dismissed *sua sponte* since the Plaintiff has no standing to prosecute any such claims. It is well established in this Circuit that alter ego claims, as well as any reverse veil-piercing actions, constitute property of the bankruptcy estate and therefore lie within the exclusive control of the trustee. Thus, such claims may not be prosecuted by an individual creditor of a debtor. *Cadle Co. v. Mims (In re Moore),* 608 F.3d 253, 258–59 (5th Cir.2010); *Schimmelpenninck v. Byrne (In re Schimmelpenninck),* 183 F.3d 347, 358 (5th Cir.1999); *Rodriguez v. Four Dominion Drive, L.L.C. (In re Boyd),* 2012 WL 5199141, at *4–5 (Bankr.W.D.Tex. Oct. 22, 2012). Since the Plaintiff does not have standing to prosecute this particular cause of action on behalf of the bankruptcy estate, the court has no subject matter jurisdiction over that particular claim. *See, e.g., U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988); *Diamond v. Charles,* 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). Whenever it appears to the court that subject matter jurisdiction is lacking over a particular count, that portion of the complaint may be dismissed *sua sponte. In re Phar–Mor, Inc. Sec. Litig.,* 900 F.Supp. 777, 783 (W.D.Pa.1994) (citing *Carlsberg Resources Corp. v. Cambria Savings & Loan,* 554 F.2d 1254, 1256–57 (3d Cir.1977)); *De Leon v. Perry,* 975 F.Supp.2d 632, 645 (W.D.Tex.2014) (citing *Taylor ex rel. Gordon v. Livingston,* 421 Fed.Appx. 473, 474 (5th Cir.2011)) ["Federal courts have no jurisdiction unless a case or controversy is presented by a party with standing to litigate."].

Id. at 524–25. In affirming this Court's decision in *Packer*, the Fifth Circuit gave further guidance as follows:

> As the bankruptcy court correctly recognized, alter ego and reverse veil piercing claims "belong[ ] to the debtor," are "property of the estate," lie within the control of the Trustee, and generally may not be brought by a creditor. *Cadle Co. v. Mims (In re Moore),* 608 F.3d 253, 258–59 (5th Cir.2010); *accord Schimmelpenninck v. Byrne (In re Schimmelpenninck),* 183 F.3d 347, 358 (5th Cir.1999); *S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.),* 817 F.2d 1142, 1151 (5th Cir.1987). A creditor may be able to seek a judicial declaration that corporate entities constitute the alter egos of the debtor, but only in certain circumstances. The conditions necessary for a creditor to pursue an alter ego claim include: (1) the claim must be colorable; (2) the claim must be brought on behalf of the estate; and (3) the Trustee must have unjustifiably refused to pursue the claim. *La. WorLd Exposition, Inc. v. Fed. Ins. Co. (In re La. World Exposition, Inc.),* 832 F.2d 1391, 1397 (5th Cir.1987). If the creditor shows that these conditions are met, then the bankruptcy court may, in its discretion and after considering the benefit to the estate, grant the creditor leave to purse the claim on behalf of the estate. *Id.; see also, e.g., Official Employment–Related Issues Comm. of Enron Corp. v. Lavorato (In re Enron Corp.),* 319 B.R. 128, 131 (Bankr.S.D.Tex.2004) (discussing the circumstances under which a creditor may pursue a claim); *Spring Serv. Tex., Inc. v. McConnell (In re McConnell),* 122 B.R. 41, 43–44 (Bankr.S.D.Tex.1989) (discussing the conditions that must be present for a creditor to pursue an alter ego claim).

In re Packer, 816 F.3d 87, 92 (5th Cir. 2016).

Elsewhere the Fifth Circuit has described circumstances where these claims may not be property of the estate. For example, in *Matter of Educators Group Health Trust* the analysis of whether actions are property of Debtor's bankruptcy estate was explained as follows:

> For our purposes, property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1988). The term "all legal or equitable interests" has been defined broadly to include causes of action. *See Louisiana World Exposition v. Federal Ins. Co.,* 858 F.2d 233, 245 (5th Cir.1988) ("Section 541(a)(1)'s reference to 'all legal or equitable interests of the

debtor in property' includes causes of action belonging to the debtor at the time the case is commenced."); *In re MortgageAmerica Corp.,* 714 F.2d 1266, 1274 (1983) (noting that the meaning of the term "all legal or equitable interests" includes, at the very least, rights of action). If a cause of action belongs to the estate, then the trustee has exclusive standing to assert the claim. *See Matter of S.I. Acquisition, Inc.,* 817 F.2d 1142, 1153–54 (5th Cir.1987) (observing that the "general bankruptcy policy of ensuring that all similarly-situated creditors are treated fairly" requires that the trustee have the first opportunity to pursue estate actions without interference from individual creditors); *see also In re E.F. Hutton Southwest Properties II, Ltd.,* 103 B.R. 808, 812 (Bankr.N.D.Tex.1989) ("If an action belongs to the estate, the trustee has the power and duty to prosecute the action for the benefit of all creditors and shareholders in the estate."). If, on the other hand, a cause of action belongs solely to the estate's creditors, then the trustee has no standing to bring the cause of action. *See Caplin v. Marine Midland Grace Trust Co.,* 406 U.S. 416, 433–34, 92 S.Ct. 1678, 1688, 32 L.Ed.2d 195 (1972) (holding that a trustee does not have standing to sue a third-party on behalf of debenture holders); *In re Rare Coin Galleries of America, Inc.,* 862 F.2d 896, 900 (1st Cir.1988) ("The trustee, however, has no power to assert any claim on behalf of the creditors when the cause of action belongs solely to them.").

Whether a particular state cause of action belongs to the estate depends on whether under applicable state law the debtor could have raised the claim as of the commencement of the case. *See S.I. Acquisition,* 817 F.2d at 1142 (examining the cause of action premised on alter ego under Texas law); *MortgageAmerica,* 714 F.2d at 1275–1277 (examining the causes of action based on the Fraudulent Transfers Act and "denuding the corporation" theory under Texas law). As part of this inquiry, we look at the nature of the injury for which relief is sought. *See E.F. Hutton,* 103 B.R. at 812 ("The injury characterization analysis should be considered as an inseparable component of whether an action belongs to the [estate] or individual [creditor]."). If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. *See, e.g., S.I. Acquisition,* 817 F.2d at 1152–53 (concluding that an action based upon alter ego properly belongs to the estate, where (1) the debtor could have pierced its own corporate veil under Texas law; and (2) the debtor was unable

> to meet its corporate obligations due to the misuse of the corporate form, causing a derivative injury to the individual creditor); *MortgageAmerica,* 714 F.2d at 1275 (concluding that an action under the Fraudulent Transfers Act properly belongs to the estate, where (1) the debtor could have brought the action to recover its assets; and (2) the debtor is stripped of assets, causing a derivative injury to the individual creditor). Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.

Matter of Educators Group Health Tr., 25 F.3d 1281, 1283–84 (5th Cir. 1994). Therefore, this Court should look to whether Plaintiffs' claims "explicitly or implicitly allege harm to the debtor" as a method of determining whether "under applicable state law the debtor could have raised the claim as of the commencement of the case." *Id.*

Examining this question as posed by the Fifth Circuit means also considering the distinction between general and personal claims. *In re Schimmelpenninck*, 183 F.3d 347, 359 (5th Cir. 1999). This Fifth Circuit case explained the importance of this distinction as follows:

> It is axiomatic that a trustee has the right to bring actions that will benefit the estate. Such claims can either be founded on the rights of the debtor or on the rights of the debtor's creditors. If the right belongs to the debtor's creditors, the distinction between personal and general claims takes on significance: A trustee can assert the general claims of creditors, but is precluded from asserting those creditor claims that are personal. In other words, even if a claim "belongs to" the creditor, the trustee is the proper party to assert the claim, for the benefit of all creditors, provided the claim advances a generalized grievance.

Id. Defendant's standing contentions must be considered within this "legal framework for determining whether the trustee or an individual creditor is the appropriate actor." *Id*. This framework is categorized by "three kinds of action:

> 1) Actions by the estate that belong to the estate;
> 2) Actions by individual creditors asserting a generalized injury to the debtor's estate, which ultimately affects all creditors; and
> 3) Actions by individual creditors that affect only that creditor personally.

Id. at 360. "The trustee is the proper party to advance the first two of these kinds of claims, and the creditor is the proper party to advance the third." *Id.*

Plaintiffs in this case argue their claims fall into this third category. Plaintiffs contend they are not seeking to reach assets of Defendant's companies which might otherwise be available to augment the estate. Instead, they argue there are no corporate *assets* existent and that Plaintiffs are instead seeking to have their *debts* included in the claims of the estate. Their logic is that because Defendant-Debtor is the alleged bad actor, he has no reason to assert any alter ego and/or veil piercing claim, and because there are no assets to recover neither does the Trustee.

The creativity of Plaintiff's argument does not dispense with this Court's obligation to determine, based upon the Motion and related pleadings, whether Plaintiff's claims are direct (i.e. personal to Plaintiffs) or

derivative (i.e. general to all creditors). "This question does not turn on an evaluation of the merits of the claim." *In re R.E. Loans, LLC*, No. 3:12-CV-3513-D, 2013 WL 1265205, at *4 (N.D. Tex. Mar. 28, 2013). "Nor does it turn on the label given to the claim." *Id.* Instead, this Court must focus on whether any harm to Debtor is alleged. Recently, the Fifth Circuit explained this distinction:

> Whether the bankruptcy estate or a creditor can pursue a claim against third parties is a recurring issue in bankruptcy law. *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575 (5th Cir. 2008), instructs us to focus on whether the creditor has suffered a direct injury or one that is derivative of an injury to the debtor. *Id.* at 584. If the harm to the creditor comes about only because of harm to the debtor, then its injury is derivative, and the claim is property of the estate. *Id.*; *see also* 11 U.S.C. § 541(a)(1). In that situation, only the bankruptcy trustee has standing to pursue the claim for the estate so that all creditors will share in any recovery. *Seven Seas*, 522 F.3d at 584.
>
> As for direct-injury claims that belong to a particular creditor or group of creditors, the simple case is when the claim does not involve any harm to the debtor. These cannot be part of the estate. *Id.* at 584 (quoting *In re Educators Grp. Health Trust*, 25 F.3d 1281, 1284 (5th Cir. 1994)). But even when the conduct harms the debtor, the creditor may also have a claim if its asserted injury does not flow from injury to the debtor. This means that the estate and a creditor may have separate claims against a third party arising out of the same events. *Seven Seas*, 522 F.3d at 585, 590; *Educators Trust*, 25 F.3d at 1284–85. To pursue a claim on its own behalf, a creditor must show this direct injury is not dependent on injury to the estate.

Matter of Buccaneer Res., L.L.C., 912 F.3d 291, 293–94 (5th Cir. 2019). The Fifth Circuit in *Buccaneer* named *Seven Seas* and *Educators Trust* as cases where direct (i.e. personal) injuries existed. *Id.* at 294. Conversely, the Fifth

Circuit named *Schimmelpenninck* as a case where derivative (i.e. general to all creditors) injuries existed. *Id.* "Similarly, an alter ego suit that attempted to pierce the corporate veil and recover assets improperly moved through the corporate structure belonged only to the estate." *Id.*

Keeping in mind the importance of whether harm to Debtor-Defendant is alleged by Plaintiffs, a discussion of the Fifth Circuit's decision in *S.I. Acquisition, Inc.* is warranted. *See S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.),* 817 F.2d 1142 (5th Cir.1987). *S.I. Acquisition, Inc.* was cited by this Court and the Fifth Circuit in support of the decisions in *Packer* relied upon by Defendant. S.I. Acquisition, Inc. was a corporate Chapter 11 debtor. *Id.* at 1143. Eastway Delivery Service, a creditor, brought pre-petition suit in state court against S.I. Acquisition and three other non-debtor defendants for breach of contract and alleged these non-debtor defendants were liable for S.I. Acquisition's breach based upon alter ego. *Id.* at 1144. Later, one of the three non-debtor defendants also filed Chapter 11, and its case was substantively consolidated with that of S.I. Acquisition. *Id.* The bankruptcy court deciding *S.I. Acquisition, Inc.* "found that Eastway's alter ego action was not 'a claim assertable by the debtor-in-possession S.I.A. or a trustee in bankruptcy under 11 U.S.C. § 544.'" *Id.* at 1145. The Fifth Circuit reversed, finding "that section 362(a)(3)

automatically stayed Eastway's state court action." *Id*. at 1151. In making this decision, the court asked "two important questions:

> (1) does Eastway's cause of action based on alter ego under Texas law belong to the corporate debtor, S.I.A.; or
>
> (2) does Eastway's cause of action based on alter ego seek to recover or control property of the debtor, S.I.A.?"

Id. The Fifth Circuit answered the first of these questions in the affirmative, meaning that Eastway's alter ego cause of action under Texas law against the corporate debtor-defendant was property of the estate such that section 362(a)(3) stayed the state court action. *Id*. The second question was not decided. *Id*.

Since *S.I. Acquisition, Inc.* was decided, Texas law regarding alter ego has been amended twice. The Texas Supreme Court previously held in *Castleberry* "that a complaining party need show only constructive fraud in order to prove that a corporation had been used as a sham to perpetrate a fraud, thus establishing the liability of the individual so using the corporation." *Farr v. Sun World Sav. Ass'n*, 810 S.W.2d 294, 296 (Tex. App.—El Paso 1991, no writ), discussing *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex.1986). As a result, Article 2.21 of the Texas Business Corporation Act was amended:

> As can readily be seen, the amendments to Article 2.21A effectively eliminated constructive fraud and the failure to observe corporate formalities and requirements as vehicles for establishing shareholder

> liability for acts of the corporation in connection with contract claims, but left untouched the effect of constructive fraud on tort claims. Carefully preserved, however, is the right of a person to go behind the corporate entity in order to establish individual shareholder liability by a showing of actual or common law fraud. Where actual fraud primarily for the benefit of the perpetrating shareholder or shareholders can be shown, the various doctrines for disregarding the corporate entity, including alter ego and a sham to perpetrate a fraud, are still very much alive.

Farr, 810 S.W.2d at 296. Thereafter, the law was again amended. Currently, it necessary to demonstrate "that the holder . . . caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder . . . " TEX. BUS. ORGS. CODE ANN. § 21.223(b). Despite these amendments however, "there are still 'three broad categories in which a court may pierce the corporate veil: (1) the corporation is the alter ego of its owners and/or shareholders; (2) the corporation is used for illegal purposes; and (3) the corporation is used as a sham to perpetrate a fraud.'" *Rimade Ltd. v. Hubbard Enterprises, Inc.,* 388 F.3d 138, 143 (5th Cir.2004), citing *Western Horizontal Drilling, Inc. v. Jonnet Energy Corp.,* 11 F.3d 65, 67 (5th Cir. 1994). These statutory amendments therefore do not appear to disturb the central holding of *S.I. Acquisition, Inc.* The Fifth Circuit has explained that central holding as follows:

> We have previously addressed whether alter ego claims brought by a creditor under Texas state law are property of the estate within the

> meaning of § 541. *S.I. Acquisition,* 817 F.2d at 1152–53. We identified as operative the question "whether a [debtor] corporation could assert an action against itself based upon alter ego." *Id.* at 1152. We recognized that alter ego claims are typically asserted by the debtor's creditors but noted that "theoretically nothing in Texas law prohibits a corporation from asserting on its own an action based on alter ego and that in fact the underlying policy of the remedy supports this conclusion." *Id.* at 1153. We therefore held that the alter ego action brought by the creditor in fact belonged to the debtor and was property of the estate within the meaning of § 541(a)(1). *Id.*

In re Moore, 608 F.3d 253, 258 (5th Cir. 2010).

This case is one with an individual debtor, not a corporate debtor such as *S.I. Acquisition*. Additionally, Plaintiffs do not allege any harm was perpetrated *to Debtor* as outlined in *Buccaneer*. Rather, they allege harm was perpetrated to Plaintiffs *by Debtor*. Similarly, Plaintiffs are not seeking to recover or control any assets of Debtor or any of the entities scheduled as being owned by Debtor. Rather, Plaintiffs seek to make their claim against those scheduled entities enforceable against Debtor because of Debtor's alleged fraud. This Court does not understand the reasoning of *S.I. Acquisition* to mean that in every case where alter ego is alleged, a Plaintiff has no standing.

An analysis of *Packer* is more helpful, as the debtor in that case was an individual. In *Packer*, Parthenon Development Partners, LLC and its three members borrowed funds to finance a residential development. Packer and the other members guaranteed this development loan. *In re Packer*, 816 F.3d

87, 89 (5th Cir. 2016). The development was unsuccessful, the lender foreclosed, and the lender also obtained a deficiency judgment against Packer. *Id*. This judgment was later acquired by Judgment Factors, LLC (an entity owned by the spouses of the members of Parthenon other than Packer) which sought to enforce it against Packer. *Id*. Packer then filed Chapter 7, and Judgment Factors, LLC filed a § 727 adversary objecting to Packer's bankruptcy discharge and sought a determination that other entities owned by Packer but not listed in his schedules were "'alter egos' and that the 'corporate veils' of these entities be 'reverse pierced.'" *Id*. at 90.

In *Packer*, Plaintiffs claims were attempting, in part, to increase the pool of assets which might otherwise have been available for creditors. "Specifically, Judgment Factors argued that Packer should have listed the assets of these other entities in his bankruptcy schedules (because these entities were his 'alter egos') and that the bankruptcy court should determine that these assets were subject to the claims of Packer's creditors." *Id.* That fact pattern is different from this case, where Defendant does not seek relief touching upon recovery of any assets for the estate, and where there likely are no such assets to recover. For this reason, it does not seem consistent to read *Packer* as establishing a blanket rule that creditors have no standing in every case where alter ego is alleged, even if debtor is an individual. Nor does it seem consistent in light of the above guidance in *Buccaneer* and

Schimmelpenninck, which both describe circumstances in which a creditor could possibly have standing.

The facts presented in this case are different from the underlying facts in the case precedents cited above. Plaintiffs allege claims and injuries particular to them which are not generalized. If Plaintiffs are successful, estate creditors will be no better off than they otherwise would be. Plaintiffs do not allege Defendant suffered harm, but rather that Defendant perpetrated the harm suffered by Plaintiffs. Nor do Plaintiffs seek to augment, recover, or control estate assets within the Trustee's scope of authority, either directly or indirectly. Therefore, the Court finds under these circumstances that Plaintiffs have standing to proceed on their claims in this case. Whether Plaintiffs will be successful at trial, or ultimately able to prove their allegations, is a different matter not resolved here.

B. Statute of Limitations

Defendant next argues that the fraud claim brought by Plaintiffs is barred by the Ohio statute of limitations. Under Ohio law, fraud carries with it a statute of limitations of four years. Ohio Rev. Code Ann. § 2305.09. Defendant argues that since closing under the PSA occurred on August 2, 2016, the limitations deadline to file a fraud claim was August 2, 2020.[25]

[25] Def. Mot. Summ. J., at 7-8 ECF No. 14.

However, Ohio law is not so simple. As pointed out by Plaintiffs, Ohio law employs the discovery rule. *Investors REIT One v. Jacobs*, 546 N.E. 2d 206 (1989). The Ohio Supreme Court has stated that "the four-year statute limitations period does not commence to run on claims presented in fraud or conversion until the complainants have discovered, or should have discovered, the claimed matters." *Id.* at 206-07.

Plaintiffs claim that they could not have discovered the alleged fraud of Defendant until February 8, 2018.[26] This was when Plaintiffs allege payment of the contemplated seller financing of the remaining purchase price became due. *Id*. Plaintiffs claim that they could not have reasonably discovered their fraud cause of action until this amount was due under the PSA.[27]

Defendant argues that Plaintiffs should have discovered their fraud cause of action one month after the closing date on September 8, 2016.[28] Defendant reasons this is because Plaintiffs knew by then "they had not been paid" and that "Debtor was in breach" of the PSA.[29] If monthly payments were required, then the first payment should have been due on September 8, 2016 according to the never signed promissory note memorializing the terms of the seller financing agreement.[30] Plaintiffs similarly state in their

[26] Pls. Obj., at 22 ECF No. 21.
[27] *Id.*
[28] Def. Resp. to Pls. Obj, at 5 ECF No. 25.
[29] *Id.*
[30] Def. Mot. Sum. J., at 8 ECF No. 14.

Complaint that Defendant was to provide a promissory note providing "that Silver Creek and/or Caltex would make payments on the Note each month, beginning on the month following the Closing Date."[31] Plaintiffs admits that these monthly payments were never made because Defendant never delivered a signed note to Plaintiffs. [32] It does not necessarily follow however, that this failure is the result of fraud committed by Defendant that Plaintiffs should have discovered.

Based on the summary judgment evidence submitted, it is unclear whether an obligation to make specific monthly payments was agreed upon, or instead was discussed as part of negotiations over a promissory note which ultimately was not provided or signed. The Court also considered the possibility that Plaintiffs should have discovered their claim when Defendant failed to comply with the terms of the PSA and did not provide a promissory note at closing. Certainly, closing a real estate transaction of the size described in the PSA without payment in some form of the full purchase price is questionable. Plaintiffs, however, in their Complaint claim they waived this closing condition and allowed Defendant to present the promissory note later. This assertion does not appear to be clearly contested by Defendant.[33]

[31] Pls. Compl. at 5 ECF No. 1.
[32] *Id.*
[33] *Id.* at exhibit 7, pg. 3.

The Court therefore finds that a genuine issue of material fact exists as to whether Defendant's failure to pay the remaining purchase price, by monthly payments or otherwise, put Plaintiffs on notice of their fraud claim.

C. Collateral Estoppel

Defendant finally argues that the cause of action brought by Plaintiff is barred by collateral estoppel because of a ruling in the prior Ohio state court case.[34] Bankruptcy courts apply the preclusion rules of the state in which the prior decision at issue was entered. *Canton v. Trudeau (In re Caton),* 157 F.3d 1026, 1028 (5th Cir. 1998). Because the prior case took place in Ohio, Ohio state law applies to this question. Under Ohio law, a party asserting collateral estoppel must prove four elements:

> (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action;
> (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue;
> (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and
> (4) The issue must have been identical to the issue involved in the prior suit.

Ginn v. Stonecreek Dental Care, 93 N.E.3d 78, ¶ 24 (12th Dist.).

Defendant cannot meet the summary judgement standard for all four elements of collateral estoppel under Ohio law. This is because the Ohio state court does not appear to have issued a "final judgement on the merits"

[34] Def. Mot. Summ. J., at 9 ECF No. 14.

regarding the fraud claim. Instead, in the first Ohio case the presiding state court dismissed Plaintiffs' fraud cause of action because of a failure to state a claim.[35] Specifically it granted the motion to dismiss the fraud claim because the claim "fail[ed] to meet the particularity requirements of Civ. R. 9(B)."[36] The Ohio state court's ruling did not specify whether that dismissal was with or without prejudice.[37]

According to Ohio state law, a dismissal for failure to comply with Rule 9(b) should be a dismissal without prejudice. *Gallagher v. Borden, Inc.,* 616 N.E. 2d 577, 190 (Ohio 10th Dist. 1992).[38] Furthermore, the Ohio Supreme Court has ruled that a dismissal without prejudice is not an adjudication of the merits of the case. *Thomas v. Freeman*, 225, 680 N.E. 2d 997, 1001, fn. 2 (Ohio 1997). Because the dismissal of the fraud claim was apparently without prejudice, Defendant has not established that no genuine issue of material fact exists whether there was a final judgement on the merits of Plaintiffs' fraud claims.

Consequently, Defendant is not entitled to summary judgment as a matter of law on his collateral estoppel defense to Plaintiffs' fraud claim.

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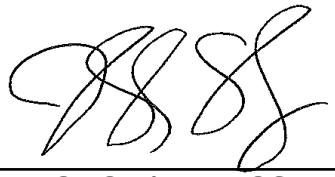
[35] Pls. Obj. to Def. Mot. Summ. J., at exhibit 5.
[36] *Id.* at exhibit 5, pg. 4.
[37] *Id.*
[38] "However, in journalizing its dismissal of the fraud claim, the trial court dismissed the claim with prejudice. To that extent, the trial court erred. A dismissal for failure to state a claim is not a dismissal with prejudice, but a dismissal without prejudice." *Gallagher v. Borden, Inc.,* 616 N.E. 2d 577, 190 (Ohio 10th Dist. 1992).

VI. Conclusion

IT IS THEREFORE ORDERED that the "Motion for Summary Judgment" filed by Defendant, Jason William Coutts, is hereby **DENIED** for the reasons set forth above. The Court finds Plaintiffs have standing in this matter, and that Defendant failed to demonstrate he was entitled to a judgement as a matter of law regarding the affirmative defenses of statute of limitations or collateral estoppel. Therefore, these affirmative defenses must be determined through a trial on the merits.

Signed on 07/01/2022



THE HONORABLE JOSHUA P. SEARCY
UNITED STATES BANKRUPTCY JUDGE