SO ORDERED,

Judge Jamie A. Wilson
United States Bankruptcy Judge
Date Signed: August 4, 2025

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

EL DORADO GAS & OIL, INC., *et al.*,[1]	**CASE NO. 23-51715-JAW**
DEBTORS.	**CHAPTER 11**
THOMAS L. SWAREK, INTERESTED PARTY, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF EL DORADO GAS & OIL, INC.	**PLAINTIFFS**
VS.	**ADV. PROC. NO. 25-06007-JAW**
MS FACILITIES 2020, LLC	**DEFENDANT**

ORDER GRANTING MS FACILITIES 2020 LLC'S MOTION TO DISMISS

There came before the Court for hearing on July 8, 2025 (the "Hearing"), MS Facilities 2020 LLC's Motion to Dismiss (the "Motion to Dismiss") (Adv. Dkt. #9)[2] filed by MS Facilities 2020, LLC[3] ("MSF 2020"); the Memorandum of Law in Support of MS Facilities 2020 LLC's Motion to Dismiss ("MSF 2020's Brief") (Adv. Dkt. #10) filed by MSF 2020; the Response in Opposition to

[1] Jointly administered with *In re Hugoton Operating Company, Inc.*, Case No. 23-51139-JAW; *In re Bluestone Natural Resources II – South Texas, LLC*, Case No. 24-50223-JAW; and *In re World Aircraft, Inc.*, Case No. 24-50224-JAW.

[2] In the above-referenced adversary proceeding (the "Adversary"), docket entries are cited as "(Adv. Dkt. ___)"; and in the above-referenced lead bankruptcy case (the "Bankruptcy Case"), they are cited as "(Bankr. Dkt. ___)".

[3] Although the Complaint for Damages (Adv. Dkt. #1) names "MS Facilities, LLC" as the defendant, the correct legal name of the defendant is "MS Facilities 2020, LLC."

MS Facilities 2020, LLC's Motion to Dismiss (the "Response") (Adv. Dkt. #23) filed by Thomas L. Swarek ("Swarek"); the Brief Supporting Response in Opposition to MS Facilities 2020, LLC's Motion to Dismiss (Adv. Dkt. #24) filed by Swarek; MS Facilities 2020 LLC's Reply in Support of Its Motion to Dismiss (Adv. Dkt. #27) filed by MSF 2020; and the Notice of Filing Supplemental Exhibits in Support of MS Facilities 2020 LLC's Motion to Dismiss (Dkt. #28) filed by MSF 2020 in the Adversary.

At the Hearing, John B. Hutton, Ari Newman, and Elizabeth R. Hadley represented MSF 2020; Bradley T. Golmon represented Swarek; and Jack A. Crawford, Jr. and David L. Curry, Jr. represented First Service Bank ("FSB"). Because MSF 2020's Brief, filed contemporaneously with the Motion to Dismiss, argues grounds for dismissal that do not appear in the Motion to Dismiss, the Court inquired at the Hearing whether Swarek had received adequate notice. The Court expressly asked his counsel if the matter should be continued and reset. Counsel for Swarek indicated that he had addressed all of MSF 2020's arguments in the Response and was ready to proceed. (MTD Hr'g at 1:40, 2:22 (July 8, 2025)).[4]

JURISDICTION

The Court has jurisdiction over the subject matter of and the parties to this Adversary as to the claims belonging to the debtor, El Dorado Gas & Oil, Inc. ("EDGO"), pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. As to these claims, this is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A), (B), and (O). For the reasons discussed below, the Court finds that it lacks subject matter jurisdiction over the personal claims asserted by Swarek (a non-debtor) against MSF 2020 (also a non-debtor). Notice of the Hearing was proper under the circumstances.

[4] The Hearing on the Motion to Dismiss was not transcribed. Citations are to the timestamp of the audio recording.

FACTS

The MSL Loan

This adversary arises out of a $50 million loan (the "MS Loan") from FSB, as lender, to EDGO, as borrower, governed by a Term Loan Credit Agreement (the "Loan Agreement") (Adv. Dkt. #24-1 at 1-22) dated September 17, 2020. Payment of the MS Loan was guaranteed by Swarek, Hugoton Operating Company, Inc. ("Hugoton"), and World Aircraft, Inc. ("World Aircraft"). The only signatories to the Loan Agreement are EDGO, FSB, Swarek, Hugoton, and World Aircraft. The MS Loan is evidenced by a Term Note made payable to FSB. To secure the Term Note, EDGO granted FSB a security interest in substantially all of its assets.

The MS Loan was made pursuant to the Main Street Lending Program (the "MSL Program"), established by the Federal Reserve in 2020 to support lending to small and medium-sized for-profit firms "that were in sound financial condition before the onset of the COVID-19 pandemic" but whose businesses suffered during the crisis.[5] The MSL Program formed MSF 2020 as a special purpose vehicle to purchase 95% participations in eligible loans from private lenders, mainly commercial banks. MSF 2020 did not screen or originate these loans but relied on banks to perform these services. Main Street loan terms were standardized. All loans matured in five year, deferred principal payments for two years, and deferred interest payments for one year.[6] FSB was one of many banks across the country that registered to participate in the MSL Program. (Adv. Dkt. #10-1 at 6).

EDGO obtained the $50 million MS Loan "to reinvigorate the company and rehire dismissed staff, amounting to 300 employees." (Adv. Dkt. 1 at 2). As contemplated by the Loan Agreement,

[5] *Main Street Lending Program*, www.federalreserve.gov/monetarypolicy/mainstreetlending.htm (last visited Aug. 4, 2025); *see* 12 U.S.C. § 343(3). The MSL Program started accepting loan submissions on July 6, 2020 and stopped on January 8, 2021.
[6] https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm (last visited Aug. 4, 2025).

on the same day that FSB loaned EDGO $50 million, FSB entered into the Participation Agreement under the Main Street Lending Program (the "Participation Agreement") (Adv. Dkt. #10-1), under which FSB agreed to sell, and MSF 2020 agreed to buy, 95% of the MS Loan. EDGO was not a party to the Participation Agreement. FSB retained sole authority to service and enforce the debt pursuant to the MSL Program. MSF 2020 paid FSB administrative and servicing fees under the Servicing Agreement under the Main Street Lending Program (the "Servicing Agreement"). (Adv. Dkt. #10-3; Adv. Dkt. #24-1 at 23-31).

In early 2023, EDGO defaulted under the Loan Agreement. On November 22, 2023, FSB sent EDGO and Swarek a letter declaring EDGO in default, accelerating the MS Loan, and demanding immediate payment of $53,275,468.59. (Adv. Dkt. #10-2 at 1-2).

EDGO's Bankruptcy Case & Appointment of Chapter 11 Trustee

On December 22, 2023, Swarek signed and filed a chapter 11 petition for relief on EDGO's behalf. (Bankr. Dkt. #1). The filing instituted an automatic stay as to any collection action against EDGO. 11 U.S.C. § 362(a)(1). Swarek continued operating EDGO as the debtor in possession only briefly. On January 8, 2024, seventeen days after the Bankruptcy Case was filed, FSB filed a motion seeking the appointment of a chapter 11 trustee, alleging that the appointment was necessary "if there is to be any preservation of value of [EDGO's] assets." (Bankr. Dkt. #73). FSB complained that EDGO was "either unable to, or simply refuse[d] to meet its obligations as a debtor-in-possession"; failed to pay key employees both pre- and post-petition which has resulted in the stoppage of work"; and "allowed certain oil and gas leases to expire." (Bankr. Dkt. #73 at 1). Four creditors, Resource Strategies, LLC, American National Insurance Company, Briguna, LLC, and ATIC Limited Partnership, filed a limited joinder in support of FSB's motion. (Bankr. Dkt. #141). A fifth creditor, Pilot Thomas Logistics, filed a reservation of rights with respect to its purported

statutory lien claims but otherwise did not oppose FSB's motion. Drew McManigle, the chapter 11 trustee of an affiliated debtor, Escambia Operating Company, LLC, also filed a limited joinder in support of FSB's motion. (Bankr. Dkt. #113). Swarek did not file a response opposing the motion and ultimately consented to the appointment of a chapter 11 trustee. The Court approved the appointment of Dawn Ragan as the chapter 11 trustee (the "Trustee") on February 2, 2024. (Bankr. Dkt. #208). From that date forward, Swarek lost control, and the Trustee began operating and controlling EDGO.

FSB's Guaranty Action Against Swarek in District Court

Weeks before the Trustee's appointment, on January 19, 2024, FSB sued Swarek in the U.S. District Court for the Southern District of Mississippi to enforce the guaranty. *See First Service Bank v. Thomas Swarek*, Case No. 1:24-cv-00020-TBM-RPM (S.D. Miss.)[7] (the "Guaranty Action"). Swarek failed to file an answer or responsive pleading, and an entry of default was entered against him on February 20, 2024. Swarek, acting *pro se*, moved to set aside the entry of default, and FSB, in turn, moved for default judgment. After a hearing on these motions, FSB moved for summary judgment on its $54,928,751.83 claim. Swarek opposed the summary judgment motion. (Case No. 1:24-cv-00020-TBM-RPM, Dkt. #40). He admitted that the MS Loan was enforceable, that he had a duty to pay FSB as a guarantor, and that he had defaulted on his payments. (Case No. 1:24-cv-00020-TBM-RPM, Dkt. #40; Adv. Dkt. #10-2). Swarek nevertheless opposed the summary judgment motion on two grounds. First, he argued that FSB, as the owner of only 5% of the MS Loan, lacked standing to sue for the full amount of the debt. Second, he complained that MSF 2020, the 95% owner, was "an essential missing party." (Case No. 1:24-cv-00020-TBM-RPM, Dkt. #40 at 1). The District Court rejected both arguments. It found that FSB was both a lender

[7] FSB also sued World Aircraft, but the District Court stayed the Guaranty Action against World Aircraft after it filed bankruptcy. (Adv. Dkt. #10-2).

and a servicing agent for MSF 2020 under the Participation Agreement. FSB had agreed to "hold title to the Loans for the benefit of [MSF 2020] to the extent of the Participation" and was authorized to bring suit against Swarek for the full amount of the MS Loan. (Adv. Dkt. #10-2). It concluded that FSB had standing to sue for the entirety of the debt being serviced. (Adv. Dkt. #10-2) (citing *Neil v. Wells Fargo Bank, N.A.*, 686 F. App'x 213 (4th Cir. 2017); *CWCapital Asset Mgmt., LLC v. Chicago Props., LLC*, 610 F.3d 497, 500-01 (7th Cir. 2010)). For that reason, MSF 2020's joinder was unnecessary. (Adv. Dkt. #10-2); FED. R. CIV. P. 19(a)(1)(A) (joinder of a party is required if "in that person's absence, the court cannot accord complete relief among existing" parties).

The District Court entered an order: (a) granting summary judgment in favor of FSB in the amount of $54,928,751.83 and (b) in the alternative, denying Swarek's motion to set aside the entry of default and granting FSB's motion for default judgment. (Adv. Dkt. #10-2). A Final Judgment Against Thomas Swarek and Order Administratively Closing Case (Case No. 1:24-cv-20-TBM-RPM, Dkt. #47) was entered the next day, July 13, 2024.

Swarek asked the District Court to reconsider its order. (Case No. 1:24-cv-00020-TBM-RPM, Dkt. #52). He claimed that new evidence proved EDGO was entitled to eighteen months of forbearance and a restructuring of the MS Loan. This evidence, which he attached to his motion, consisted of 229 pages of print outs of various government websites about the MSL Program and screenshots from news articles about Covid-19. On March 5, 2025, the District Court denied Swarek's motion to reconsider.[8] (Case No. 1:24-cv-00020-TBM-RPM, Dkt. #64). The District Court concluded that the documents were available to Swarek and should have been presented earlier at the summary judgment stage of the proceedings and, regardless, did not show that FSB

[8] The District Court stayed the Guaranty Action during the brief pendency of Swarek's personal bankruptcy case.

was obligated to extend the MS Loan. *See* FED. R. CIV. P. 54(b). Swarek did not appeal, and the judgment became final (the "Guaranty Judgment") (Case No. 1:24-cv-20-TBM-RPM, Dkt. #47).

DIP Motion in Bankruptcy Case

EDGO, now under the control of the Trustee, did not have sufficient cash to maintain business operations or to market and sell its assets. (Bankr. Dkt. #329 at 10). On April 15, 2024, the Trustee filed an emergency motion seeking entry of interim and final orders authorizing EDGO to obtain post-petition financing up to $8,750,000 from FSB and another lender (the "DIP Motion")[9] (Bankr. Dkt. #329). One of the material terms of the proposed credit facility was EDGO's agreement to "unconditionally and irrevocably release[], acquit[], absolve[], [and] forever discharge[]" FSB and MSF "from any and all claims, interests, causes of actions, avoidance actions, counterclaims, defenses [and] setoffs." (Bankr. Dkt. #329 at 20).

Interim Hearing on DIP Motion in Bankruptcy Case

The interim hearing on the DIP Motion was held on April 23, 2024. Swarek, acting *pro se*, was present and participated in the interim hearing but had not filed a written response. Other interested parties, however, had filed formal objections. (Bankr. Dkt. #347, #348, #349, #350). Two of them, Mestena LLC ("Mestena") and the United States Trustee ("UST"), raised concerns about EDGO's release of prepetition claims against FSB. (Bankr. Dkt. #349, #350). Mestena questioned whether the Trustee had fully and comprehensively investigated whether EDGO held any such claims or causes of action. (Bankr. Dkt. #349 at 2). Swarek complained that FSB had refused to restructure the MS Loan and challenged FSB's ability to seek payment of the full amount of the MS Loan but did not mention the release. (Bankr. Dkt. #418 at 56-59).

[9] The parties describe the post-petition motion as the "DIP Motion" although EDGO was no longer the debtor in possession at the time the loan was negotiated.

The parties agreed to reserve the release issues for resolution at the final hearing on the DIP Motion. Based on that agreement, the Court entered the Interim Order (I) Authorizing the Debtors To (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superiority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief (the "Interim DIP Order") (Bankr. Dkt. #365). The Interim DIP Order allowed EDGO to borrow up to $2.5 million on an interim basis. (Bankr. Dkt. #365).

Final Hearing on DIP Motion in Bankruptcy Case

The final hearing on the DIP Motion was held on May 15, 2024. Before that hearing, Swarek filed a three-page objection to the DIP Motion. (Bankr. Dkt. #409). He did not oppose the post-petition loan itself but complained that the Trustee was not keeping him informed and challenged the use of any loan proceeds to market and sell EDGO's assets. (Bankr. Dkt. #409). After Swarek filed his objection, Thru Tubing Solutions, Inc. and Cudd Pressure Control, Inc. filed their joint objection (Bankr. Dkt. #413), and Mestena and the UST both filed supplemental objections, again challenging the release provision. (Bankr. Dkt. #417; Bankr. Dkt. #414).

Before the final hearing, the Trustee resolved all objections except for Mestena's and the UST's opposition to the release. (DIP Hr'g at 9:57-10:10 (May 15, 2024)).[10] Fully aware of the pending release issue, the Trustee had ample opportunity to, and did investigate potential lender liability claims, preference claims, and other claims arising under chapter 5 against FSB and/or

[10] The final hearing on the DIP Motion was not transcribed. Citations are to the timestamp of the audio recording.

MSF 2020. The Trustee, who has substantial bankruptcy experience, testified that she found none.[11] (DIP Hr'g at 10:56).

On cross-examination, Mestena and the UST questioned the Trustee about the scope of her investigation. Swarek,[12] representing himself, cross examined the Trustee about many of the allegations that appear in the Complaint for Damages (the "Complaint") (Adv. Dkt. #1) against MSF 2020. He asked her about FSB's alleged "sweeping" of EDGO's bank account (DIP Hr'g at 12:58); MSF 2020's alleged corporate dissolution (DIP Hr'g at 1:07-1:08); and FSB's standing to collect the full amount of the debt[13] (DIP Hr'g at 1:09). The Trustee testified that she found no proof that FSB had ever "swept" EDGO's account and that FSB's enforcement of its rights was authorized by the Loan Agreement and otherwise lawful. (DIP Hr'g at 10:55-10:56). Mestena called Swarek as a witness to testify about his long business relationship with FSB and the origination of the MS Loan. (DIP Hr'g at 3:33).

In the end, the Court concluded that the Trustee had thoroughly evaluated any potential claims and causes of action against MSF 2020 and/or FSB and approved the financing arrangement on a final basis, including the release, with certain modifications. On May 24, 2024, the Court entered the Final Order (I) Authorizing the Debtors To (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Liens and Superiority Administrative Expense Claims, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and

[11] The Trustee has an undergraduate degree in accounting and a master's degree in business administration. (DIP Hr'g at 10:31). She has spent over nine years in investment banking and over twenty years as a financial restructuring advisor. (DIP Hr'g at 10:32).

[12] One week earlier on May 7, 2024, as discussed in detail later, Swarek formed a new entity named "MS Facilities, LLC" in Delaware.

[13] The final hearing took place a week after Swarek filed his response in opposition to FSB's summary judgment motion in the Guaranty Action where he raised many of these same allegations. (Case No. 1:24-cv-00020-TBM-RPM, Dkt. #40).

(VI) Granting Related Relief (the "Final DIP Order") (Bankr. Dkt. #463). There was no appeal, and it became final.

Filing & Dismissal of Swarek's Bankruptcy Case

Swarek, acting *pro se*, filed personal bankruptcy on September 30, 2024. *In re Swarek*, Case No. 24-51388-JAW. The Court dismissed his case on November 19, 2024 for failure to file schedules and other required documents by the deadline set by the Court. (Case No. 24-51388-JW, Dkt. #97). The filing deadline had been extended at Swarek's request to allow him additional time to retain counsel, but Swarek failed to meet the extended deadline and did not appear at the hearing set by the Court to show cause why his bankruptcy case should not be dismissed.

Adversary Filed by Swarek Against FSB (Adv. Proc. 25-06002-JAW)

Almost a year after the Trustee's appointment, January 7, 2025, Swarek retained counsel and filed an adversary complaint against FSB[14] on EDGO's behalf in *El Dorado Gas & Oil, Inc. Debtor and Thomas L. Swarek, Interested Party v. First Service Bank*, Adv. Proc. 25-06002-JAW, Dkt. #1, and also filed an objection to FSB's proof of claim.[15] (Bankr. Dkt. #1219). The complaint was not styled as asserting derivative claims on EDGO's behalf but directly alleged claims held by EDGO and controlled by the Trustee against FSB. Swarek maintained that FSB had effectively forced EDGO into a receivership, taken control of EDGO away from him, violated the Federal Reserve's directive on loan abatement, and failed to keep clear records regarding the MS Loan. Presumably, after he was made aware that only the Trustee had authority to act on EDGO's behalf as to these matters, Swarek voluntarily dismissed the adversary proceeding without prejudice on January 15, 2025 (Adv. Proc. 25-06002-JAW, Dkt. #6) and withdrew the objection to FSB's proof of claim on March 25, 2025. (Bankr. Dkt. #1229).

[14] MF 2020 was not named as a defendant in this first Adversary complaint.
[15] FSB filed a proof of claim "for money loaned" totaling $53,891,253.17. (Cl. #2-2).

Instant Adversary Filed by Swarek Against MSF 2020 (Adv. Proc. 25-06007-JAW)

On April 23, 2025, Swarek initiated the present Adversary by filing the Complaint against MSF 2020 "individually and derivatively on behalf of El Dorado Gas & Oil, Inc." The focus of the Complaint is FSB's alleged improper use of the remedies provided in the Loan Agreement against EDGO but names MSF 2020 as the sole defendant.

Allegations Against FSB in the Instant Adversary Complaint

The Complaint alleges that Swarek and "certain other parties and guarantors" were prepared to pay $15 million to bring the MS Loan current provided that FSB subordinated its $4 million secured position in certain equipment but that FSB declined to do so. Instead, FSB took a series of actions to enforce its rights under the Loan Agreement. FSB declared the MS Loan in default, swept EDGO's bank account, initiated foreclosure actions in Mississippi, Texas, and Arkansas, and commenced a receivership action. These actions, according to the Complaint, violated the Federal Reserve's "Joint Statement on Additional Loan Accommodations Related to COVID-19" regarding loan abatement and were motivated by FSB's discrimination against the oil and gas industry. (Compl. ¶ 23). Notably, there are no allegations in the Complaint that EDGO was *not* in default or that the remedies pursued by EDGO were *not* provided for in the Loan Agreement.

The Complaint also describes issues regarding FSB's servicing of the MS Loan. According to the Complaint, FSB charged interest beginning September 17, 2020 but did not fully fund the MS Loan until October 22, 2020; withheld and delayed certain advances and payments; failed to keep adequate financial records; and hid exorbitant expenses charged to the MS Loan. (Compl. ¶¶ 15, 18, 20, 22, 28-29). The Complaint also alleges that FSB "improperly threatened Swarek's wife with a $60,000,000.00 lawsuit leading to . . . a divorce." (Compl. ¶ 41).

Based on these allegations, the Complaint asserts claims for intentional or negligent infliction of emotional distress (Compl. ¶41), breach of contract (Compl. ¶ 43), lender liability (Compl. ¶ 44), intentional interference with EDGO's business (Compl. ¶ 45), discrimination based on the nature of EDGO's business (Compl. ¶ 46), fraud (Compl. ¶ 47), misuse of federal funds (Compl. ¶ 50), and violation of the covenant of good faith and fair dealing (Compl. ¶ 51).

MSF 2020 as the Named Defendant in the Complaint

The allegations in the Complaint concern FSB's conduct, but the Complaint names MF 2020 as the sole defendant. The Complaint alleges that MSF 2020 appointed FSB as its administrative agent and, therefore, MSF 2020 is responsible for FSB's actions. (Compl. ¶¶ 13, 47-49).

DISCUSSION

MSF 2020 seeks the dismissal of all claims in the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)").[16] MSF 2020 argues that EDGO voluntarily released all claims against both it and FSB pursuant to the terms of the Final DIP Order and, in any event, that Swarek lacks derivative standing to sue on the Trustee's behalf. MSF 2020 next argues that this Court lacks subject matter jurisdiction over Swarek's personal claims.

A. Swarek's Creation of a New Entity Named "MS Facilities, LLC" and MSF's Revival as MS 2020

The Participation Agreement names "MS Facilities, LLC" as the buyer of the 95% participation interest in the MS Loan. (Adv. Dkt. #24-1 at 19-20). Because of an administrative error, "MS Facilities, LLC" failed to pay its annual taxes and ceased to be in good standing with Delaware's Division of Corporations on June 1, 2023. Swarek discovered the cancellation and on May 7, 2024 created a new distinct entity using the same name—"MS Facilities, LLC." Swarek now contends

[16] Rule 12(b)(6) is made applicable to adversary proceedings by Rule 7012 of the Federal Rules of Bankruptcy Procedure.

that the wrong entity filed the Motion to Dismiss. He says he sued "MS Facilities, LLC,"[17] the participating lender mentioned in the Loan documents, not MSF 2020. He suggests that both MSF 2020 and "MS Facilities, LLC" are barred from defending the Adversary and relatedly that MSF 2020 was not released in the Final DIP Order. (MTD Hr'g at 2:30). His argument requires the Court to consider MSF 2020's corporate history.

Documents from Delaware's Division of Corporation, produced by both MSF 2020 and Swarek, show that "MS Facilities, LLC" was formed on May 18, 2020 under Delaware's Limited Liability Company Act. (Adv. Dkt. #24-2; Adv. Dkt. #28 at 4). In Delaware, Domestic limited liability companies ("LLCs") must pay an annual flat tax of $300. 6 DEL. CODE § 18-1107(b). Nonpayment of the tax could result in the cancellation of an LLC's certificate of formation at which time the LLC is no longer in good standing. As a consequence, the LLC "may not maintain any action, suit or proceeding" in a Delaware court. 6 DEL. CODE § 18-1107(b). The cancellation of a certificate for failure to pay taxes, however, does not dissolve the LLC, invalidate its contracts, or bar it from defending proceedings against it:

> The neglect, refusal or failure of a domestic limited liability company . . . to pay an annual tax shall not impair the validity of any contract, deed, mortgage, security interest, lien or act of such domestic limited liability company . . . or prevent such domestic limited liability company . . . from defending any action, suit or proceeding with any court of the State of Delaware.

6 DEL. CODE § 18-1107(m). Moreover, a canceled LLC may be revived to good standing by paying all delinquent taxes, including penalties and interest. 6 DEL. CODE § 18-1107(l).

[17] Confusingly, at first glance, Swarek appears to have sued the entity he created on May 7, 2024, but as explained herein, the revival of "MS Facilities, LLC" under the name MS Facilities 2020, LLC did not invalidate the MS Loan, which Swarek does not dispute. (MTD Hr'g at 2:13-2:14).

At the Hearing, MSF 2020 introduced into evidence, without objection, a chart listing the timeline of events surrounding "MS Facilities, LLC's" formation, cancellation, and subsequent revival as MSF 2020:

Timeline of Events

Date	Event	Supporting Document/Citations
May 18, 2020	Original MS Facilities LLC formed as a Delaware limited liability company.	- Notice of Filing of Supplemental Exhibits, at 4 (*Certificate of Formation (dated May 8, 2024 noting original formation)*) - **Swarek's Resp. Brief Ex. B.**
July 31, 2020	MS Facilities LLC enters into a Participation Agreement with FSB under the Main Street Lending Program.	- *Participation Agreement (dated July 31, 2020)* - **Swarek's Resp. Brief Ex. A at pg 19.**
June 1, 2023	MS Facilities LLC is canceled by the Delaware Secretary of State for failure to pay franchise tax.	- Notice of Filing of Supplemental Exhibits, at 4 (*Certificate of Formation (dated May 8, 2024 noting cancellation)*)
May 7, 2024	A new, distinct entity named MS Facilities LLC is formed under file number 3611674—by Plaintiff Thomas Swarek. This Entity is Not Part of the Main Street Lending Program	- Notice of Filing of Supplemental Exhibits, at 8 (*Entity Details for MS Facilities LLC (New Entity Formed on May 7, 2024)*) - **Swarek's Resp. Brief Ex. B at 1.**
May 9, 2024	The Federal Reserve Bank of Boston files a Certificate of Revival for the original MS Facilities LLC and changes its name to "MS Facilities 2020 LLC"	- Notice of Filing of Supplemental Exhibits, at 5-7 (*MS Facilities LLC's Certificate of Revival)* - Notice of Filing of Supplemental Exhibits, at 9 (*Entity Details for MS Facilities 2020, LLC (Formed on May 18, 2020)*). - **Swarek's Resp. Brief Ex. B at 2.**

As shown by Delaware's records, Delaware canceled "MS Facilities, LLC" certificate of formation on June 1, 2023 for failure to pay taxes; and "MS Facilities, LLC" filed its certificate of revival on May 9, 2024 using a different name, MSF 2020, because Swarek had registered a new entity using the name "MS Facilities, LLC" ("MSF 2024") two days earlier. (Adv. Dkt. #24-2; Adv. Dkt. #28). Delaware law expressly contemplates this scenario: if "the name of the limited

liability company at the time its certificate of formation was canceled and, if such name is not available at the time of revival," then the certificate of revival must include "the name under which the limited liability company is to be revived." 6 DEL. CODE § 18-1109(a)(1).

Unlike MSF 2020, the new entity formed by Swarek on May 7, 2024, MSF 2024, is wholly unrelated to the MSL Program. At the Hearing, Swarek's counsel said he did not know why Swarek formed an LLC in Delaware using MSF's name—but "apparently it was lawful to do so because it still exists."[18] (MTD Hr'g at 2:11). Swarek's retention of the name is nothing more than a self-created "red herring" without legal effect. Swarek presented no evidence that MSF 2020 lost any contractual rights.

Unnecessary Motion to Substitute

The certificate of revival, which Swarek's counsel had not previously seen, caused him to change his position at the Hearing. (MTD Hr'g at 2:18). Although he continued to challenge MSF 2020's right to file the Motion to Dismiss, he focused his argument on MSF 2020's failure to file a motion to substitute under Rule 25 of the Federal Rules of Civil Procedure.[19] (MTD Hr'g at 2:18). The Court finds Swarek's reliance on Rule 25 to be misplaced.

"MS Facilities, LLC's" revival as MSF 2020, even *assuming* it constituted a transfer of interest, occurred almost a year *before* Swarek filed the Complaint. Rule 25(c), however, governs the substitution of a party when an interest is transferred during the pendency of the lawsuit. *Froning's, Inc. v. Johnston Feed Serv., Inc.*, 568 F.2d 108, 110 (8th Cir. 1978). Instead of Rule 25, the Court

[18] According to the documents attached to the Response, MSF 2024 ceased to be in good standing on June 1, 2025 because of Swarek's failure to pay taxes. (Adv. Dkt. #24-2).
[19] Federal Rule of Civil Procedure 25 is made applicable to adversary proceedings by Rule 7025 of the Federal Rules of Bankruptcy Procedure.

examines Swarek's challenge under Rule 17 of the Federal Rules of Civil Procedure,[20] which governs real parties in interest.

Under Rule 17(b)(2), an LLC's capacity to be sued is determined by the law under which it was organized. Swarek does not dispute that MSF 2020 is a limited liability company organized under the laws of Delaware. Section 18-1109(c) provides that a company, upon revival, "shall be revised with the same force and effect as if the certificate of formation . . . had not been canceled." Revival also "validates all contracts, acts, matters and things made, done and performed by the limited liability company . . . during the time when the certificate of formation. . . was canceled . . . with the same force and effect and to all intents and purposes as if the certificate of formation . . . had remained in full force and effect. 6 DEL. CODE § 18-1109(c). Moreover, all "real and personal property, and all rights and interests" belonging to the company at the time of cancellation—or acquired during the cancellation period—are fully "vested in the limited liability company, . . . as fully as they were held . . . at, and after . . . the time" of cancellation. *Id*. These provisions show that a revival under Delaware law does not create a new entity—it reinstates the original one. For that reason, MSF 2020's certificate of revival shows the date of its formation as May 18, 2020, the same as "MS Facilities, LLC's" and not the date of its revival. (Adv. Dkt. #28 at 5-6, 9).

The Court is satisfied that under Delaware law, MSF 2020 is the real party in interest and may appropriately act as the entity that was the original participant in the MSL Program. The Court is also satisfied (and Swarek does not dispute) that MSF 2020 has remained in good standing since its revival. A finding that "MS Facilities, LLC" or MSF 2024 (and not MSF 2020) is the real party in interest would suggest that Swarek is suing himself, a circumstance that even his attorney agreed at the Hearing made no sense. (MTD Hr'g at 2:18-2:19).

[20] Federal Rule of Civil Procedure 17 is made applicable to adversary proceedings by Rule 7017 of the Federal Rules of Bankruptcy Procedure.

Swarek does not dispute the validity of the MS Loan, and his challenge as to whether MSF 2020 is the real party in interest is one of his own making. (MTD Hr'g at 2:13-2:14). Counsel for Swarek could not explain what Swarek hoped to achieve by obtaining the prior name of MSF 2020. (MTD Hr'g at 2:11). When the Federal Reserve Bank of Boston filed the revival certificate, it used a different name only because its original name was no longer available as a result of Swarek's antics. The Court fails to see any purpose for Swarek obtaining the name other than to cause confusion. Swarek's retention of MSF 2020's previous name is of no legal consequence in this Adversary.

B. Rule 12(b)(6) Standard

The U.S. Supreme Court has held that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matters, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The Fifth Circuit has noted that "[w]here the complaint is devoid of facts that would put the defendant on notice as to what conduct supports the claims, the complaint fails to satisfy the requirement of notice pleading." *Anderson v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 525, 528 (5th Cir. 2008). In resolving a Rule 12(b)(6) motion, the Court must construe the Complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations as true. On the other hand, the Court is not bound by conclusory statements, statements of law, and unwarranted inferences cast as factual allegations. *Twombly*, 550 U.S. at 555-57. "A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient

facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008).

Although "[t]he failure-to-state-a-claim inquiry typically focuses on whether the plaintiff plausibly alleges the element of a claim," a Rule 12(b)(6) dismissal may also "be appropriately based on a successful affirmative defense provided that the affirmative defense appear[s] on the face of the complaint." *Am. Precision Ammunition, LLC v. City of Mineral Wells*, 90 F.4th 820, 824 (5th Cir. 2024) (quotation omitted). In other words, the facts supporting the affirmative defense must be undisputed. *Canidae, LLC v. Cooper*, No. 6:21-CV-0019, 2022 WL 660197, at *16 (N.D. Tex. Feb. 9, 2022).

In considering a Rule 12(b)(6) motion, a court must limit itself to the contents of the complaint, including any attachments, documents incorporated into the complaint by reference, and "matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). A documents may be incorporated by reference into a complaint if the complaint extensively refers to the document or the document forms the basis of the plaintiff's claim. A court may also consider matters which are subject to judicial notice. *Id*. (citation omitted).

Here, MSF attached the Participation Agreement (Adv. Dkt. #10-1) and the Servicing Agreement to the Motion to Dismiss (Adv. Dkt. #10-3), and Swarek attached the Term Loan Agreement (Adv. Dkt. #24-1 at 1-22) and the same Servicing Agreement (Adv. Dkt. #24-1 at 23-31) to the Response. Because the Complaint centers on the MS Loan, the Court considers the Term Loan Credit Agreement and the Participation Agreement to be part of the Complaint for the purpose of the Motion to Dismiss. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (holding that documents attached to a motion to dismiss are treated as a part of the pleadings

if "referred to in the plaintiff's complaint and are central to her claim"). In addition, the Court takes judicial notice of certain orders entered in this Bankruptcy Case and in the Guaranty Action.

C. The Complaint

Swarek's Complaint contains no counts and no headings. *See* FED. R. BANKR. P. 7010 (requiring that claims be stated "in numbered paragraphs" and that each claim be stated in a separate count). It is a non-chronological narrative of events recounted across 52 numbered paragraphs occasionally punctuated with a theory of liability. Contributing to the confusion is the Complaint's failure to separate claims belonging to EDGO from those owned by Swarek, but the focus of the Complaint is the alleged harm to EDGO.

1. EDGO's Claims Against MSF 2020

The claims Swarek asserts against MSF 2020 on EDGO's behalf arise from FSB's exercise of its remedies under the Loan Agreement and its servicing of the MS Loan. As to these claims, the Court finds that the Complaint fails as a matter of law because: (a) EDGO released FSB and MSF 2020 from all such claims and causes of action pursuant to the Final DIP Order approving EDGO's post-petition financing; and (b) Swarek lacks derivative standing to assert EDGO's claims.

a. EDGO's Release of All Claims Against FSB & MSF 2020

On May 24, 2024, the Court entered the Final DIP Order authorizing EDGO to borrow up to $8,750,000 from FSB and another lender. (Bankr. Dkt. #463). No appeal was taken, and the Final DIP Order became final. As part of the financing structure, EDGO released FSB and MSF 2020 from all existing claims related to the MS Loan:

> [F]or good and valuable consideration, the adequacy of which, as to the Debtors and their estates, is hereby confirmed, each of the Credit Parties (in its own right and, as applicable, on behalf of its respective estate and its estate's respective successors and assigns) hereby unconditionally and irrevocably releases . . . [FSB and MSF 2020] . . . from any and all claims . . . (*including any derivative claims asserted or assertable on behalf of the Debtors, their estates, or such entities' successors or assigns, whether individually or collectively*)

> whether known [or] unknown . . . including, without limitation, all legal and equitable theories of recovery . . . that exist on the date hereof with respect to the Prepetition MSL Obligation, the Prepetition MSL Liens, and/or the DIP Facility, including, without limitation, (a) *any so-called "lender liability"* or equitable subordination claims or defenses, and (b) any and all "claims" . . . and causes of action arising under the Bankruptcy Code.

(Final DIP Order ¶ F (viii)-(ix), at 12-13) (emphasis added). "Credit Parties" were defined as the Debtors. "Released Parties" included: (a) FSB; (b) MSF 2020, described as a "participating Prepetition Lender and entity formed in connection with the implementation of the Main Street Lending Program;" and (c) each Related Party. "Related Party," in turn, included "successors and assigns." The release was binding not only on EDGO, but on any party asserting claims on EDGO's behalf. In New York,[21] "a valid release constitutes a complete bar to an action on a claim which is the subject of the release." *Great Lakes Reinsurance (UK) SE v. Herzig*, 673 F. Supp. 3d 432, 449 (S.D.N.Y. 2023) (quotations & citations omitted).

In chapter 11 bankruptcy cases, releases are common in financing orders where prepetition lenders are asked to make concessions to permit post-petition financing. *In re Adelphia Commc'ns Corp*., 330 B.R. 364, 383-84 (Bankr. S.D.N.Y. 2005). For FSB, the release was an essential term of the financing arrangement to prevent EDGO from using any proceeds from the DIP loan to fund litigation against itself or MSF 2020.

At the Hearing in the Adversary, Swarek admitted that the Final DIP Order released FSB from the claims asserted on EDGO's behalf in the Complaint but argued that EDGO's release of claims against MSF 2020 was invalid. (MTD Hr'g at 2:43). Initially, Swarek argued that MSF 2020 failed to provide any consideration because unlike FSB, MSF 2020 was not a DIP lender.[22] At the Hearing, MSF 2020 pointed to the provisions in the Final DIP Order that required MSF 2020 to

[21] The law of New York applies based on a choice of law provision in the Loan Agreement. (Bankr. Dkt. #463 at 73).
[22] The MSL Program ended on December 31, 2020.

subordinate its interests, allow the use of its cash collateral, and consent to the priming of its liens. (Final DIP Order ¶¶ D(i)-(iii), F(i)-(iii), (viii)). In light of this consideration for the release, Swarek recognized that his argument constituted an impermissible collateral attack on the Final DIP Order. (MTD Hr'g at 2:31-2:32; Adv. Dkt. #27); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009) (final bankruptcy orders are not subject to collateral attack). Swarek then argued that MSF 2020, as opposed to "MS Facilities, LLC," was not a Released Party.

The Court has previously rejected Swarek's argument that the wrong entity filed the Motion to Dismiss. For those same reasons, the Court rejects Swarek's attempt to create confusion about the parties released in the Final DIP Order. Although the release names "MS Facilities, LLC," it describes that entity as a "participating Prepetition Lender and entity formed in connection with the implementation of the Main Street Lending Program." That description can only refer to MSF 2020.[23] At bottom, there is no doubt the Trustee's intent was to release FSB and MSF 2020 as lenders. *In re Roman Catholic Diocese of Rockville Centre*, 650 B.R. 58 (Bankr. S.D.N.Y. 2023).

Because EDGO clearly released all pre-petition claims against FSB and MSF 2020, the Complaint cannot proceed and is due to be dismissed for failure to state a plausible claim.

b. Lack of Derivative Standing To Assert EDGO's Claims Against MSF 2020

When EDGO filed bankruptcy, "all legal or equitable interests of the debtor in property as of the commencement of the case" became property of the estate, including causes of action. 11 U.S.C. § 541(a)(1); *United States v. Whiting Pools, Inc*., 462 U.S. 198, 205 n.5 (1983). The term "all legal or equitable interests" is understood to include causes of action. *See La. World Exposition, Inc. v. Fed. Ins. Co. (In re La. World Exposition, Inc.)*, 858 F.2d 233, 245 (5th Cir. 1988). Generally, only a debtor in possession or a trustee has the right to pursue estate causes of action.

[23] Even if Swarek is correct, he does not address why MSF 2020 was not a "Related Party," described, in part, as "successors and assigns."

In re S.I. Acquisition, Inc., 817 F.2d 1142, 1153-54 (5th Cir. 1987) (observing that the "general bankruptcy policy of ensuring that all similarly situated creditors are treated fairly" requires that the trustee have the first opportunity to pursue estate actions). Allowing a creditor standing to sue in the name of the chapter 11 trustee is the exception, not the rule. The Fifth Circuit Court of Appeals, however, has upheld derivative standing if certain conditions are met. *See Louisiana World*, 858 F.2d at 247 (noting that the circumstances under which a creditor may sue are not explicitly spelled out in the Bankruptcy Code).

In *Louisiana World*, the estate had potential causes of action against the debtor's officers and directors for gross negligence, mismanagement, and breach of fiduciary duty. *Louisiana World*, 858 F.2d at 235. The creditors' committee demanded that the debtor bring an action, but the debtor's board of directors declined to vote on the demand. Construing that response as a refusal to sue, the creditors' committee obtained permission from the bankruptcy court to file an action in the debtor's name. In the subsequent district court action, the creditors' committee faced a motion to dismiss, which the district court granted.

The Fifth Circuit reversed. It held that a creditors' committee has standing in some circumstances to file suit on behalf of a debtor. *Louisiana World*, 858 F.2d at 247. The Fifth Circuit articulated three considerations in determining whether derivative standing should be allowed: (1) whether the claim is colorable; (2) whether the debtor in possession or the trustee unjustifiably refused to pursue the claim; and (3) whether the creditors' committee first received leave to sue from the bankruptcy court. *Louisiana World*, 858 F.2d at 247. All three elements must be met. *In re On-Site Fuel Servs.*, No. 18-04196-NPO, 2020 WL 3703004, at *9-10 (Bankr. S.D. Miss. May 8, 2020).

(1) No "Colorable" Claim

For derivative standing purposes, a "colorable" claim must at least survive a motion to dismiss under Rule 12(b)(6). *On-Site Fuel Servs*., 2020 WL 3703004, at *12. The Court finds that Swarek has not met his burden to demonstrate that a colorable claim exists against MSF 2020. As discussed previously, the Final DIP Order released EDGO's prepetition claims against FSB and MSF 2020. This element for derivative standing to bring claims against MSF 2020 is absent.

(2) Trustee's Justifiable Refusal to Pursue Claims

In the Complaint, Swarek alleges that the Trustee is "unwilling to assert or pursue this claim." (Compl. ¶ 6). The basis for this allegation is his earlier failed attempt "to secure the agreement of the Trustee" to sue FSB on EDGO's behalf in adversary proceeding 25-06002-JAW. (Compl. ¶ 7). In other words, because the Trustee denied him permission to sue FSB in that first adversary, Swarek apparently *assumed* that she would deny him permission to sue MSF 2020 in the instant Adversary. Swarek had voluntarily dismissed that first adversary proceeding and did not disclose the reason for the Trustee's decision. (Adv. Proc. 25-06002-JAW).

As to the claims in the Complaint against MSF 2020, Swarek had the opportunity to and did question the Trustee about her investigation at the final hearing. The Trustee is an experienced chapter 11 trustee; her testimony was thorough and unimpeached. Recall that there were two written limited objections to the release at the interim hearing. At the end of the final hearing, it was clear to the Court that the Trustee had evaluated the potential claims against FSB and MSF 2020 before agreeing to the release.

Also, typical concerns that undergird decisions allowing derivative standing are not present when a chapter 11 trustee has already been appointed. A trustee is a neutral fiduciary charged with acting in the best interests of the estate. *Reed v. Cooper (In re Cooper)*, 405 B.R. 801, 804 (Bankr.

N.D. Tex. 2009) ("[A] trustee has a unique role as an independent fiduciary, with a completely different perspective and interest in a bankruptcy estate than an individual creditor."). As an estate fiduciary, a trustee is the "gatekeeper for what actions make sense" and the one best positioned to evaluate "the potential benefits of litigation." *Id*. Here, there has been no allegation that the Trustee has not competently discharged her fiduciary duties, and her role in this Bankruptcy Case eliminates any potential conflict of interest that EDGO might have in pursuing a cause of action, as was the scenario in *Louisiana World*. Swarek has failed to show that the Trustee's refusal was unjustified. *See PW Enters., Inc. v. N.D. Racing Comm'n (In re Racing Servs., Inc.)*, 540 F.3d 892, 900 (8th Cir. 2008) ("A creditor thus does not meet its burden with a naked assertion that 'the trustee's refusal is unjustified.'. . . The creditor, not the bankruptcy court, has the onus of establishing the trustee unjustifiably refuses to bring the creditor's claim.").

(3) Failure to Satisfy Other Procedural Requirements

Swarek failed to comply with other procedural requirements for derivative standing. (Adv. Dkt. #24 at 2). He admits in his Response that he failed to make a proper demand on the Trustee or obtain permission from this Court to pursue estate claims. These requirements were not unknown to him because he had previously filed and voluntarily dismissed a complaint against FSB on EDGO's behalf after failing to meet them. (Adv. Proc. 25-06002-JAW).

Derivative standing is not self-executing; it arises only after a bankruptcy court reviews the proposed claims and authorizes the third party to bring estate causes of action. Such permission is an essential gatekeeping function to "ensure that derivative standing does not risk interfering with the debtor or trustee and prevents creditors from pursuing weak claims." *On-Site Fuel Servs*., 2020 WL 3703004 at *9; *Kriet v. Quinn (In re Cleveland Imaging & Surgical Hospital, LLC)*, 26 F.4th

285, 296-97 (5th Cir. 2022) (no derivative standing where board members "never demanded" that the trustee pursue the claim).

In his Response, Swarek seeks additional time to satisfy the procedural requirements for derivate standing. Swarek's Response was filed on July 2, 2025, yet he made no effort to satisfy any of them before the Hearing. Further, the *nunc pro tunc* request, if granted, would be futile given his inability to satisfy the other factors for derivative standing. This element is not satisfied.

(4) Other Considerations

While not an enumerated element, the Court pauses to note that Swarek would not be the appropriate party to exercise derivative standing to bring claims on EDGO's behalf even if he had otherwise satisfied the elements in *Louisiana World*. Swarek's interest in the bankruptcy case arises, if at all, from his ownership of EDGO. He is not an unsecured creditor of the estate and, therefore, it appears that his interest is to reduce his personal guaranty—not necessarily to act on behalf of unsecured creditors.

Also, there is no dispute that Swarek controlled EDGO and many other related affiliates before the filing of EDGO's Bankruptcy Case and the appointment of the Trustee. His inability to observe corporate formalities has been a pervasive and extensive problem. (Bankr. Dkt. #1162). EDGO is the parent company of three affiliated debtors in this jointly administered Bankruptcy Case. (Other affiliated debtors controlled by Swarek are jointly administered under the lead case of *In re Escambia Operating Company, LLC*, Case No. 23-50491-JAW). Under Swarek's control, assets were co-mingled among all of them. Equipment purchased with EDGO's funds were titled in other affiliates' names. Swarek never practiced meaningful corporate governance. His affiliated companies drew from whatever cash accounts had available funds while not maintaining intercompany

accounting. This practice created legal issues for EDGO and its affiliates.[24] Swarek voluntarily conceded control of EDGO pending motions to appoint a chapter 11 trustee. He would not be the appropriate non-statutory fiduciary to lead EDGO through any litigation.

Also, the Court questions whether Swarek has the ability to maintain this lawsuit. Despite this Court's repeated warnings to retain counsel, he has represented himself in most contested matters in the Bankruptcy Case, and his consistent reason for appearing *pro se* has been his lack of funds. Here, Swarek had no choice but to retain counsel to represent himself and EDGO. 28 U.S.C. § 1654; FED. R. BANKR. P. 9011; MISS. BANKR. L.R. 9010-1; *K.M.A., Inc. v. Gen. Motors Acceptance Corp. (In re K.M.A., Inc.)*, 652 F.2d 398, 399 (5th Cir. Unit B 1981) ("[A] corporation as a fictional legal person can only be represented by licensed counsel . . . even when the person seeking to represent the corporation is its president and major stockholder.") Even so, he has filed pleadings acting *pro se*. An example is his response to the Motion to Dismiss, which he filed *pro se* while being represented by counsel and which his counsel subsequently asked the Court to strike. (Adv. Dkt. #22; Adv. Dkt. #25). This inability to follow bankruptcy rules and procedure is disruptive and a waste of judicial resources.[25]

At bottom, even if derivative standing were appropriate (and it is not), this Court would not be inclined to appoint the very person who was removed from the helm of the bankruptcy estate at the request of five creditors and the chapter 11 trustee of an affiliated debtor.

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[24] An example of how Swarek used the affiliated debtors can be gleaned from the Court's Order Denying Without Prejudice First Service Bank's Motion for Entry of an Order (I) Extending the Automatic Stay under 11 U.S.C. § 362 and (II) Granting Related Relief (Bankr. Dkt. #1162). There are also pending the Trustee's Motion for Substantive Consolidation of the Debtors and El Dorado Oil & Gas, Inc. (Bankr. Dkt. #1379) and Joint Motion for Order (I) Approving Initial Compromise and Settlement Pursuant to Fed. R. Bank. P. 9019 Pertaining to Sale of Certain Personal Property and Reservation of Rights and (II) Granting a Priority Administrative Expense Claim in Favor of First Service Bank in Connection with Such Settlement (Bankr. Dkt. #833).

[25] Swarek's personal bankruptcy case was dismissed because of his failure to file required documents by the deadline.

2. Swarek's Personal Claims Against MSF 2020

The Complaint does not separate derivative claims asserted on EDGO's behalf from Swarek's direct claims. The emotional distress claim could only be asserted on Swarek's behalf based on the nature of the alleged injury, a divorce. The remaining claims, however, appear to be dual natured or, in other words, they are the same claims he asserts on EDGO's behalf. Swarek apparently contends that he lost the value of his ownership interest in EDGO and incurred liability on his guaranty as a result of FSB's actions, which he imputes to MSF 2020. A question arises as to whether these remaining claims belong solely to the bankruptcy estate. *Schertz-Cibolo-Universal City, Indep. School Dist. v. Wright (In re Educators Grp. Health Tr.)*, 25 F.3d 1281, 1284 (5th Cir. 1994) ("If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate."). For purposes of the Motion to Dismiss, it is unnecessary to address this issue because the Court lacks subject matter jurisdiction over Swarek's non-debtor claims against MSF 2020, a non-debtor.[26]

As the party invoking jurisdiction, Swarek has the burden of establishing its existence. Bankruptcy subject matter jurisdiction is conferred by 28 U.S.C. § 1334(a) and extends to four types of title 11 matters: (1) cases under title 11; (2) proceedings arising under title 11; (3) proceedings arising in a case under title 11; and (4) proceedings related to a case under title 11. If subject matter jurisdiction exists, all bankruptcy matters are classified into two categories: (1) core proceedings arising under title 11 and (2) non-core proceedings that are otherwise related to a case under title 11. *See* 28 U.S.C. § 157(b). The core/non-core distinction does not itself determine whether subject jurisdiction exists but provides guidance in analyzing its existence. The bankruptcy court has the

[26] The Court examines the jurisdictional issue under Rule 12(b)(1).

statutory authority to determine all core matters. 28 U.S.C. § 157(b)(1). As to non-core matters, the bankruptcy court may not enter a final judgment but may only submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C. § 157(c).

A core proceeding is anchored in two jurisdictional grounds stated in 28 U.S.C. § 1334(b): those that "arise under" and those that "arise in" the bankruptcy case.[27] Core proceedings involve claims that invoke a substantive right provided by the Bankruptcy Code or claims that could arise only in the context of bankruptcy. An illustrative list of core proceedings is provided in 28 U.S.C. § 157(b). In contrast, non-core proceedings include the broader universe of proceedings that are not core but are nevertheless "related to" a bankruptcy case.

Swarek's direct claims do not arise under or arise in the Bankruptcy Case. The Court's subject matter jurisdiction exists only if Swarek's claims are non-core. The test for determining whether a matter is sufficiently "related to" the bankruptcy case to create subject matter jurisdiction is:

> Whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy . . . . An action is related to bankruptcy if the outcome could alter the debtors rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), *overruled on other grounds by Things Remembered, Inc. v. Petraca*, 516 U.S. 124 (1995). Under *Pacor*, most questions involving the scope of the court's non-core ("related to") jurisdiction are determined by focusing on the effect, if any, that resolution of the dispute may have on the bankruptcy estate. "Typically, litigation which is related to a bankruptcy case is litigation which will affect in some manner the property to be

[27] The Supreme Court's decision in *Stern v Marshall*, 564 U.S. 462 (2011), created a third category. The Supreme Court held that Article III of the U.S. Constitution prohibits bankruptcy courts from issuing final orders in certain matters that Congress classified as core in 28 U.S.C. § 157(b). Such claims (commonly referred to as "*Stern*" claims) are treated mostly as non-core. *See Wellness Int'l Network Ltd. v. Sharif*, 575 U.S. 665, 676 (2015).

administered by the bankruptcy trustee or the amount or priority of claims to be repaid." *In re Shuman*, 277 B.R. 638, 647 (Bankr. E.D. Pa. 2001); *see Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995) ("[B]ankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor."). Litigation between non-debtors may affect the bankruptcy estate if the litigation could potentially: (1) increase or decrease the amount of claims against the estate or (2) decrease the value of property of the estate. *Meritage Homes Corp. v. JPMorgan Chase Bank, N.A.*, 474 B.R. 526, 559 (Bankr. S.D. Ohio 2012).

> Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy. Moreover, judicial economy alone cannot justify a court's finding jurisdiction over an otherwise un-related suit.

In re Zale Corp., 62 F.3d 746, 753-54 (5th Cir. 1995).

Here, the jurisdictional question is whether the resolution of Swarek's alleged claims against MSF 2020 could have any conceivable effect on the bankruptcy estate. Swarek appears to contend that his status as a guarantor of the MS Loan could conceivably effect the size, obligations, and rights of EDGO's bankruptcy estate. He asserts claims against MSF 2020 for whatever damages he can prove that he personally suffered as a result of MSF 2020's alleged misconduct. Assuming Swarek's claims are plausible[28] and he succeeds in litigation, he might recover money or a reduction of his personal guaranty liability but the bankruptcy estate would be unaffected by the outcome of their dispute because EDGO stipulated in the Final DIP Order that the MS Loan was valid and that its prepetition debt arising from the Loan Agreement totaled not less than $53,891,253.17.[29]

[28] MSF 2020 argued that Swarek's claim are barred by claims preclusion and/or issue preclusion because of the Guaranty Judgment. Lacking subject matter jurisdiction, the Court makes no judgment as to MSF 2020's preclusion defense.

[29] Another reason precludes this Court from resolving Swarek's emotional distress claim arising from his divorce. 28 U.S.C. § 157(b)(5). "Personal injury tort or wrongful death claims shall be tried in the district in which the bankruptcy case is pending." The Bankruptcy Code does not define "personal injury tort." Courts have reached different results under 28 U.S.C. § 157(b)(5) for emotional distress claims. In *In re*

(Bankr. Dkt. #463 at 7). Swarek has failed to show that his personal claims are "related to" this Bankruptcy Case and, therefore, this Court is without subject matter jurisdiction over his claims.

CONCLUSION

The Complaint fails to show a plausible claim for relief by EDGO against MSF 2020 in light of the release provision in the Final DIP Order. Notwithstanding the release, the Complaint fails to demonstrate that Swarek has attempted to meet any of the elements necessary for derivative standing to pursue claims against MSF 2020 on behalf of EDGO. As to Swarek's personal claims against MSF, this Court lacks subject matter jurisdiction.

The defects in the Complaint as to EDGO's claims cannot be corrected by amendment. *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002); *Iqbal*, 556 U.S. at 678-79 (Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). Accordingly, the Court finds that the Complaint should be dismissed with prejudice as to EDGO's claims and without prejudice as to Swarek's claims.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss is granted with prejudice as to the claims asserted by EDGO and without prejudice as to the claims asserted by Swarek.

##END OF ORDER##

Residential Capital, LLC, in determining whether a claim for intentional infliction of emotional distress was a personal injury tort, the court asked, "whether the emotional trauma is the gravamen of the complaint or merely an element of damages." 536 B.R. 566, 573 (Bankr. S.D.N.Y. 2015).