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June 22, 2021

**VIA ECF**

Honorable Brian M. Cogan  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: Securities and Exchange Commission v. Platinum Management (NY) LLC,  
Civil Case No. 1:16-cv-06848-BMC

Dear Judge Cogan:

We write as counsel to Melanie L. Cyganowski, as Receiver (the “**Receiver**”) in the above-captioned matter, regarding an issue relating to the Chapter 7 bankruptcy of Defendant Mark A. Nordlicht (“**Nordlicht**”), Case No. 20-22782-rdd (Bankr. S.D.N.Y.) (the “**Nordlicht Bankruptcy Case**”).

Specifically, the Receiver respectfully requests clarification from the Court regarding the applicability of this Court’s October 16, 2017, Second Amended Order Appointing Receiver, Dkt. No. 276, (the “**Receivership Order**”), to the Receiver’s objection to the discharge action captioned *Cyganowski v. Nordlicht*, Adv. Pro. No. 20-07025-rdd commenced by the Receiver in the Nordlicht Bankruptcy Case pursuant to 11 U.S.C. § 727(a)(4)(A) (the “**Discharge Objection**”) and, if applicable, leave from this Court, to continue to pursue the Discharge Objection. The Receiver is a creditor in the Nordlicht Bankruptcy Case, having asserted a claim in an amount of not less than \$220 million (the “**Nordlicht Claim**”). The Receiver alleges in the Discharge Objection that Nordlicht knowingly and fraudulently made a false oath in the Nordlicht Bankruptcy Case by failing to list significant assets and financial transactions in his bankruptcy schedules. As such, the Receiver determined that, consistent with the authority and direction vested in her by, *inter alia*, Par. 34 of the Receivership Order that she “investigate, prosecute, defend, intervene in or otherwise participate in, compromise, and/or adjust actions in any state, federal or foreign court or proceeding of any kind as may in the Receiver’s discretion, be advisable or proper to recover and/or conserve Receivership Property,” it was, and still is, in the best interests of the Receivership Estate that Nordlicht not obtain a discharge of his debts, including, but not limited to, the Receiver’s aforementioned \$220 million Nordlicht Claim.



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By way of background, Nordlicht filed the Nordlicht Bankruptcy Case on June 29, 2020 in the United States Bankruptcy Court for the Southern District of New York. The Receiver first informed this Court of the commencement of the Nordlicht Bankruptcy Case in her Thirteenth Status Report to this Court, filed October 20, 2020, Dkt. No. 544 (the “*Thirteenth Report*”), and that the Receiver had entered into a tolling agreement with Nordlicht and the chapter 7 trustee with respect to the deadline for the Receiver to object to the discharge of Nordlicht’s debts. Thirteenth Report, p. 9. In her next status report, the Fourteenth Status Report to this Court, filed on January 20, 2021, Dkt. No. 561 (the “*Fourteenth Report*”), the Receiver further reported that following Nordlicht’s refusal to further extend the tolling period, she had filed a complaint objecting to the discharge sought by Nordlicht in the Nordlicht Bankruptcy Case. Fourteenth Report, p. 7. It is the Receiver’s belief that these reports (which were consistent with her prior practice for reporting receivership-related litigation to this Court), coupled with the unambiguous language of 11 U.S.C. § 727(c)(1), which provides that the “trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section,” allowed the Receiver to file and prosecute the Discharge Objection without the need to formally seek this Court’s leave before doing so as may be required for other actions by paragraphs 24 and 35 of the Receivership Order.

In spite of the foregoing, and as previously reported to this Court by the Receiver in her Fifteenth Status Report to the Court, filed April 20, 2021, Dkt. No. 565 (the “*Fifteenth Report*”), Nordlicht moved the Bankruptcy Court to dismiss the Discharge Objection, for among other reasons, the Receiver’s lack of standing as a result of not expressly obtaining leave of this Court in advance of filing the Discharge Objection in the Nordlicht Bankruptcy Case. *See*, Nordlicht’s Motion to Dismiss, Bankruptcy Case, Adv. Pro. 20-07025-rdd, Dkt. 11-1 (the “*Motion to Dismiss*”). Following briefing on the Motion to Dismiss, and after an adjournment granted by the Bankruptcy Court to allow for continued, but ultimately unsuccessful settlement discussions, the Bankruptcy Court heard oral argument on the motion on June 14, 2021 (the “*Motion to Dismiss Hearing*”). Following the Motion to Dismiss Hearing, the Hon. Robert D. Drain, provided an oral ruling from the bench,<sup>1</sup> preliminarily denying in part (as to claims by Nordlicht that the Discharge Objection was not sufficiently plead) and granting in part (as to claims by Nordlicht that the Receiver lacked standing), the Motion to Dismiss.

More specifically, and of most relevance to Your Honor and the request made in this letter by the Receiver, Judge Drain instructed the Receiver to seek clarification from Your Honor (i) whether paragraphs 24 and 35 of the Receivership Order require that the Receiver seek and obtain affirmative leave of this Court to pursue the Discharge Objection and (ii) if they do,

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<sup>1</sup> A copy of the transcript of the hearing, including Judge Drain’s ruling from the bench (the “*Ruling Transcript*”), is annexed hereto as Exhibit A.



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whether Your Honor would grant authorization to continue to pursue the Discharge Objection. *See* Ruling Transcript 53:9-57:23. As previously stated, the Receiver does not believe that the referenced provision in the Receiver Order applies to the Discharge Objection because, among other things, it: (a) falls under the Receiver's explicit and inherent authority to protect and preserve estate assets (in this case the very significant Nordlicht Claim); (b) is a defensive response to the Nordlicht Bankruptcy Case (which itself arguably should not have been filed without first consulting with this Court); and (c) was reported to this Court and all parties-in-interest by the Receiver in advance as to the possibility of the filing (*see*, Thirteenth Report), and then the actual filing (*see*, Fourteenth Report) in a manner consistent with her reporting of other receivership-related litigations, and – other than the Motion to Dismiss, filed in the Nordlicht Bankruptcy Case and not this case – no parties objected or otherwise raised a concern as to the Receiver's course of action. Nonetheless, if the Court does believe that the referenced injunction and leave provisions are applicable to the Discharge Objection, the Receiver respectfully requests authorization to continue to pursue the Discharge Objection. Judge Drain stated that his preliminary ruling on the sufficiency of the pleading portion of the Motion to Dismiss would become final when and if Your Honor determines that the Receivership Order's injunction and leave provisions are inapplicable here or, alternatively, grants the Receiver authority to proceed. *See* Ruling Transcript 57:24-58:4.

For these reasons, the Receiver respectfully requests clarification from the Court regarding the Receivership Order or, if required, leave to continue to maintain the Discharge Objection. If Your Honor grants the Receiver the relief requested herein, the Discharge Objection may proceed, subject to the Receiver filing a motion for leave to amend within thirty days of such a decision by Your Honor. *See* Ruling Transcript 71:9-18.

Should Your Honor require, the Receiver is prepared to more fully and formally brief this matter and/or answer any questions Your Honor may have regarding her request.

Thank you for your continued courtesies and consideration of these matters.

Respectfully submitted,

/s/ Erik B. Weinick  
Erik B. Weinick

Enclosure: Exhibit A

cc: Scott Krinsky, Esq. (Bankruptcy counsel to Mark Nordlicht)

# **EXHIBIT A**

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 20-22782-rdd

Adv. Case No. 20-07025-rdd

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In the Matter of:

MARK A. NORDLICHT,

Debtor.

- - - - - x

CYGANOWSKI et al.,

Plaintiffs,

v.

NORDLICHT,

Defendant.

- - - - - x

United States Bankruptcy Court

300 Quarropas Street, Room 248

White Plains, NY 10601

June 14, 2021

11:30 AM

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B E F O R E :  
HON ROBERT D. DRAIN  
U.S. BANKRUPTCY JUDGE  
  
ECRO: JUSTIN WALKER

1 HEARING re Adversary proceeding: 20-07025-rdd Cyganowski et  
2 al v. Nordlicht Pre-Trial Conference

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4 HEARING re Adversary proceeding: 20-07025-rdd Cyganowski et  
5 al v. Nordlicht

6 Motion to Dismiss Adversary Proceeding (related  
7 document(s) 10, 9, 1, 4) (ECF #11)

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9 HEARING re Adversary proceeding: 20-07025-rdd Cyganowski et  
10 al v. Nordlicht

11 Declaration of Erik B. Weinck in Opposition to Motion to  
12 Dismiss Complaint (related document( s) 11) filed by Erik  
13 Bradley Wei nick on behalf of Melanie L. Cyganowski.  
14 (ECF #13)

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16 HEARING re Adversary proceeding: 20-07025-rdd Cyganowski et  
17 al v. Nordlicht

18 Reply to Motion in further Support of Motion to Dismiss and  
19 in Reply to Plaintiffs Opposition (related document(s) 11)  
20 filed by Scott Krinsky on behalf of Mark A. Nordlicht.  
21 (ECF #14)

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1 HEARING re Adversary proceeding: 20-07025-rdd Cyganowski et  
2 al v. Nordlicht  
3 Declaration in Reply in Further Support of Debtor's Motion  
4 to Dismiss Complaint and in Opposition to Plaintiffs  
5 Opposition (related document(s) 11) filed by Scott Krinsky  
6 on behalf of Mark A. Nordlicht. (ECF # 15)

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25 Transcribed by: Sonya Ledanski Hyde



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A P P E A R A N C E S :

BACKENROTH FRANKEL KRINSKY, LLP

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P R O C E E D I N G S

THE COURT: So this is In re Nordlicht, and more specifically Cyganowski, et al v. Nordlicht. We're here on the Defendant's Motion to Dismiss, which is opposed by the Plaintiff, and if I don't grant that motion, we're also here on the pre-trial conference in that adversary proceeding. So I have reviewed the motion, the documents of record submitted with the motion, including of course the underlying complaint, the Defendant's memorandum of law, the memorandum of law in opposition, and the documents submitted again as of record in support of it in Mr. Weinick's declaration, and then the reply memorandum of law and the reply declaration of Mr. Krinsky.

So, why don't I take the parties' appearances and then we can proceed to brief oral argument. You're on.

MR. WEINICK: Good morning, Your Honor.

Go ahead, Mr. Krinsky.

MR. KRINSKY: (no audible response)

THE COURT: No, you're still on mute, Mr. Krinsky.

MR. KRINSKY: (no audible response)

THE COURT: No, he's still on mute. Could -- can you --

REPORTER: No, he's unmuted on Zoom. He's unmuted now.

THE COURT: You should be unmuted at this point.

1 Are you?

2 MR. KRINSKY: (no audible response)

3 THE COURT: No, you're not. It's weird.

4 REPORTER: He's unmuted on Zoom. I don't know  
5 why.

6 THE COURT: Are you on a different -- are you not  
7 on Zoom?

8 MR. KRINSKY: (no audible response)

9 MR. WEINICK: Use the bottom left button on the  
10 screen.

11 REPORTER: This is (indiscernible).

12 MR. KRINSKY: (no audible response)

13 THE COURT: I'm still not hearing you.

14 REPORTER: And apparently on our side he's -- he  
15 is unmuted on Zoom.

16 THE COURT: Well, on Zoom we are apparently  
17 unmuted, at least from our end, but I can't hear you.

18 REPORTER: And I just tested it. It said it's not  
19 a Zoom issue. It's something on his end.

20 THE COURT: Okay. I think it's something on your  
21 end, Mr. Krinsky. Are you using two different devices,  
22 or...

23 MR. KRINSKY: (no audible response)

24 MR. WEINICK: Your Honor, if I may, perhaps he  
25 should dial in on the phone line.

1 THE COURT: Let me just -- before you do that, Mr.  
2 Krinsky, is the -- when you go down to the bottom tool bar,  
3 does the microphone have a red slash through it or does it  
4 not?

5 MR. KRINSKY: (no audible response)

6 THE COURT: All right. Well, I'm trying to read  
7 your lips, but obviously something's not working. Can -- do  
8 they have a phone call that they can go through? All right.  
9 So I think Mr. Weinick's suggestion is what we ought to do  
10 here, which is you should dial in.

11 MR. WEINICK: Your Honor, would you like me to  
12 give my appearance in the interim, or would --

13 THE COURT: Sure.

14 MR. WEINICK: Sure. For the record, Your Honor,  
15 Erik Weinick of Otterbourg, P.C. on behalf of Melanie  
16 Cyganowski (sound drop) the receiver. Ms. Cyganowski's on  
17 the line with us as is our colleague Jennifer Feeney.

18 THE COURT: Okay. Good morning.

19 MR. KRINSKY: Your Honor, can you hear me?

20 THE COURT: Yes.

21 MR. KRINSKY: I'm on the phone. I apologize for  
22 this.

23 THE COURT: That's fine. I don't know if you want  
24 to go back to your screen so I can see you too, or...

25 MR. KRINSKY: Sure.

1 THE COURT: Okay.

2 MR. KRINSKY: I'm not sure why I'm not -- oh.

3 THE COURT: There we are.

4 MR. KRINSKY: Yes, I'm here.

5 THE COURT: All right. Very well. So, we've  
6 already been stating your name, but if you could just state  
7 your name for the record.

8 MR. KRINSKY: My name is Scott Krinsky, Backenroth  
9 Frankel attorneys for the Defendant Mark Nordlicht.

10 THE COURT: Okay. All right. Good morning.  
11 Again, I have before me Mr. Nordlicht's motion to dismiss  
12 this complaint, which asserts one cause of action for the  
13 denial of Mr. Nordlicht's discharge under Section 727(a)(4)  
14 of the Bankruptcy Code. Again, I reviewed the parties'  
15 pleadings on this, but I'm happy to hear brief oral  
16 argument.

17 MR. KRINSKY: Your Honor, our arguments are pretty  
18 much set forth in our motion papers and in our reply papers.  
19 It's really a two-fold argument. The first part of the  
20 argument is that the receiver is governed by the appointment  
21 order. It's undisputed that the appointment order requires  
22 the Plaintiffs to seek leave from the District Court prior  
23 to proceeding (sound drop) action. They have not done that.  
24 Therefore, the order is ambiguous.

25 Courts will construe the ambiguous order as

1 something that must be complied with. In addition to that,  
2 they have the power to modify the order, to remove the leave  
3 provisions, which they did not do. So, based on that we  
4 believe that the complaint should be dismissed. Now, they  
5 raise a couple of arguments in opposition. They basically  
6 say that, well, there were four other times where we filed  
7 suit without seeking permission. But their prior failure to  
8 obtain leave does not excuse non-compliance. And again, the  
9 Court must enforce the court order as per its terms and it's  
10 not ambiguous.

11 They also order -- or they try to blame it on us  
12 because we would not give them an 11th hour second  
13 adjournment request, but that is sort of disingenuous,  
14 because again, they failed four other times to even seek  
15 leave. In addition to that, we did give them the first  
16 extension which extended their time basically for 23 weeks  
17 up until December 7th. They did not ask for the extension  
18 until a few days before.

19 Also, we didn't really put it in the papers, but  
20 they were confused. They really thought they were seeking  
21 an extension to object to dischargeability, but they had not  
22 preserved that right. They also argue that the complaint  
23 was merely a defensive action because the Chapter 7 petition  
24 forced it. They don't cite any federal authority for that  
25 position, and we have shown that federal courts have

1 rejected that argument.

2 They also argue that they can object to discharge  
3 because they're a creditor, but there is the appointment  
4 order, which again they drafted and modified except for the  
5 leave provisions, basically assumes that they would be a  
6 creditor because any action has to be necessary and  
7 appropriate and does not contain any exceptions for a  
8 creditor.

9 In addition to that, we would argue that  
10 Stadtmauers had previously sought -- they relied primarily  
11 upon the Kritzer declaration in support of the Stadtmauers'  
12 motion for an injunction. And the same Stadtmauers  
13 requested permission from the district court to file a proof  
14 of claim in this court. They also argue that we needed  
15 permission to see the file of bankruptcy, but we do not  
16 believe anything under the paragraphs that they cite require  
17 that.

18 And even if the debtor needed leave, the receiver  
19 order says that the Plaintiff must promptly notify the Court  
20 under paragraph 23, which the Plaintiff failed to do. In  
21 addition to that --

22 THE COURT: I guess, I didn't follow that part  
23 because they have notified the Court of the -- in their  
24 reports that they file periodically, right?

25 MR. KRINSKY: They did not notify the Court that

1 the bankruptcy was improper.

2 THE COURT: Was in what? In process?

3 MR. KRINSKY: Improper.

4 THE COURT: Oh, I -- okay. So that -- your  
5 notification point is just referencing that issue. I  
6 understand.

7 MR. KRINSKY: Correct.

8 THE COURT: Okay.

9 MR. KRINSKY: We also don't believe -- well, the  
10 receiver appointment order also requires an action -- new  
11 action to not only seek leave, but to be necessary and  
12 appropriate. We don't believe that according to their own  
13 documents this action was necessary and appropriate. They  
14 disclosed in prior status reports, in the 11th status report  
15 and the 12th status report, that they're entering into final  
16 stages where they would make a determination as to final  
17 litigation.

18 In the 13th status report, they deleted those  
19 requirements and just -- or they deleted that language and  
20 just said we're in the final stages. That was seven weeks  
21 before the complaint was filed. It didn't say anything  
22 about filing any additional litigation. Plus, any  
23 additional litigation cannot be necessary and appropriate  
24 because all they would do and all they are doing is helping  
25 other creditors at the expense of their own receivership.



1 They would be helping creditors that have not filed proofs  
2 of claims and have longer timelines.

3 THE COURT: But they would also be -- but the  
4 companies for which the receiver is the receiver is a  
5 creditor, right?

6 MR. KRINSKY: They have filed a proof of claim.

7 THE COURT: Right.

8 MR. KRINSKY: But they did not sue us pre-petition  
9 in contrast to every other creditor.

10 THE COURT: That's because they're the receiver.  
11 I mean, I don't follow any of this argument, frankly.

12 MR. KRINSKY: Okay.

13 THE COURT: I don't know whether it's --

14 MR. KRINSKY: I'll move on, Your Honor.

15 THE COURT: I don't even know what legal doctrine  
16 it's based on. You don't argue waiver, and I don't see how  
17 you could argue waiver. It's really a judgment call. And  
18 if one follows the first part of your argument, which is  
19 that court approval was necessary, i.e. the district court  
20 approval, it's for the district court to decide whether it's  
21 reasonable and necessary, not for me, right?

22 MR. KRINSKY: I'll move on, Your Honor.

23 THE COURT: Okay.

24 MR. KRINSKY: The second part of our argument is  
25 even if they could avoid the leave provision, then our

1 motion to the complaint should be granted because they  
2 failed to state a claim. They basically have a couple of  
3 omissions. Now, all these omissions are based on  
4 allegations made in an -- a declaration by Kritzer on behalf  
5 of the Stadtmauers. All these admissions -- well, let me  
6 put it this way. We disclosed the state court action  
7 involving the Stadtmauers in our schedules or our statement  
8 of financial affairs. And in that state court action are  
9 all the allegations that they are seeking or alleging were  
10 omissions.

11 All those allegations, the four or the five, were  
12 in either Stadtmauers complaint or supplemental complaint.  
13 All those allegations are in that action. We disclosed in  
14 our schedules that action. In addition to that, we removed  
15 that action to the bankruptcy court. In addition to that,  
16 after 341 testimony, it was clear that Stadtmauer had spoken  
17 with the trustee because the trustee and Stadtmauer asked  
18 questions concerning the four alleged omissions.

19 In addition to that, we of course entered into the  
20 settlement and with the trustee which involved all parties  
21 that are involved in the alleged omissions. So we certainly  
22 did not impeded any negation by the trustee into  
23 investigating the assets. To the contrary. We worked with  
24 the trustee to help facilitate a settlement which involved  
25 these alleged assets.

1           In addition to that, going back to some of these  
2           allegations, on the condo they allege in the complain that  
3           we control the condo. Later on in their opposition they  
4           allege we have an equitable interest. But even assuming  
5           that they can do that, the complaint and the documents show  
6           that the owner of the New York City condo is 535 W.E.A..  
7           The complaint or the documentary evidence shows that Dahlia  
8           Kalter is the sole member of 535 W.E.A.. So we don't  
9           believe we had any obligation to disclose any sort of  
10          ownership interest in 535 WA -- W.E.A..

11           The alleged -- the recording of the deed of 535  
12          W.E.A. occurred way back in 2010. Neither the complaint nor  
13          the opposition papers allege that at the time of that  
14          transfer back in 2010, that the debtor was in any sort of  
15          financial pressure like a judgment against him, or financial  
16          pressure or suspicious circumstances. So we don't believe  
17          that they've set forth a claim regarding the alleged  
18          equitable ownership.

19           They also allege for the very first time in  
20          opposition that we did not disclose the rental income from  
21          535 W.E.A.. That was not raised in the complaint. We don't  
22          think it's proper for them to raise that for the first time  
23          in opposition papers. In addition to that, they -- we also  
24          don't believe that that would be material because it's not  
25          property of the estate. The owner of 535 W.E.A. is Dahlia

1 Kalter, and under the decision under Collier's and under the  
2 decision in the Levy case by Judge Wiles, that would be  
3 income belonging to the non-debtor's spouse, which would not  
4 be material.

5 In addition to that, again both the New York City  
6 condo and the rental income were alleged by the Stadtmauers  
7 in the state court action. We disclosed the state court  
8 action on our schedules. That action was removed to this  
9 court with the complaint, and there was questions regarding  
10 the New York City condo and the rental income at the 341.  
11 In addition to that, it's the subject of the settlement  
12 agreement and the trustee has released 353 W.E.A. and also  
13 has release Dahlia Kalter.

14 They also allege an allegation that, though it's  
15 unclear from the complaint whether they're alleging an  
16 equitable ownership interest in 16 AA that should've been  
17 disclosed. We do not think that the complaint does that,  
18 but out of excess caution we raise that. In the opposition  
19 papers they say they did do that, and then they basically  
20 point to a letter written by Mike Levine. That letter was  
21 not referred to in the complaint.

22 Moreover, we believe that that letter supports us.  
23 That letter shows that 16 AA was not capitalized by the  
24 debtor. It was capitalized by Barbara Nordlicht. It was  
25 not formed by the debtor. It was formed by others. It was

1 formed for a legitimate purpose, estate planning, and the  
2 debtor did not transfer stock or an existing business into  
3 16 AA. So we believe under the Reeve case that they failed  
4 to state a claim there. But even if the debtor had a  
5 (indiscernible), we believe it's -- any omission was not  
6 material because we did not impede any investigation by the  
7 trustee.

8 Again, allegations regarding 16 AA were set forth  
9 in the state court action in the supplemental complaint. We  
10 disclosed the state court action in our statement of  
11 financial affairs. We also removed -- not we, but other  
12 parties, removed the state court action before this court,  
13 and there were questions concerning 16 AA at the 341, and  
14 the trustee executed the settlement agreement with the  
15 parties, which also involved 16 AA. Trustee also  
16 acknowledged in their motion that they reviewed the removed  
17 action including the complaint and supplemental complaint.  
18 And as of today, the trustee has not objected to discharge,  
19 and their time ran on June 8th.

20 I also want to point out as regards to the New  
21 York City condo, which I omitted before, that they relied on  
22 the Stadtmauers' allegations and the Stadtmauers have  
23 alleged in the removed action that there's no equity in the  
24 New York City condo, which would also render any omission  
25 immaterial.

1 THE COURT: Why aren't these --

2 MR. KRINSKY: In order --

3 THE COURT: Why aren't these materiality issues  
4 all at best summary judgment issues as opposed to motion to  
5 dismiss issues?

6 MR. KRINSKY: Well, Your Honor, because again,  
7 it's undisputed that we did disclose the Stadtmauer action.  
8 So anyone could've looked in the Stadtmauer action and saw  
9 all these allegations.

10 THE COURT: Well --

11 MR. KRINSKY: And that action was removed to this  
12 court.

13 THE COURT: Okay. That's really what it --

14 MR. KRINSKY: I will keep proceeding.

15 THE COURT: -- comes down to right?

16 MR. KRINSKY: Okay. There's also the issue of the  
17 trust. They do not dispute that it's excluded under  
18 541(c)(2). We've set forth case law that if an asset is not  
19 property of the estate, then any omission is not material.  
20 We also found a decision by Judge Conrad when he was roving  
21 around the country from Colorado where he basically said you  
22 do not have to disclose the spendthrift trust.

23 So, again, even if we -- even if those were  
24 material, they were alleged by the Stadtmauers in the state  
25 court action, and we disclosed that action in our statement

1 of financial affairs. And that action was removed to this  
2 court. We were also asked questions about that asset at the  
3 341, and we also entered into the settlement agreement with  
4 the trustee.

5 The last two omissions, one is the payment from  
6 Barbara Nordlicht to Dahlia Kalter. And we cited Colliers  
7 for the proposition that an alleged income of the non-debtor  
8 spouse, an omission would not be material. They do not  
9 address that argument. In addition to that, they cite to  
10 the Levy case by Judge Wiles where Judge Wiles found that  
11 even if the omission was fraudulent, that if it involved an  
12 income of a non-debtor spouse it would not be material. So  
13 we rely on that decision also. And again, the trust is part  
14 of the state court action, which we did disclose and which  
15 we ultimately --

16 THE COURT: Do you have any case that says that  
17 someone can get out from under the obligation under 521 to  
18 provide schedules if it's -- if that person has separately  
19 referenced a litigation by a third party that includes  
20 allegations regarding assets that weren't disclosed?

21 MR. KRINSKY: Your Honor, it usually comes up in  
22 cases in sort of what they would refer to as indirect  
23 disclosure. I think I've seen it that way. I know that  
24 Your Honor in Klutchko indicated that there was a failure to  
25 disclose the confession of judgment, but elsewhere in the

1 schedules they had disclosed that the person holding the  
2 confession was a creditor. Now Your Honor may say that's a  
3 different scenario, but again, there's also case law that  
4 says that when you have an extremely hostile creditor, which  
5 we cited, it's unlikely that a debtor would believe that  
6 they could avoid that creditor. And we have those -- we  
7 cited those two cases as well.

8 THE COURT: I'm sorry. I didn't follow that  
9 argument.

10 MR. KRINSKY: Right. So we cited also -- in our  
11 reply we cited law that says that an omission is not  
12 material if you did not impede the investigation of the  
13 trustee. And then we also argued that -- we cited case law  
14 -- we cited two cases, In re Shoop, 214 Br. 166 and Kato  
15 Company v. Zafko, 2009 W.L. 10687816 that courts have found  
16 that a debtor's omission lacks fraudulent intent whether the  
17 debtor is being pursued by an overly aggressive creditor  
18 since it is unlikely that the debtor would believe that he  
19 could hide assets from that creditor.

20 THE COURT: But again, that --

21 MR. KRINSKY: So here --

22 THE COURT: That to me is not a motion to dismiss  
23 issue. If the complaint alleges a sufficient basis to infer  
24 fraudulent intent, then you actually go to the facts in  
25 either a summary judgment or a trial. And it would seem to



1 me that if in fact, as I think is the case here, that the  
2 debtor quite strongly contends that the claims in this  
3 litigation are without merit, that really discounts the  
4 argument or argues against the point that by just simply  
5 filing the complaint the debtor's disclosed the potential  
6 asset as opposed to the debtor putting it in his or her own  
7 schedules.

8 MR. KRINSKY: Your Honor, I'm sorry. Could you  
9 say that again? I...

10 THE COURT: Put yourself in the shoes of a  
11 trustee, right? Or any creditor. If a debtor is  
12 vociferously contending that a lawsuit brought prepetition  
13 against him is without merit, then it would seem to me that  
14 that creditor or that trustee would not immediately assume  
15 that that lawsuit is enough as far as the debtor's  
16 disclosure as to available assets.

17 Because again, the debtor is saying this is --  
18 this lawsuit has no merit. You'd think the debtor would  
19 have a separate obligation to disclose an asset rather than  
20 just listing litigation against it. And enforcing --

21 MR. KRINSKY: Well, Your Honor, but it --

22 THE COURT: -- enforcing the --

23 MR. KRINSKY: -- but it's more than that.

24 THE COURT: -- the parties of interest to and find  
25 that litigation as opposed to just looking at the schedules

1 and then assessing --

2 MR. KRINSKY: But it's --

3 THE COURT: -- assessing the entire litigation as  
4 opposed to just looking at the schedule.

5 MR. KRINSKY: But Your Honor, it's more than that  
6 because that action was removed to the bankruptcy court.  
7 It's before the Court, and everyone, or at least at the 341  
8 it was clear that the trustee was asking questions about  
9 those assets, so you had --

10 THE COURT: Trustees --

11 MR. KRINSKY: -- at least --

12 THE COURT: -- often ask questions about assets at  
13 341 meetings that other creditors have brought up. That  
14 doesn't excuse the debtor from not disclosing them. You  
15 know, it's quite common for a creditor, often an unhappy  
16 spouse, to say ask him about X, ask him about that gun  
17 collection, you know? And the fact that the trustee's  
18 asking it doesn't then give the debtor a free pass for not  
19 having disclosed it in the first place.

20 MR. KRINSKY: Well, but Your Honor, we don't own  
21 the New York City condo. We don't own 16 AA.

22 THE COURT: I understand that point. I'm just --

23 MR. KRINSKY: We don't own --

24 THE COURT: I'm just react -- I understand that  
25 point very well. I'm just reacting to the notion that if

1 someone just lists a lawsuit, that's enough as far as  
2 complying with 521 as far as assets.

3 MR. KRINSKY: Well, Your Honor, again, we're not  
4 talking about a normal lawsuit and a normal creditor. We're  
5 talking about a lawsuit and a creditor, which has been all  
6 over this bankruptcy that everyone knew about and has been  
7 talking to everyone, has been before this Court.

8 THE COURT: There's no one all over a bankruptcy  
9 than an aggrieved non-debtor spouse. It's -- you know,  
10 they're analogous. In fact the spouse is probably more  
11 credible. So I think we should move off of this point.

12 MR. KRINSKY: Okay. Again, just getting back to  
13 those -- the alleged omissions are not assets we own. As  
14 Your Honor just said, the debtor does not own the New York  
15 City condo. He does not own an ownership interest in 535  
16 W.E.A.. The alleged acquisition occurred way back in 2010.  
17 The debtor does not own 16 AA. That's owned by Dahlia  
18 Kalter.

19 In addition to that, the payment by the mother to  
20 the wife, that's non-debtor spouse income. And the trust  
21 clearly they admit it's not property of the estate under  
22 541(c)(2). So basically, none of these are assets that we  
23 own and are property of the estate and that we would have  
24 (sound drop).

25 THE COURT: Okay.

1 MR. KRINSKY: Thank you, Your Honor. And thank  
2 you for putting (sound drop) my lack of (sound drop) Zoom.

3 THE COURT: That's fine.

4 MR. KRINSKY: Sorry about that.

5 THE COURT: That's fine. Okay.

6 MR. WEINICK: Good afternoon, Your Honor. Erik  
7 Weinick of Otterbourg P.C. on behalf of Melanie Cyganowski  
8 as (indiscernible) receiver. I'd like to try to narrow my  
9 comments to just the items that haven't been addressed in  
10 the papers or that have just come up in your discussion with  
11 counsel, and those would generally fall in three categories.  
12 First, the sufficiency of our pleading; second, our standing  
13 to object to the discharge; and then third, the items that  
14 have just come up on the reply and today here in argument.

15 But I think that the debtor's counsel's citation  
16 to Your Honor's decision (indiscernible). And as Your Honor  
17 is aware, you wrote that a debtor's obligation is to provide  
18 accurate disclosure, and that shouldn't be minimized. And I  
19 think that here, that's exactly what the debtor is trying to  
20 do, and that's exactly what our one cause of action is.

21 Under 727(a)(4)(A), a debtor knowingly and fraudulently or  
22 in connection with the case made a false note or account.

23 And we have set forth in our complaint  
24 sufficiently, accordingly to Twombly and Iqbal, that's what  
25 should be viewed in our favor at this point until we get to

1 summary judgment or a trial or some other proceeding down  
2 the road. And I'm happy that the debtors dispute those, but  
3 that's not really the standard for today. It's, are they  
4 adequately pled. And the materiality of them, especially in  
5 light of a particular cause of action brought here by the  
6 receiver, are largely irrelevant.

7 What we've set forth, Your Honor -- and I don't  
8 want to belabor the elements. I know you're well aware of  
9 them, but we've set forth the proverbial first paragraph of  
10 the newspaper article, the who, the what, the when, the  
11 where, and the how. And we've gone through in our motion -  
12 - in our opposition papers and explained how each of the  
13 assets just discussed by counsel was not properly disclosed.  
14 And the --

15 THE COURT: Well, can I tell you --

16 MR. WEINICK: It was there --

17 THE COURT: Let me interrupt you on that. I mean,  
18 it -- you really are dealing with four alleged failures of  
19 disclosure, four different assets that weren't properly  
20 disclosed, the first being the condo. What wasn't disclosed  
21 with respect to the condo?

22 MR. WEINICK: The debtor's equitable interest in  
23 that condo, the benefits that he derives, and his ability to  
24 control any mortgages taken out on that, and any rents  
25 derived therefrom.

1 THE COURT: But he did disclose his ownership of  
2 the entity that owns the condo, right? It's not alleged  
3 that he failed to disclose the owner of the condo and that  
4 he owns that entity?

5 MR. WEINICK: No, I believe that is our  
6 allegation.

7 THE COURT: Well, I -- let --

8 MR. WEINICK: In paragraph 49 of our complaint.

9 THE COURT: Let me turn to the complaint. No, but  
10 you say her ownership interest -- I'm sorry. But you say --  
11 but it's -- it says debtor also failed to disclose his  
12 ownership interest in an 8,400 square foot luxury condo and  
13 held in name by 535 W.E.A.. So what was it that he -- did  
14 he not disclose that he owned 535 W.E.A.? Did he list --

15 MR. WEINICK: I don't believe --

16 THE COURT: Did he list 535 W.E.A. on his  
17 schedules as an entity owned by him? This doesn't really  
18 say that. I think what this is saying is that he disclosed  
19 535 W.E.A., but really he's the real owner. If you either  
20 pierce the veil or he's the true equitable owner, although  
21 it doesn't say he's the equitable owner.

22 MR. WEINICK: Right.

23 THE COURT: IF he didn't disclose 535 W.E.A. and  
24 that he owns it, then I guess I understand your point  
25 completely. That should've been disclosed. But if he did

1 disclose it and that he owns it, that he owns the equity  
2 interest in it, then I think you have to allege more than  
3 just his one sentence.

4 MR. WEINICK: Your Honor, I'm looking at the  
5 debtor's petition at part 1 and it says, do you own or have  
6 any legal or equitable interest in any residence, building,  
7 land, or similar property? And the response is no. So if  
8 it's a question of amending this paragraph to make it --  
9 this allegation to make it a little clearer, we're happy to  
10 do that.

11 THE COURT: Okay.

12 MR. WEINICK: But I think that is important.

13 THE COURT: I think that's really critical  
14 because, look. If you sell an apartment like this that's  
15 owned by a company that you own 100 percent of, or even 50  
16 percent of, after the sale costs and the mortgage, you're  
17 going to get the rest and that's important for creditors to  
18 know. So I understand that completely. I think that if  
19 it's just that he failed to disclose an equitable interest,  
20 I think you need to allege more facts to show that he has an  
21 equitable interest.

22 MR. WEINICK: Yeah. And I would just add to that,  
23 Your Honor, 535 W.E.A. is not in his schedules.

24 THE COURT: Okay.

25 MR. WEINICK: The entity itself.

1 THE COURT: All right.

2 MR. KRINSKY: Your Honor, we don't own 535 W.E.A..  
3 The non-debtor spouse owns 535 W.E.A., and that's disclosed  
4 in the declaration, the Kritzer declaration which they  
5 relied upon, and which also contains the Kalter affidavit  
6 which says that. So we don't -- the debtor does not own the  
7 condo, which is owned by 535, and the debtor is not a member  
8 of 535. The non-debtor spouse is.

9 MR. WEINICK: Your Honor, I think, you know, that  
10 may ultimately be what is proved in discovery, but for  
11 purposes today on a motion to dismiss, this is our  
12 allegation. And if it's put -- sufficiently puts the debtor  
13 on notice as to what that allegation is, it's sufficient to  
14 survive a motion to dismiss. We're happy to clarify if  
15 that's all that's required to move forward.

16 MR. KRINSKY: Well, it --

17 MR. WEINICK: If I may, Your Honor, I sat  
18 patiently while counsel --

19 THE COURT: Well, let me just -- I'm looking at  
20 it. All right. The complaint never actually say, I think,  
21 that someone other than the debtor owns 535 W.E.A., right?  
22 I don't think it says that. I'm looking at the next  
23 paragraphs. It just refers to the transfer of the option  
24 agreement. So I understand your point, although, obviously,  
25 you have to have a good faith reason to believe that he owns



1 an equity interest in W.E.A., and you can say that in two  
2 ways.

3 You could say it literally he owns it, or  
4 alternatively you need to lay out facts that support the  
5 notion that he has an equitable interest in it, which I  
6 actually think you've come quite close to doing in  
7 paragraphs 50 through 55. Although, what's not entirely  
8 clear since there -- these points aren't really tied to the  
9 factors pertaining to a equitable interest where, you know,  
10 the debtor is transferring title under suspicious  
11 circumstances. We sort of refer to the platinum funds  
12 suspicious circumstances, but not really the debtor. So  
13 that's a -- I think if you're going to go the equitable  
14 interest route, is a circle you need to close better.

15 MR. WEINICK: Yeah. I appreciate that, Your  
16 Honor. I think you're right, particularly paragraph 52  
17 where we discuss 535 W.E.A. being controlled by the debtor,  
18 but I can certainly see the point of clarifying and drilling  
19 down on that some more if an amendment is necessary.

20 THE COURT: Okay.

21 MR. WEINICK: I'm sure that Your Honor has  
22 additional questions.

23 THE COURT: Well, we're going to -- let's move to  
24 the payments to the law firms --

25 MR. WEINICK: Yes.

1 THE COURT: -- through 16 AA. I guess there --  
2 again, I have the same question. What is not truthful? I  
3 mean, these are -- I think you allege two different  
4 arguments here. The first is that this is regular income  
5 that needs to be disclosed in schedule I, but it was --  
6 there was, you know -- well, it's hard to say that they were  
7 regular, and it wasn't for living expenses. And then I  
8 think the second argument you make is that, again, even  
9 though in this case I think it's acknowledged that 16 AA is  
10 not something that the debtor Defendant has an actual  
11 ownership interest in.

12 He has an equitable ownership in it, but again,  
13 there's the same loop that I think needs to get closed  
14 unless you can point me to something that shows that his --  
15 he should be said under the well-established case law to  
16 have an equitable interest because it's really just a front  
17 for him.

18 MR. WEINICK: Your Honor, a couple of responses to  
19 that. The first is that the instructions for completing  
20 schedule I that are published by the bankruptcy court  
21 specifically contemplate irregular payments for that  
22 schedule and it goes through with examples how to do the  
23 math to set those forth. And what the debtor here has tried  
24 to argue is that he was exempt from making that disclosure  
25 because 122 just says everything for the six months prior.

1           But A, that's for a consumer debtor, which this  
2 debtor is not. He's a business debtor. And second, and we  
3 pointed to the cases on this, there is a difference in the  
4 information that's called for by those two schedules.  
5 Schedule I is specifically calling for -- I'm sorry, 122 is  
6 schedule is the -- calling for current as opposed to little  
7 "I" which is an order (indiscernible) payments not only from  
8 16 AA, but the \$1.4 million from Arbor Nordlicht here.

9           THE COURT: No, I'm going to get to that in a  
10 second. I'm still just focusing on the payments to pay the  
11 lawyers. I'm not sure which obligation under 521 or the  
12 official form is not complied with here.

13           MR. WEINICK: It's the obligation to provide a  
14 complete and accurate description of the income that's come  
15 in, and it's right on the form itself.

16           THE COURT: Well, I have the form here. Let me  
17 just get it out. So, okay. Is it -- so we're looking at  
18 paragraph 8, right? Which is headed, list all other income  
19 regularly received, and I guess it would be 8C? No, it --  
20 not really, right? It's not family support payments. So  
21 it's other monthly income 8H?

22           MR. WEINICK: That's correct.

23           THE COURT: I'm sorry?

24           MR. WEINICK: He lists the contribution for  
25 tuition and other expenses from his mother, but does not

1 list the legal fee payment, which is ongoing, and which came  
2 in on a frequent basis. I think in their footnote they list  
3 all of (sound drop) that were made in the footnote on -- in  
4 their papers. This is that footnote 12 of the accompanying  
5 brief.

6 THE COURT: But when -- I'm sorry. When was the  
7 last -- how soon before the petition date was the last legal  
8 fee payment made?

9 MR. WEINICK: February of 2020.

10 THE COURT: And the petition date was June, right?

11 MR. WEINICK: June, yes.

12 THE COURT: Okay. So --

13 MR. WEINICK: 29th. It went from approximately  
14 the year before the petition date, May 2019, through  
15 February of 2019.

16 THE COURT: All right. And --

17 MR. WEINICK: I mean, significant payments and,  
18 you know, one has to wonder why --

19 THE COURT: So which --

20 MR. WEINICK: -- (indiscernible).

21 THE COURT: -- paragraph here sets forth a time  
22 period that goes back at least to February of 2020? Which  
23 --

24 MR. WEINICK: A paragraph of the complaint?

25 THE COURT: No, of the -- of either 521 or

1 schedule I?

2 MR. WEINICK: Schedule I says estimate -- in part  
3 2 it says estimate monthly income. And again, as I pointed  
4 out in the instructions, it says -- and this is at the top  
5 of the second column, one easy way to calculate how much  
6 income per month is to total the payments earned in a year,  
7 then divide by 12 to get a monthly figure. For example, if  
8 you're paid (indiscernible), you would simply divide the  
9 amount you would expect to earn in a year by 12 to get the  
10 monthly amount, and then it gives examples for weekly,  
11 biweekly, daily, quarterly, and at the end irregular  
12 payments. So these are clearly contemplated to be included.

13 We've also described, Your Honor, the -- in our  
14 memorandum of law at page 24, we've described the debtor's  
15 interest in 16 AA.

16 THE COURT: I'm sorry. Paragraph 24, right?

17 MR. WEINICK: Page 24 --

18 THE COURT: Page 24.

19 MR. WEINICK: -- of our brief.

20 THE COURT: No, not the brief. I'm looking at the  
21 complaint.

22 MR. WEINICK: Sure.

23 THE COURT: So...

24 MR. WEINICK: Well, this is paragraphs 46 through  
25 48 of the complaint, Your Honor.

1 THE COURT: Right. So again, this is not a -- it  
2 doesn't assert other than that he controls and manages, that  
3 he, which is on information and belief in paragraph 48, it  
4 doesn't assert that he actually has an equity interest, a  
5 specific equity interest or management interest in 16 AA,  
6 right?

7 MR. KRINSKY: I --

8 MR. WEINICK: Correct.

9 MR. KRINSKY: You're right, Your Honor. It's  
10 asking for (indiscernible) --

11 THE COURT: And --

12 MR. KRINSKY: -- (indiscernible).

13 THE COURT: -- it doesn't I guess state how  
14 there's a equitable interest either in 16 AA or in the money  
15 that 16 AA paid, and it could be either. I mean, if the  
16 money came from some source that the debtor had and he ran  
17 it through 16 AA, then that would certainly fit within the  
18 facts of the Klutchko case, for example.

19 MR. WEINICK: Mm-hmm.

20 THE COURT: If that isn't alleged, and I don't  
21 think it's alleged here, and you're just saying that really  
22 he owns 16 AA, I think you need to allege facts that show  
23 that at the time that 16 AA became owned by someone else,  
24 whoever that was -- I'm assuming it's Ms. Kalter -- the  
25 facts establishing an equitable interest in that stock or

1 LLC interest, are pled. And I don't think they're pled  
2 because we don't know when that happened, you know? Was it  
3 when it was looking like there was going to be a judgment  
4 against him? Or was it years before when he was flush and  
5 he was just thinking ahead to -- I don't know, for any  
6 number of reasons.

7 MR. WEINICK: Well, certainly, Your Honor, this is  
8 a family that thinks it had counsel --

9 THE COURT: Well, I don't know. I mean, it's not  
10 really alleged.

11 MR. WEINICK: (indiscernible) declaration that  
12 says exactly that, but --

13 THE COURT: But going back to the first point, I  
14 guess it's hard for me to see that this is the type of  
15 monthly income that you would be expected to disclose unless  
16 there's some sort of equitable interest in it. It looks a  
17 lot more like a gift, in other words, unless you can show  
18 that there is an equitable interest in the money.

19 MR. WEINICK: Right. Well, Your Honor, I don't  
20 think there's been any allegation by anybody that 16 AA is  
21 any type of charitable organization or trust --

22 THE COURT: No, no, no, but it could be --

23 MR. WEINICK: -- (indiscernible) debtor.

24 THE COURT: Look. Once -- Ms. Kalter could easily  
25 give the money to her husband. He's the one that's, you

1 know, running the risk of going to jail. So you know, I  
2 would hope my spouse would give me money at that point. So  
3 --

4 MR. WEINICK: We all would, Your Honor.

5 THE COURT: Just know it's not --

6 MR. KRINSKY: Your Honor, there was an allegation  
7 by the Stadtmauers in the supplemental complaint that they  
8 were gifts, and of course they relied upon Stadtmauer's  
9 allegations.

10 THE COURT: Yeah, but I guess --

11 MR. WEINICK: Who doesn't?

12 THE COURT: I don't think -- look, this doesn't  
13 just incorporate every aspect of what the Stadtmauers have  
14 alleged or the Kritzer declaration.

15 MR. KRINSKY: Thank you, Your Honor.

16 THE COURT: It's its own -- it stands on its own  
17 two feet.

18 MR. WEINICK: Right.

19 THE COURT: So anyway, I guess I have -- put it  
20 differently. I have more sympathy for your allegations  
21 about the Barbara Nordlicht payments.

22 MR. WEINICK: Okay.

23 THE COURT: It's hard for me to see why those  
24 wouldn't be disclosed. They're ostensibly to the wife, but  
25 they're obviously I think -- well, maybe not obviously.



1 Maybe you need to allege this, but I doubt that they are  
2 just to be spent by the wife on whatever, you know, is  
3 unique to the wife as opposed to the couple and their  
4 children. And I would think that that is something that you  
5 would normally disclose because it came in and, you know,  
6 why isn't it reported?

7 MR. WEINICK: Yeah, I -- we would agree with that,  
8 Your Honor.

9 THE COURT: I mean, it's more of a question for  
10 Mr. Krinsky, I guess. I mean if you're filling out  
11 schedules --

12 MR. KRINSKY: Well, Your Honor, that --

13 THE COURT: Yeah.

14 MR. KRINSKY: Your Honor, again, it's --

15 THE COURT: And --

16 MR. KRINSKY: I mean, this was -- Judge Wiles  
17 ruled on this issue. You know, he basically said that even  
18 if the omission was fraudulent, that the non-disclosure of  
19 income, this is the Levy case --

20 THE COURT: Yeah, but --

21 MR. KRINSKY: -- the non-debtor spouse --

22 THE COURT: -- but that was income to the wife.

23 MR. WEINICK: (indiscernible)

24 THE COURT: That was income to the spouse. This  
25 is -- I mean, just on its face is -- it's not -- this is

1 also a gift it seems, right? It's not on account of any  
2 work that Ms. Kalter did. It's not a salary or a dividend,  
3 it's a gift. And I think to me, it's hard to imagine it not  
4 at least passing a motion to dismiss to say that its  
5 should've been disclosed because why would it just be to the  
6 wife?

7 MR. WEINICK: Your Honor, if I may, they had their  
8 --

9 THE COURT: I mean, it -- the money could still  
10 have been there on the petition date. And if it was really  
11 ostensibly for both of them, then that would be estate  
12 money. But the trustee wouldn't know to look for it because  
13 it wasn't disclosed. Or half the money would be --

14 MR. WEINICK: But in terms --

15 THE COURT: -- would be Nordlicht's --

16 MR. WEINICK: Your Honor, and I would add there --

17 THE COURT: -- as opposed to all of it being  
18 Kalter's.

19 MR. WEINICK: I'm sorry, Your Honor.

20 THE COURT: No, go ahead, Mr. Weinick.

21 MR. WEINICK: You know, I would also just add  
22 there, because counsel has referred to the Levy case a  
23 number of times, there's a -- an important factual  
24 distinction there. The non-debtor spouse there was really  
25 separate and apart from the debtor's business here. There

1 is, by debtor's own admission, the spouse of the debtor has  
2 been involved in careful planning for a potential bankruptcy  
3 for quite some time. And so I think that sets what we have  
4 here apart from the holding in the Levy case.

5 THE COURT: Yeah.

6 MR. KRINSKY: If I could just add, Your Honor, in  
7 Levy, there was disclosure of no income, no income for the  
8 wife. Here, obviously, there's a disclosure of I believe  
9 25,000 a month.

10 THE COURT: Yeah, but this amount is a lot more  
11 than that if you prorate it over the year.

12 MR. WEINICK: Your Honor --

13 THE COURT: Why don't we turn to the trust? It  
14 does -- does the Plaintiff acknowledge that this is a  
15 spendthrift trust?

16 MR. WEINICK: We do, Your Honor. And I -- just  
17 before we move onto the trust, I just want to just for the  
18 record, we had a scrivener's error in our opposition paper  
19 on the last point. And if I may, I just wanted to clarify  
20 that for the record. At the top of page 22, we omitted a  
21 "not", which is critical to the sentence there. So it  
22 should read this does not exempt the debtor.

23 But let me address your point on the spendthrift  
24 trust. The cases -- and we disagree on the cases here,  
25 obviously. The cases cited by the debtor do not involve

1 spendthrift trusts, and we set forth that even if it's -- we  
2 agree. Even if it's not an asset that the estate will be  
3 able to monetize and distribute for the benefit of  
4 creditors, what's required, particularly under the cause of  
5 action asserted here, is that it be disclosed. In the -- we  
6 cite the In re Bub case where the -- it says that the Second  
7 Circuit held that the inclusion of assets that would've  
8 increased the value of the debtor's estate is not  
9 determinative of whether the omission is material.

10 The Court went on to state that (indiscernible)  
11 the debtor may not escape Section 727 denial of discharge by  
12 asserted that they admittedly omitted falsely stated  
13 information concerned a worthless business relationship or  
14 holding (indiscernible) is (indiscernible). And the debtor  
15 has cited a couple of cases. Let me run through them  
16 quickly.

17 In Kuchecki, you had a much less sophisticated  
18 debtor. The debtor quickly amended the schedules, and it  
19 did not involve a spendthrift trust. In Swanson, the debtor  
20 at least disclosed the existence of the (indiscernible)  
21 debtor here did not. I think Your Honor addressed Swanson  
22 in Klutchko and found that in Swanson there was no false  
23 oath with intent to conceal because of that disclosure even  
24 though future earnings would not be property of the estate.

25 And we cited to several cases which hold the

1 opposite. We cited Ridgeway, which found that a debtor does  
2 not have the discretion to make the determination as to  
3 whether the spendthrift trust was closed. The -- forgive my  
4 pronouncement, the Artesanias Hacienda Real case stating  
5 that a spendthrift trust should've been disclosed in the  
6 debtor's schedules regardless of whether the property was  
7 being paid. And In re Katz, the presence of even a  
8 spendthrift trust should be closed, although it is not  
9 property of the debtor to take. So that's our position on  
10 the spendthrift trust that, again, if they disclose that  
11 immateriality standard as the debtor wishes it to be.

12 THE COURT: Okay.

13 MR. WEINICK: Unless Your Honor has additional  
14 questions on the pleadings, I'd like to address some of the  
15 standing issues that were raised.

16 THE COURT: Okay.

17 MR. WEINICK: Your Honor, first of all, our  
18 standing in this case derives from the statute itself.  
19 727(a)(C)(1) says the trustee, a creditor of the -- or the  
20 United States trustee may object to the granting of a  
21 discharge under subsection (a) of this section. That's  
22 exactly what we're seeking to do. So in the first instance,  
23 the claim by the debtor that the receivership order  
24 precludes this because leave was required is simply not true  
25 because paragraph 34 of the receivership order specifically

1 permits the receiver without have first seen the pleading to  
2 defend, intervene, or otherwise participate in compromise  
3 and will adjust actions in any state, federal, or foreign  
4 court proceeding that in the receiver's discretion is  
5 advisable or (indiscernible) cover and conserve  
6 (indiscernible) --

7 THE COURT: No, but the lead-in clause there is  
8 subject to the requirement of section 7 above that leave of  
9 this court is required.

10 MR. WEINICK: To commence certain litigation.

11 THE COURT: Right.

12 MR. WEINICK: Right. And so --

13 THE COURT: So the issue whether this fits with  
14 that -- within the certain litigation.

15 MR. WEINICK: That's correct, Your Honor. And our  
16 contention is that given that this is more akin to an  
17 objection over an answer and defense of an existing property  
18 right because, again, as the statute itself says, it's an  
19 objection that specific leave of court of the receivership  
20 of court wasn't required in advance.

21 Now, I know that counsel has pointed to the  
22 (indiscernible) case, which first of all is not binding on  
23 Your Honor certainly. But they quote in their papers a  
24 portion, but they fail to point the court in -- and I'll  
25 read it to Your Honor. Creditors who choose to enforce

1 their claims during the pendency of the case under Title 11  
2 and seek relief from stay are, thus, still in the position  
3 Plaintiffs. Because as (indiscernible) above, resort to the  
4 complaint for relief from stay is not the only avenue the  
5 section rights.

6 The focus on that case, Your Honor, was whether  
7 the Plaintiff had to pay a \$60 fee and whether they should  
8 be considered a Plaintiff or a Defendant in that regard.  
9 That's very different than what's at issue here. And just  
10 not to dismiss it entirely out-of-hand simply because it's  
11 one case, but it is one case. It's fairly old, and it's out  
12 of another district and another circuit. We did cite  
13 (indiscernible) court case, the Adelvi Goodwin case, where  
14 they did equate a discharge action claim to be more akin to  
15 an answer or an objection.

16 So viewed through that lens, no (indiscernible)  
17 was required of the receivership order. As counsel pointed  
18 out, the receivership order very technically at paragraph  
19 24, I do believe that the debtor himself (indiscernible) --

20 THE COURT: But let's just go to that order. It  
21 does say that all the following are stayed: All civil legal  
22 proceedings of any nature, including bankruptcy proceedings.  
23 So, I'm not sure it has to be offense, right? I mean, it --  
24 a bankruptcy proceeding includes, I think, contested matters  
25 of adversary proceedings, whether it's defense --

1 MR. WEINICK: Well --

2 THE COURT: -- or offense.

3 MR. WEINICK: Right, but it would also include the  
4 institution of the bankruptcy pursuing itself --

5 THE COURT: Well, but that --

6 MR. WEINICK: -- (indiscernible) --

7 THE COURT: -- that's not what's before me. I  
8 mean, that -- that's -- that is an issue, but that's not  
9 really before me. And of course, there may be  
10 constitutional limitations on that too.

11 MR. WEINICK: I understand that, Your Honor, but  
12 the point being that whether there was a -- whether leave  
13 was required here I think is a -- with all respect to this  
14 Court, I know people say when you say that you're not being  
15 respectful, but I truly am, that especially given that this  
16 debtor is a party to that receivership here proceeding,  
17 that's a question for Judge Cogan, especially the portion  
18 where the debtor says this is a waste of estate resources.

19 But what I would point out is that this is exactly  
20 the way that we have conducted receivership when it -- if  
21 you do categorize this as a ordinary regular litigation as  
22 opposed to something that's more (indiscernible) objection  
23 or an answer, this is exactly how this receivership has been  
24 conducted with respect to those matters. And they concede  
25 this at footnote 2 of their brief, which actually there's an



1 error in the facts, which I feel compelled to point out.

2 I'm sure it wasn't done intentionally, but the --  
3 it lists the cases that were reported to the Court after  
4 they had been commenced in the reports that Your Honor  
5 referenced earlier in the proceeding. But they all  
6 reference the (indiscernible) case, and that case was  
7 actually transferred directly to Judge Cogan after it was  
8 instituted. And that's observable in the current docket of  
9 which the Court can take judicial notice. Judge Cogan and I  
10 appeared at an initial conference on that case. Judge Cogan  
11 was well aware of the institution. There was no formal  
12 leave sought prior to the institution of that case.

13 And neither Judge Cogan, nor any of the parties in  
14 interest, including Mr. Nordlicht, took issue with that  
15 process. The final point here, Your Honor, is that this  
16 case was filed before Your Honor. Forty-two days then  
17 elapsed between the reporting of the case to Judge Cogan in  
18 the report and the filing of the motion to dismiss. And in  
19 that time, the -- if the debtor here was so concerned about  
20 the receivership order being followed and believed it  
21 wasn't, then he had a very simple and economical course of  
22 action available to him.

23 He could have put in a no more than three-page  
24 pre-motion letter to Judge Cogan and taken issue with that.  
25 Instead, he put in 60-plus pages of briefing here. So we

1 just don't think that the standing argument holds any water.  
2 It's a ten case --

3 THE COURT: Can't you do the same thing? Couldn't  
4 you do a three-page application now to Judge Cogan? I mean,  
5 technically it's not his order. I think it's Judge  
6 Irizarry's order, but can't you do that so he can construe?  
7 It would seem to me that he'd be able to provide you  
8 retroactive relief to the extent this provision applies at  
9 all. I don't think I can.

10 MR. WEINICK: Yeah. Judge Cogan actually did  
11 enter the current form of the order and --

12 THE COURT: He did, so it's his order. I mean,  
13 isn't -- why not just do that?

14 MR. WEINICK: You know, Your Honor, if you want to  
15 say to use, come back to me with that, we don't think it's  
16 necessary, but we could certainly do that. Though again, we  
17 don't think it's necessary. It's not the type of action  
18 that required leave of the court. It's we've acted in  
19 accordance with the procedures that we've done the entire  
20 time. But if that's what Your Honor would like us to do,  
21 we're certainly happy to do that. But I don't want to  
22 create a side litigation over whether this is within the  
23 receiver's discretion.

24 THE COURT: Look, I could read this order as not  
25 covering this type of litigation. I can also read it as

1 covering it. I don't think it places any time limit on when  
2 you could get authority. But rather than my saying that, I  
3 think it's probably -- I mean, it's his order.

4 MR. WEINICK: Your Honor, I'd be very happy to  
5 draft a letter to Judge Cogan, seek nunc pro tunc approval,  
6 come back with a very slightly amended complaint to take  
7 that next little level of detail we were discussing earlier,  
8 and move on if that's what's necessary to proceed here. But  
9 I think that the debtor has put up a lot of smoke where  
10 there's no fire.

11 THE COURT: Well, there is a -- I guess there is a  
12 related issue, which is what you touched on, which is, who  
13 is the beneficiary of this provision? I think it's -- look,  
14 you have the case law on this. The receiver is governed by  
15 the order. I'm not quite sure, though, whether the debtor  
16 has the ability to enforce this provision, but on the other  
17 hand -- again, I don't particularly want to get cross-wise  
18 with Judge Cogan on it.

19 MR. WEINICK: Nor do I, Your Honor. And I would  
20 go out on a limb and say perhaps that Mr. Krinsky and I  
21 could even submit a joint letter to Judge Cogan seeing of  
22 the issue.

23 THE COURT: Okay. All right. Anything else?

24 MR. WEINICK: No, Your Honor. I mean, the -- just  
25 coming full circle to some of counsel's comments at the

1 onset of the if-you-look-for-it-it's-there defense, we don't  
2 think that that holds water. You know, and we went into a  
3 lot of facts, and we're happy and we're looking forward to  
4 arguing those as we get into the case and into discovery.

5           They take the Martin case in their reply brief. I  
6 don't think that they quite got it right there. There, the  
7 Court was finding that the omissions were immaterial because  
8 they didn't impede the investigation. But the dispute there  
9 was over whether it was proper to disclose that the property  
10 was a rental versus owning. It was disclosed, and it was  
11 disclosed as an owned property elsewhere in the schedule.  
12 And that's simply not the case here where there were  
13 material omissions.

14           We discussed the Levy case, and one other -- two  
15 other cases that were mentioned were the Kadle Company and  
16 the Shoop case. In Kadle Company, the Court found that they  
17 made accurate disclosures. Again, we don't think that  
18 that's the case here. And Shoop, the Court found that the  
19 Plaintiff didn't meet its evidentiary burden in objecting,  
20 but it didn't deny the objection on the grounds that a  
21 highly motivated creditor would cause the debtor to disclose  
22 assets.

23           And we think that just because we have a highly  
24 motivated creditor in the form of the receiver, namely Mr.  
25 Stadtmauers, that doesn't mean that the debtor is not

1 obligated to provide complete and accurate disclosures. If  
2 you take that reading, it renders (sound drop).

3 THE COURT: Okay.

4 MR. WEINICK: For those reasons, Your Honor, we  
5 believe that the motion should be denied and that we should  
6 spend our remaining time together attending to the pre-trial  
7 and preliminary conference matters, such as setting a  
8 schedule.

9 THE COURT: All right.

10 MR. WEINICK: Thank you.

11 THE COURT: I committed three weeks ago to give a  
12 talk to the summer interns at 1. I didn't realize that the  
13 disclosure statement that was the subject of the first  
14 hearing before me would have so many problems with it when I  
15 did that, so I'm going to have to break now. I'll give you  
16 my ruling when we come back. And given that it's a one-hour  
17 presentation and I'm going to have to have a bite to eat  
18 too, let's -- can we resume at 2:30?

19 MR. KRINSKY: Yes, Your Honor.

20 THE COURT: Are they going to have to sign back --  
21 can they sign back in again, or is this a unique thing?  
22 Should they just keep it on during for that whole period?

23 REPORTER: Yeah, they can just keep it on.

24 THE COURT: Just keep it on. Keep the Zoom on for  
25 that time, okay? Now, Mr. Krinsky, I don't know if you have

1 anything more to say in reply to all that. Probably not,  
2 right? Unless so --

3 MR. KRINSKY: No, Your Honor.

4 THE COURT: I'll give you my ruling when we come  
5 back and then we can discuss what to do next in the  
6 litigation.

7 MR. KRINSKY: Thank you, Your Honor.

8 THE COURT: Okay. Thank you.

9 MR. WEINICK: Thank you, Your Honor.

10 THE COURT: Okay.

11 (Recess.)

12 THE COURT: Okay. Good afternoon. We're back on  
13 the record in Cyganowski as receiver versus Nordlicht. And  
14 I'm ready to give you my ruling on the Defendant's Motion to  
15 Dismiss.

16 When considering such a motion under Rule  
17 12(b)(6), the Court must assess the legal feasibility of the  
18 complaint, not weigh the evidence that might be offered in  
19 its support. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d  
20 Cir. 1999). The Court's consideration is limited to facts  
21 stated on the face of the complaint and the documents  
22 appended to the complaint or incorporated into the complaint  
23 by reference, as well as to matters of which judicial notice  
24 may be taken. *Hertz Corp. v. City of New York*, 1 F.3d 121,  
25 125 (2d. Cir. 1993) cert denied, 510 U.S. 1111 (1993).

1           The Court accepts the complaint's factual  
2           allegations as true and must draw all reasonable inferences  
3           in favor of the Plaintiff. *Tellabs, Inc. v. Makor Issues &*  
4           *Rights, Ltd.*, 551 U.S. 308, 323 (2007). However, if a  
5           complaint's allegations are clearly contradicted by  
6           documents incorporated into the pleadings by reference, the  
7           Court need not accept them. *Labajo v. Best Buy Stores, LP*,  
8           478 F. Supp. 2d 523, 528 (S.D.N.Y. 2007). Moreover, the  
9           Court is not bound to accept as true a legal conclusion  
10          couched as a factual allegation. *Papasan v. Allain*, 478  
11          U.S. 265, 286 (1986).

12           Instead, the complaint must state more than  
13          "labels and conclusions and a formulaic recitation of the  
14          elements of the cause of action will not do." *Bell Atlantic*  
15          *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Relatedly, a  
16          complaint's factual allegations must be enough to raise a  
17          right to relief above the speculative level. *Id.* The  
18          complaint must contain sufficient facts, except it is true  
19          to state that a claim is plausible on its face. *Id.* at 570.

20           In other words, if the claim would not otherwise  
21          be plausible on its face, the Plaintiff must allege  
22          sufficient facts to nudge the claim across the line from  
23          conceivable to plausible. *Id.* Evaluating plausibility is a  
24          context-specific task that requires the Court to draw on its  
25          judicial experience and common sense. But where the well-

1     pleaded facts do not permit the Court to infer more than  
2     mere possibility of this conduct, the complaint has alleged  
3     but it is not shown that the pleader is entitled to relief  
4     Under Rule 8. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949  
5     (2009).

6             The plausibility standard is not akin to a  
7     probability requirement, but it asks more than sheer  
8     possibility that a Defendant has acted unlawfully. *Id.* In  
9     determining whether a claim should survive a motion to  
10    dismiss, therefore, a Court must first identify each element  
11    of the cause of action. *Iqbal*, 129 S.Ct. at 1947. Next,  
12    the Court must identify the allegations that are not  
13    entitled to the assumption of truth because they are legal  
14    conclusions, not factual allegations. *Id.* at 1951.

15            Finally, the Court must assess the factual  
16    allegations in the context of the elements of the claim to  
17    determine whether they plausibly suggest an entitlement to  
18    relief. *Id.* In part, the motion also relies on Bankruptcy  
19    Rule 7009, which incorporates Federal Rule of Civil  
20    Procedure 9(b), which provides that when pleading fraud in  
21    any capacity or in any context, a party must state with  
22    particularity the circumstances constituting fraud. Malice  
23    intent, knowledge, and other conditions of a person's mind  
24    may be alleged generally, however.

25            With regard to that latter point, however, this



1 does not mean that intent can be pled in a conclusory  
2 fashion or simply on information and belief. It is  
3 incumbent on the pleader to assert sufficient facts often in  
4 the form of badges of fraud to establish actual intent to  
5 defraud. See *Salomon v. Kaiser (In re Kaiser)*, 722 F.2d  
6 1574, 1582 (2d. Cir. 1983), as well as *Bub v. Rockstone*  
7 *Capital, LCC*, 516 B.R. 685, 694 (E.D.N.Y. 2014) and the  
8 cases cited therein.

9 Now, here, finally, the motion relies first on its  
10 assertion that the Plaintiff receiver Ms. Cyganowski lacks  
11 standing under her appointment order to bring this lawsuit.  
12 Standing goes to -- that the Plaintiff have proper standing  
13 goes to the Court's jurisdiction and power to decide the  
14 underlying claims and therefore should be determined first.  
15 The Bankruptcy Code in Section 727(a) clearly gives a  
16 creditor standing to object to a debtor's discharge under  
17 that section, including Subsection (a)(4).

18 It's undisputed, in any event, set forth in the  
19 complaint sufficiently that the parties for which Ms.  
20 Cyganowski has been appointed receiver, included entities  
21 that have filed claims against the debtor in this Chapter 7  
22 case. So Ms. Cyganowski clearly has statutory standing to  
23 bring this lawsuit for a declaration that the debtor Mr.  
24 Nordlicht is not entitled to a discharge of his debts,  
25 including those claims.

1           However, the receiver's powers are constrained by  
2           the terms of the order appointing her, and she can act only  
3           as expressly authorized by the appointing court. See  
4           Security Pacific Mortgage and Real Estate Services, Inc. v.  
5           Republic of Philippines, 962 F.2d 204, 211 (2d. Cir. 1992).  
6           Paragraph I, and specifically subparagraphs J and K of that  
7           paragraph, give the receiver the authority to bring such  
8           legal actions based on law or equity in any state, federal,  
9           or foreign court as a receiver making -- deems necessary and  
10          appropriate in discharging the receiver's duties as  
11          receiver. And paragraph K provides she has the power "to  
12          pursue, resist, and defend all suits, actions, claims, and  
13          demands which may now be pending or which may be brought by  
14          or asserted against the receivership estate."

15                 The claims filed in the bankruptcy case constitute  
16          property of those receivership entities and under the  
17          defined term on page 2 of receivership estate would be part  
18          of the receivership estate. So, Ms. Cyganowski has the  
19          general power to bring this adversary proceeding.  
20          Nevertheless, Section VII, paragraph 24 provides that with  
21          the exception of four excluded proceedings as listed in the  
22          first paragraph of paragraph 24, the following proceedings  
23          are stayed until further order of this court, namely the  
24          district court, presiding over the receivership.

25                 And those include all civil legal proceedings of

1 any nature, included but not limited to bankruptcy  
2 proceedings or other actions of any nature involving the  
3 receiver in the receiver's capacity as receiver, any  
4 receivership property wherever located, any other  
5 receivership entities, or any other receivership entities,  
6 past or present officers, directors, managers, etc. It does  
7 provide, however, in paragraph 26 after stating that all  
8 such proceedings which are defined as ancillary proceedings  
9 are stayed in their entirety and all courts having any  
10 jurisdiction thereof are enjoined from taking or permitting  
11 any action until further order of this court the following.

12 Further, as to cause of action accrued or accruing  
13 in favor of one or more of the receivership entities against  
14 a third person or party, any applicable statute of  
15 limitation is tolled during the period in which this  
16 injunction against commencement of legal proceedings is in  
17 effect as to that cause of action tolled. Tolled being  
18 spelled T-O-L-L-E-D.

19 Further, paragraph IX, subparagraph 34 states,  
20 subject to the requirement in section 7 above, which I've  
21 already discussed, that leave of this court is required to  
22 resume or commence certain litigation. The receiver is  
23 authorized, empowered, and directed to investigate,  
24 prosecute, defend, intervene and/or otherwise participate  
25 in, compromise, and/or adjust actions in any state, federal,

1 or foreign court or proceeding of any kind as may be -- as  
2 may, in the receiver's discretion, be advisable or proper to  
3 recover and/or conserve receivership property.

4 One can certainly read those paragraphs as  
5 enjoining the commencement of this adversary proceeding and  
6 subjecting the receiver's pursuit of this proceeding to  
7 approval of the district court presiding over the  
8 receivership. One could take the view first that, since  
9 this is within the general power of the receiver to bring  
10 this lawsuit, that constraint is only a limited one, and  
11 that it can be granted, therefore, at any time. It is not  
12 one that would be properly relied upon as a suitable defense  
13 by the Defendant here, Mr. Nordlicht, especially in the  
14 light of the tolling of any statute of limitations as noted  
15 in paragraph 26 with respect to this suit.

16 It has also been argued by the receiver that she  
17 is merely defending against a discharge in respect to the  
18 claim that she has asserted on behalf of the receivership  
19 entities in this case. But even to the extent that that is  
20 the case under the law, and it is not a proposition that  
21 either party has submitted cases, not even close to being  
22 directly on point, it appears to me that the injunction  
23 extends two defense as well as claims. It appears to me,  
24 therefore, that especially in the light of the order being  
25 another Court's order, i.e. District Judge Cogan's order, in

1 the receivership, he should interpret its scope and  
2 implementation as it pertains to this litigation.

3 And rather than speculate as to how he would do  
4 that, I conclude that the receiver should not proceed  
5 further with this lawsuit until such permission is granted,  
6 if it is to be granted. On the other hand, it does not  
7 appear to be that a question about her standing, which might  
8 well be resolved by retroactively granting relief from the  
9 stay in the order, is enough to require the dismissal of  
10 this lawsuit. Again, it is only a question at this point,  
11 and I believe subject to relief that the district court  
12 could grant.

13 In any event, if I am wrong about that or if the  
14 district court concludes that it will not permit the  
15 litigation to proceed, then the parties can take the rest of  
16 my ruling merely as a preliminary ruling. But given the  
17 work that they have put into the matter and the work that I  
18 have put into the matter, I believe it is appropriate to me  
19 to rule on the other grounds upon which the Motion to  
20 Dismiss is based. Again, if the district court in the  
21 receivership concludes that it will not lift the injunction,  
22 this is merely a preliminary ruling and is in effect  
23 rendered moot.

24 However, if the district court concludes that  
25 either the injunction doesn't apply to this litigation or

1 determines to lift it as of the commencement of the  
2 litigation, then this ruling will be my ruling on the Motion  
3 to Dismiss as to the extent that that motion asserts other  
4 grounds for relief.

5 As I noted, there is only one cause of action  
6 asserted in the complaint. It is under Section 727(a)(4) of  
7 the Bankruptcy Code, which states, "The court shall grant  
8 the debtor a discharge unless the debtor knowingly and  
9 fraudulently in or in connection with the case," that is the  
10 Chapter 7 case, "(a) made a false oath or account." There  
11 are Subsections (b) through (d) as well, but the receiver is  
12 relying upon subsection (a).

13 It is well-established that Section 727(a)(4)(A)  
14 requires proof of the following by a preponderance of the  
15 evidence; one, the debtor made a statement under oath; two,  
16 the statement was false; three, the debtor knew that the  
17 statement was false; the debtor made the statement with  
18 intent to deceive; and five, the statement related  
19 materially to the bankruptcy case. Again, see *Bub v.*  
20 *Rockstone Capital, LLC*, 516 B.R. 685 at 693-94. See also  
21 the formulation in *Mazer-Marino v. Levi, L-E-V-I, (In re*  
22 *Levi)*, 581 B.R. 733, 746, which adds the phrase to the  
23 statement as material -- the statement related materially to  
24 the bankruptcy case.

25 As noted by Judge Wiles in that case, the

1 bankruptcy petition and schedules of a debtor are statements  
2 under oath. Id. at 594. He goes on to state that  
3 fraudulent intent must be shown by demonstrating actual  
4 fraud, not constructive fraud. And further that, "the party  
5 objecting to a discharge based on the admission of  
6 information in a sworn statement must show that the  
7 information was omitted with a specific purpose of  
8 perpetrating a fraud and not simply because the debtor was  
9 careless or failed to fully understand an attorney's  
10 instructions." Citing *In re Moreo*, M-O-R-E-O, 437 B.R. 40,  
11 62 (E.D.N.Y. 2010).

12 Judge Wiles goes on to state, however, a reckless  
13 disregard of both the serious nature of the information  
14 sought and the necessary attention to detail and accuracy in  
15 answering may rise to the level of fraudulent intent  
16 necessary to bar a discharge. As I noted under Rule 9, the  
17 facts with respect to an allegation of fraud must be alleged  
18 with particularity. However, intent does not need to be  
19 alleged with particularity, but can instead be asserted by  
20 various badges of fraud or facts that would lead the Court  
21 to infer fraudulent intent.

22 This is particularly the case where the party  
23 asserting the fraud is a trustee, or in this case a  
24 receiver, who does not have access to the underlying facts.  
25 Indeed, the particularity requirement in general as opposed

1 to the requirement not to allege fraudulent intent in a  
2 conclusory way is relaxed to some extent when a trustee or  
3 receiver is the Plaintiff. See for example, *In re O.P.M.*  
4 *Leasing Services, Inc.*, 32 B.R. 199, 203 (Bankr. S.D.N.Y.  
5 1983) and *Nisselson v. Drew Industries, Inc.* (*In re White*  
6 *Metal Rolling and Stamping Corp.*), 222 B.R. 417, 428 (Bankr.  
7 S.D.N.Y. 1998).

8 Based on my review of the complaint, the complaint  
9 satisfies Rule 9(d)'s particularity requirements insofar as  
10 it alleges the who, where, what, and when of the alleged  
11 fraud. In each case, it's the assertions under oath by Mr.  
12 Nordlicht in his bankruptcy schedules. Mr. Nordlicht has no  
13 difficulty in pinpointing. Therefore, the facts as to the  
14 alleged fraud that he must defend against.

15 The complaint is based upon four different alleged  
16 failures of disclosure in Mr. Nordlicht's schedules. And  
17 again, the Court must review it to determine whether it  
18 alleges the sufficient elements of such a claim with respect  
19 to each or any of those four occurrences or non-occurrences,  
20 if you will, non-disclosures.

21 First, it is alleged that the debtor failed to  
22 schedule an interest in an 8,400-square-foot condominium in  
23 Manhattan, which is his primary residence. The complaint  
24 specifically states that, "The debtor also failed to  
25 disclose his ownership interest in an 8,400-square-foot



1 luxury condominium on Manhattan's Upper West Side located at  
2 535 West End Avenue, Number 15, defined term the New York  
3 Condo, and held in name by 535 W.E.A., a corporate entity."  
4 That is described earlier in the complaint as a Delaware  
5 limited liability company with a registered address in New  
6 Rochelle, and that's in paragraph 17 of the complaint.

7 The complaint also alleges that the debtor  
8 assigned an option agreement with respect to the Manhattan  
9 condo and initial payment under the agreement to 535 W.E.A.  
10 for no consideration in July of 2010. And in paragraph 54  
11 it states that after he assigned the Manhattan condo to 535  
12 W.E.A., he continued to treat the condo as his own,  
13 including by securing a mortgage on it as stated in the  
14 following paragraph.

15 The foregoing paragraphs are ambiguous as to  
16 whether the failure to disclose with regard to the New York  
17 condo or Manhattan condo is that the debtor failed to  
18 disclose an interest that he had in 535 W.E.A. or whether it  
19 is asserted that he failed to disclose some other equitable  
20 interest, either in the condo or some portion of it.

21 The bankruptcy schedules require disclosure of all  
22 assets, including those equitably owned, not simply as a  
23 matter of title or legal title. To the extent that the  
24 complaint is based upon an assertion that the debtor  
25 actually owned a legal interest in 535 W.E.A., it would

1     assert a claim under Section 747 -- I'm sorry, 727(a)(4)  
2     given that that interest is a decided or would be a decided  
3     property interest. And the omission would relate materially  
4     to the bankruptcy case in that it would bear a relationship  
5     to the debtor's business transactions or estate, or concern  
6     the discovery of assets, business dealings, or the existence  
7     of disposition of the debtor's property. Again, see *In re*  
8     Levi, 581 B.R. at 746 citing *In re Gordon*, 535 B.R. 531, 538  
9     (S.D.N.Y. 2015).

10           However, if the basis for the non-disclosure claim  
11     is that the debtor failed to disclose an equitable interest  
12     in the New York condo, while the complaint contains a number  
13     of allegations as to the debtor's declining financial  
14     position, starting with a liquidity crisis at certain of the  
15     entities that he controlled, namely the so-called Platinum  
16     funds -- I think it's a typo, it should be Platinum funds --  
17     by 2013, that's paragraph 30, and various other allegations  
18     of the declining value of the Platinum funds thereafter.

19           Through -- as asserted in the complaint, paragraph  
20     39, it does not appear to me that the -- these allegations  
21     tie sufficiently to the debtor Defendant's interest, if it  
22     is only an equitable interest, in 535 W.E.A.. As noted in  
23     the case law, an equitable interest is required to be  
24     scheduled, and it exists if the debtor has transferred title  
25     under suspicious circumstances, such as after a debtor has

1 suffered a monetary -- a money judgment or otherwise is  
2 under financial pressure but nevertheless retains attributes  
3 of beneficial ownership. See Baron v. Klutchko (In re  
4 Klutchko), 338 B.R. 554, 571 and the cases cited therein.

5 The complaint, as I've noted, asserts the control  
6 prong of that analysis, but I believe does not, as currently  
7 drafted, assert sufficiently the so-called suspicious  
8 circumstances pertaining the debtor's transfer, which was in  
9 2010 as pled in the complaint, to 535 W.E.A.. Therefore, I  
10 conclude that the non-disclosure as to an interest in the  
11 condo is insufficient as a basis for relief under 727(a)(4)  
12 unless it is premised upon the failure to disclose the  
13 debtor's title interest in 535 W.E.A., which is at best  
14 ambiguous in the complaint.

15 Next, the complaint alleges that the debtor's  
16 schedules, and more specifically his schedule of income,  
17 failed to list a payment, or actually multiple payments, by  
18 an entity again, which the debtor apparently does not have a  
19 title ownership interest, defined as 16 AA or 16 double-A of  
20 approximately one million in legal fees to the debtor's  
21 lawyers in the 13 months leading up to the commencement of  
22 the Chapter 7 case.

23 The complaint notes that 16 AA is a limited  
24 liability company with its principal place of business in  
25 New York and is nominally managed by the debtor's spouse,

1 Dahlia Kalter, or Ms. Kalter. That's in paragraph 16. The  
2 complaint, as I've noted, asserts many -- in several  
3 paragraphs, including in paragraph 39, many facts suggesting  
4 that after -- from 2013 forward, the debtor was in serious  
5 financial difficulty, and therefore disposed to hide assets  
6 that might be available to his creditors or future  
7 creditors.

8 The complaint asserts at paragraph 46 that 16 AA  
9 paid approximately one million in legal fees for the  
10 debtor's personal lawyers in the 13 months leading up to his  
11 bankruptcy filing. In paragraph 47, the complaint states,  
12 moreover, while Ms. Kalter is purportedly the managing  
13 member of 16 AA, in the February 28, 2020 affidavit filed in  
14 the Supreme Court of New York, Westchester County, Ms.  
15 Kalter stated under oath that her primary remaining assets  
16 are 535 W.E.A. (indiscernible) trust without any mention of  
17 16 AA, a significant asset with the funds to cover debtor's  
18 millions of dollars in legal fees.

19 Then paragraph 48 states, upon information and  
20 belief, Ms. Kalter's ownership interest in 16 AA is in name  
21 only. Debtor controls and manages 16 AA. The only real  
22 basis for that information and belief statement is that  
23 money came from 16 AA in a substantial amount, namely  
24 approximately \$1 million to pay the debtor's legal fees pre-  
25 petition. There is no allegation as to the transfer of

1 title by the debtor to whatever assets were in 16 AA,  
2 including the cash that went to pay the legal fees under  
3 suspicious circumstances, as discussed in my Klutchko case.

4 Although again, we do have a substantial amount of  
5 money being paid out from it, I believe that the complaint  
6 needs to allege clearly either that the debtor has title  
7 interest in 16 AA as a legal matter, at which point he  
8 clearly would have failed to disclose it and the complaint  
9 would survive a motion to dismiss, or alternatively that 16  
10 AA was the recipient of suspicious transfers by the debtor  
11 leading one to reasonably or plausibly conclude that the  
12 debtor had an equitable interest in it such that it would  
13 need to be disclosed on his schedules.

14 Without more, the payments in respect to legal  
15 fees do not appear to me to constitute regular income as  
16 required by the form, or more specifically Section 521(a) of  
17 the Bankruptcy Code. The payments are not to the debtor,  
18 but rather to creditors of the debtor, and are not made on a  
19 regular basis, and again, are made by an entity which  
20 apparently the debtor had no actual legal interest in. So I  
21 will not -- I will -- unless the complaint is, in fact,  
22 based upon a failure to disclose a legal interest that the  
23 debtor holds in 16 AA, I will grant the motion to dismiss as  
24 to the alleged 16 AA non-disclosure.

25 The complaint also asserts that the debtor's

1 failure to disclose on a -- on schedule I prorated over 12  
2 months the full amount of the \$1.4 million paid by the  
3 debtor's mother, Barbara Nordlicht, to Ms. Kalter in August  
4 of 2019 pursuant to 727(a)(4) should give rise to denial of  
5 the debtor's discharge. This payment, unlike the 16 AA  
6 payment, I believe, is sufficiently pled to support the  
7 727(a)(4)(A) cause of action. It was indeed a payment by  
8 the debtor's mother, and there's no suggestion or allegation  
9 that the money paid by the debtor's mother originated with  
10 the debtor. So therefore, it is not a suspicious -- money  
11 that was suspiciously transferred.

12 On the other hand, it was a substantial and  
13 material payment made within 12 months of the bankruptcy  
14 case, which I believe the form requires to be disclosed and  
15 annualized. It is the type of payment to a close family  
16 member, the debtor's spouse, that would appear on its face  
17 to be one that the debtor should disclose as potentially  
18 giving rise to an equitable interest in such funds.

19 It is further material, even though it is to the  
20 debtor's -- or was to the debtor's spouse because it  
21 concerns the discovery of assets, the business dealings, or  
22 the existence of disposition of the debtor's property. He  
23 -- some of this money could well be the debtor's money.  
24 Finally, the -- and therefore usable by the trustee to the  
25 extent it wasn't spent before the petition date.

1           Finally, the complaint is premised upon the  
2 debtor's failure to schedule a trust set up pre-petition set  
3 up by the debtor's late father through his will. It is  
4 conceded by the Plaintiff receiver that the trust is a  
5 spendthrift trust, and therefore would not constitute  
6 property of the debtor's estate under Section 541 of the  
7 Bankruptcy Code. The debtor Defendant contends, therefore,  
8 that it did not need to be disclosed, and/or that its  
9 disclosure -- its nondisclosure, rather, is not material.

10           I will note, however, that schedule A-B, the  
11 debtor's schedule of his property, states or requires at  
12 paragraph 25 that the debtor disclose all trusts, equitable,  
13 or future interest in property other than anything listed in  
14 line 1, which would not include a spendthrift trust, and  
15 that this was, in fact, such a trust. So there was a  
16 disclosure obligation required to be completed under penalty  
17 of perjury.

18           The motion asserts that because the trust is a  
19 spendthrift trust as conceded, it nevertheless can't be a  
20 material failure of disclosure to not disclose. But again,  
21 disclosure here, as I've repeatedly cited the Levi, but this  
22 is stated in many cases in addition to the Levi case,  
23 including the Bub v. Rockstone Capital decision that I  
24 previously cited, and McCarthy Investments, LLC v. Shah (In  
25 re Shah), 2010 Bankr. Lexus 1621 at page 9-10 (Bankr.

1 S.D.N.Y. May 13, 2010).

2 A statement is material if it bears on the  
3 discover of estate property or the debtor's business  
4 dealings. And moreover, otherwise immaterial falsehoods or  
5 admissions can aggregate into a critical mass substantial  
6 enough to bar a debtor's discharge. Here, the circumstances  
7 behind the debtor's father's creation of a spendthrift trust  
8 for the debtor, and the assets that went into it, could well  
9 be material in leading to other assets. Moreover, Section  
10 541(a)(5)(A) of the Bankruptcy Code provides that any funds  
11 actually distributed by a trustee to the debtor within 180  
12 days of the filing of the bankruptcy petition are property  
13 of the estate.

14 I appreciate that there is one opinion that  
15 clearly holds to the contrary that if something is clearly a  
16 spendthrift trust, a debtor cannot be liable for his failure  
17 to disclose it under Section 727(a)(4)(C). In re Portner,  
18 109 B.R. 977, 985 (Bankr. D.Colo. 1989). However, that was  
19 a case tried after a trial, not on a motion to dismiss, in  
20 which the Court considered cumulative evidence as recognized  
21 by the cases I've already cited should be considered in  
22 making the materiality determination, which I believe  
23 generally, unless a complaint clearly on its face does not  
24 allege sufficient facts to show materiality, is a question  
25 of fact.



1           The -- I'm sorry. See, for example, In re  
2           Aboukhater, A-B-O-U-K-H-A-T-E-R, 165 B.R. 904, 910-911,  
3           which makes that very point, and distinguishes In re Portner  
4           on that point. I'm sorry. I didn't give the court for  
5           that. That's 9th Circuit BAP 1994, where the court held  
6           that cumulative non-disclosure was a factual issue that  
7           needed to be resolved in the Plaintiff's favor in the motion  
8           to dismiss. Albeit that in that case the Plaintiff had not  
9           acknowledged that the trust was a spendthrift trust.  
10          Nevertheless, I will deny the motion to dismiss insofar as  
11          it's based upon the complaint's allegations with regard to  
12          their failure to disclose the spendthrift trust.

13                 Finally, the Defendant alleges that the failure to  
14          disclose here was not material because a -- the Defendant  
15          did disclose the existence of a lawsuit brought pre-petition  
16          by other creditors of the debtor which contained in it  
17          allegations with regard to the foregoing four fact patterns  
18          that are -- I'm sorry -- as giving rise to an obligation to  
19          disclose in the complaint before me. And that indeed, the  
20          complaint is based upon, among other things, the same  
21          creditors' allegations with regard to non-disclosure.

22                 The motion also asserts that because these fact  
23          patters were discussed at the Section 341 meeting, again,  
24          the failure to disclose could not be found to be material.  
25          I believe this is not a correct reading of Section

1 727(a)(4)'s materiality requirement. It is true that the  
2 bankruptcy courts have not imposed strict liability under  
3 Section 727(a)(4) for omissions from the schedules. By  
4 plain terms, the statute requires the false statement  
5 relating to a material matter. However, it is clear that an  
6 amendment to the schedules or discussion at the 341 meeting  
7 does not necessarily take the failure to disclose into the  
8 realm of the non-material.

9 See, for example, *Graham v. Graham*, 111 B.R. 808,  
10 806 (Bankr. E.D. Ark. 1990) and the cases cited therein, as  
11 well as the definitions of materiality that I've previously  
12 cited from the *Levi*, *Shah*, and *Bub* cases. Further, it's  
13 clear that a Chapter 7 trustee and creditors are entitled to  
14 rely on the schedules as their source of information and not  
15 have to become detectives to track down materially relevant  
16 information from other sources. *Id.* See also *In re*  
17 *Klutchko*, 338 B.R. at 568. So, I conclude that the Motion  
18 to Dismiss should be granted in part and denied in part on  
19 the -- as it goes to grounds other than standing in which  
20 I've already addressed.

21 My practice when I've granted a motion to dismiss  
22 or granted it in part is not to grant a request that is  
23 varied in the motion to dismiss for leave to amend the  
24 pleading since I believe that the hearing on the motion to  
25 dismiss and the Court's ruling has the purpose in part of

1 providing guidance to the parties as to what may work as a  
2 proper pleading. Instead, I normally give the Plaintiff a  
3 reasonable amount of time to file a motion under Federal  
4 Rules of Procedure 15 incorporated by Bankruptcy Rule 7050  
5 for leave to amend the complaint, and have attached to that  
6 motion the proposed amended complaint blacklined to show  
7 changes from the complaint that was insufficient in whole or  
8 in part.

9 I will do that here. My one hesitation is as to  
10 the time for making such a motion. It would seem to me,  
11 given my standing -- my ruling on standing, that the 30 days  
12 should run from the date that the district court determines  
13 the receiver's request with respect to the stay in the  
14 receivership order. Of course, if the district court says  
15 that it's not lifting the stay, then that's the end of it.  
16 But if the district court does lift the stay or finds that  
17 the stay doesn't apply, then the 30 days should start to run  
18 on that point.

19 I should probably also note that the -- well, the  
20 objection to the motion to dismiss, in addition to asserting  
21 potential additional facts to support an equitable interest  
22 in the condo 16 AA and the payments by Barbara Nordlicht,  
23 and more specifically the condo in 16 AA, also asserts that  
24 the debtor failed to report income to him from the condo. I  
25 did not find that reference in the complaint, and the

1 complaint cannot be amended, in fact, by a pleading in  
2 response to a motion to dismiss like an objection.

3 Of course, it could conceivably be amended,  
4 though, under Rule 15, especially given paragraph 26 of the  
5 receivership order, which stays all statutes of limitations  
6 while the stay is in effect. So I will ask Mr. Krinsky to  
7 submit an order granting the motion in part and denying it  
8 in part and setting that 30-day deadline. You don't have to  
9 formally settle it on counsel for the receiver, but you  
10 should provide Mr. Weinick with a copy, at least in the  
11 email to chambers, if not, you know, a day or so before so  
12 that he can be sure it's consistent with my ruling. Okay?

13 And again, if the district court says that the  
14 stay was never in place or lifts the stay, my ruling is more  
15 than a preliminary ruling. It's the actual ruling. As I  
16 sometimes do when I give a bench ruling, I'll go over the  
17 transcript. And if I reversed something, like said  
18 Plaintiff when I should've said Defendant, or said something  
19 not -- that is not clear or not grammatical, I may amend it.  
20 If I do that, I'll file it as a modified bench ruling, not  
21 as a transcript, but the holding won't change. And you  
22 don't need to wait for the transcript in order to submit the  
23 order. In fact, you shouldn't. So, I would ask you to --  
24 if you're ordering the transcript to let us know so we won't  
25 do a duplicate. And I'll either one of you to email the

1 transcript to chambers so I can go over it. All right.

2 MR. KRINSKY: Your Honor --

3 THE COURT: Any questions?

4 MR. KRINSKY: I'm sorry.

5 THE COURT: Any questions?

6 MR. KRINSKY: Yes. Yes, Your Honor. First of  
7 all, we've already requested the transcript, so we'll take  
8 care of that. The second item is would Your Honor like us  
9 to keep you posted as we progress on matters outside of the  
10 court in other words or will you just wait?

11 THE COURT: No, I'll just wait. You should --

12 MR. KRINSKY: Okay.

13 THE COURT: You should email chambers with  
14 whatever Judge Cogan does on this, and we should put off --  
15 we should adjourn the pre-trial conference to the hearing on  
16 the Motion for Leave to Amend. I would ask you before that  
17 hearing to talk between yourselves about what discovery you  
18 think will be needed in case I grant the motion. But I  
19 don't think there's any purpose to be served by doing more  
20 than that today.

21 MR. KRINSKY: Understood, Your Honor. Thank you.

22 MR. WEINICK: Your Honor, thank you.

23 THE COURT: All right. Thank you both.

24 (Whereupon these proceedings were concluded at  
25 3:48 PM)

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**I N D E X**

**RULINGS**

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**Defendant's Motion to Dismiss 72 7**  
**Granted in part / Denied in part**

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions  
330 Old Country Road  
Suite 300  
Mineola, NY 11501

Date: June 18, 2021

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