So Ordered.

Dated: August 6, 2026

Rachel M. Blise
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:	
	Case No. 25-22893-rmb
Candie Yer Herr and Eric Zooves Herr,	Chapter 7
Debtors.	
Long Lee, Miana Lee, Unlimited Wealth LLC, David Blong, and Mee Lee,	
	Adversary No. 25-2101
Plaintiffs,	
v.	
Candie Yer Herr and Eric Zooves Herr	
Defendants.	

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS AMENDED COMPLAINT

An adversary proceeding to establish the nondischargeability of a debt under 11 U.S.C. § 523(a) requires the existence of an underlying debt under nonbankruptcy law. The plaintiffs argue that the debtor-defendants owe them a prepetition debt based on various theories of liability under Wisconsin law. With the exception of one contingent claim against Ms. Herr, each of the plaintiffs'

purported state law claims against the defendants suffers from pleading deficiencies. Without a viable claim to create an underlying debt in this case, the plaintiffs cannot seek a declaration of nondischargeability as to Mr. Herr. Accordingly, the Court will dismiss the Amended Complaint without prejudice as to Mr. Herr, and the Court will allow the case to proceed against Ms. Herr based on the Lee Parties' contingent claim for sanctions. The Court also will allow the plaintiffs one final chance to amend their complaint if they believe they have viable claims against Mr. Herr.

BACKGROUND

Candie Herr and Eric Herr (together, the "Herrs") filed a voluntary chapter 7 bankruptcy petition on May 20, 2025. (Case No. 25-22893, Dkt. No. 1.) Plaintiffs Long Lee, Miana Lee, Unlimited Wealth LLC, David Blong, and Mee Lee (collectively, the "Lee Parties") initiated this adversary proceeding against the Herrs on August 18, 2025, and they filed the operative Amended Complaint on April 1, 2026. (Dkt. Nos. 1, 33.) For purposes of the pending motion to dismiss, the Court accepts as true the following facts pleaded in the Amended Complaint.

In 2019, the Lee Parties collectively invested more than $2,000,000 with Kay Yang based on her representations about her work as a hedge fund manager and investment advisor who could provide substantial returns on the Lee Parties' investments. (Amended Complaint, Dkt. No. 33 ("Am. Compl.") ¶ 21.) The same year, the Wisconsin Department of Financial Institutions Division of Securities ("Department") began investigating Yang for violations of the Wisconsin Uniform Securities Law. (Am. Compl. ¶ 22.) This investigation culminated in a July 13,

2020 consent order finding that Yang's purported hedge funds were never funded and had no investors. (Am. Compl. ¶ 24.) The Department and Yang entered into a payment agreement requiring Yang to pay restitution to the victims of her scheme, including the Lee Parties. (Am. Compl. ¶ 25.) Yang did not make payments to the Lee Parties under this agreement. (Am. Compl. ¶ 26.)

On April 5, 2021, the Lee Parties sued Yang in the Circuit Court for Ozaukee County, Wisconsin for various statutory violations relating to her and her entities' misuse of investor funds. (Am. Compl. ¶ 41.) The Ozaukee County court granted summary judgment in favor of the Lee Parties in the following amounts: $1,172,145.05 for Long Lee and Miana Lee, $448,811.78 for Unlimited Wealth LLC, and $822,145.11 for David Blong and Mee Lee. (Am. Compl. ¶¶ 46-49.)

Separately, on April 13, 2022, both the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") initiated lawsuits against Yang in the United States District Court for the Eastern District of Wisconsin for violations of federal securities law. (Am. Compl. ¶¶ 44-45.) The District Court entered default judgments against Yang in the CFTC case on June 5, 2023 and in the SEC case on June 21, 2023. (Am. Compl. ¶¶ 50-51.)

On March 29, 2021, Yang signed an offer to purchase the property located at 11301 West Lake Park Drive, Milwaukee, Wisconsin (the "Property") for $1,500,000. (Am. Compl. ¶ 30.) Ms. Herr worked with Yang to complete the purchase of the property, including by forming Enduring Love International Center LLC ("Enduring Love") as a separate entity to hold title to the Property. (Am. Compl. ¶ 31.) Ms.

Herr is the sole member of Enduring Love, and she exercises complete control over the entity. (Am. Compl. ¶ 36.) Mr. Herr has held himself out as a pastor of a church that operates out of the Property. (Am. Compl. ¶ 38.)

In June 2021, Yang provided the funds to purchase the Property, and the Property was titled in the name of Enduring Love. (Am. Compl. ¶¶ 32, 34.) On August 22, 2022, Yang filed a UCC Financing Statement against the Property asserting that Enduring Love owes Yang and her company, C&K Associates, a debt in the amount of $100,000,000 and that the debt is secured by the Property. (Am. Compl. ¶ 39.) The Lee Parties allege that through their involvement in the purchase of the Property, the Herrs intended to assist Yang with the dissipation of her assets to avoid paying creditors. (Am. Compl. ¶ 40.)

On May 24, 2022, the Lee Parties sued Yang and several other defendants, including Enduring Love (but not including the Herrs), in the Ozaukee County Circuit Court alleging that Yang fraudulently transferred funds to the defendants. (Am. Compl. ¶¶ 52-53.) On September 8, 2022, the court in that case entered an order (the "Attachment Order") that granted default judgment in favor of the Lee Parties and against Enduring Love and other defendants in the total amount of $2,374,290.16. (Am. Compl. ¶ 55 & Ex. 3.) The Attachment Order provides that the Property, among other real property, "is attached by a lien in favor of" the Lee Parties, and that "[t]his attachment may be filed with the appropriate Register of Deeds." (Ex. 3 to Am. Compl. at 4-5.) The Lee Parties do not allege in their Amended Complaint that they filed the Attachment Order with the Register of

Deeds for Milwaukee County, Wisconsin, where the Property is located, or that they filed a lis pendens against the Property with the Milwaukee County Register of Deeds. Counsel for the Lee Parties also agreed during a hearing on July 8, 2026 that the Lee Parties did not have an ownership interest in the Property based on the Attachment Order. Rather, they appear to claim they had an unperfected lien interest in the Property contingent on their success in a later enforcement proceeding.

The Lee Parties then sued Enduring Love in the Circuit Court for Milwaukee County, Wisconsin to enforce the Attachment Order. On June 6, 2023, the Milwaukee County court entered a Default Judgment and Execution Against Defendant Enduring Love International Center LLC. (Am. Compl. Ex. 4.) The order provides that the Lee Parties "may cause this order to be delivered to the appropriate legal authorities to execute this order against the Property without any right of redemption." (*Id.*) It also provides that "[t]itle to the Property is transferred to the [Lee Parties], effective immediately." (*Id.*) The Lee Parties allege that the Milwaukee County Sheriff executed on the Property on April 23, 2024 and conveyed it to the Lee Parties, and that the Lee Parties recorded documents related to the conveyance with the Milwaukee County Register of Deeds. (Am. Compl. ¶ 63.)

In the meantime, Enduring Love obtained a loan secured by a mortgage on the Property. On September 14, 2022, Ms. Herr, on behalf of Enduring Love, applied for a mortgage loan with Wilshire Quinn Income Fund REIT, LLC

("Wilshire Quinn"). (Am. Compl. ¶ 68.) Wilshire Quinn made a loan in the amount of $350,000 to Enduring Love on October 12, 2022, and Enduring Love granted a mortgage on the Property to Wilshire Quinn. (Am. Compl. ¶¶ 71-72.) The Herrs also gave Wilshire Quinn personal guarantees for the loan. (Am. Compl. ¶ 74.) The Herrs did not disclose the existence of the Attachment Order to Wilshire Quinn in connection with the loan process. (Am. Compl. ¶ 69.) The Lee Parties allege that the mortgage was unnecessary and had nothing to do with owning or maintaining the Property, but instead was taken for the purpose of interfering with the Lee Parties' judgment concerning the Property. (Am. Compl. ¶¶ 75-77.)

On October 14, 2022, two days after causing Enduring Love to grant the mortgage to Wilshire Quinn, Ms. Herr signed a deed on behalf of Enduring Love purporting to transfer the Property from Enduring Love to a foreign trust called 7-Fold Return Trust, in which Ms. Herr claims a beneficial interest. (Am. Compl. ¶ 83.)

According to the Lee Parties, Enduring Love and the Herrs defaulted on their loan obligations to Wilshire Quinn and made no payments to the lender. (Am. Compl. ¶¶ 89-90.) On May 13, 2024, Wilshire Quinn filed a foreclosure action in the Milwaukee County Circuit Court against Enduring Love, the Herrs, 7-Fold Return Trust, the Lee Parties, and other persons with a potential interest in the Property. Milwaukee County Case No. 2024-CV-3866 (the "Foreclosure Litigation"). On February 13, 2025, the Lee Parties filed a counterclaim against Wilshire Quinn and cross claims against Enduring Love and the Herrs in the Foreclosure Litigation.

(Am. Compl. Ex. 1.) As relevant here, the Lee Parties asked the state court to declare that their interest in the Property is superior to the interest of Wilshire Quinn, and they asserted claims for "Public Policy (Equitable Relief – Fruit of Fraud)", "Loan Fraud", and "Statutory Fraud" against the Herrs. (*Id.*)

Believing the actions of Enduring Love in mortgaging and transferring the Property to have been a violation of the Ozaukee County court's September 8, 2022 order, the Lee Parties went back to the Ozaukee County court and requested that the court find Enduring Love and Ms. Herr to be in contempt of the order and that the court impose sanctions for their contempt. (Am. Compl. ¶ 93.) The parties submitted briefs to the Ozaukee County court, and the judge took the matter under advisement in March 2025. (*Id.* ¶ 95.)

On May 20, 2025, the Herrs filed a chapter 7 bankruptcy petition. The state court had not yet issued a decision on the motion for sanctions, and it does not appear that the Herrs informed the state court of their bankruptcy filing. On May 22, 2025, the Ozaukee County court issued a decision and order finding Enduring Love and Ms. Herr in contempt. (Am. Compl. Ex. 5.) The court ordered Enduring Love and Ms. Herr to pay $350,000 to restore the Lee Parties to their September 8, 2022 position. The court also ordered that the payment be made by July 21, 2025 and "if payment is not made by that date an additional sum of $2,000 per day is imposed until the sum is paid." (*Id.* at 4.)

In this Court, the Lee Parties filed an adversary complaint on August 18, 2025 requesting that the Court declare the debt owed to them by Ms. Herr "that

arises from a contempt sanction order entered by the Ozaukee County Circuit Court" to be not dischargeable. (Dkt. No. 1 at 8-10.)[1] Because the May 22, 2025 order was entered after the petition date, the Court previously concluded that the post-petition order did not supply the basis for the underlying debt required in a nondischargeability action under § 523(a) and dismissed the complaint with leave to amend. (Dkt. No. 29.)

The Lee Parties' Amended Complaint in this case pleads a single count against the Herrs seeking a declaration of nondischargeability. (Am. Compl. at 16-21.) After quoting the language of 11 U.S.C. § 523(a)(2)(A), (4), and (6), the Lee Parties allege the Herrs violated various Wisconsin civil and criminal statutes, which violations the Lee Parties claim give rise to an underlying debt owed to the Lee Parties by the Herrs.

The Herrs moved to dismiss the Amended Complaint.[2] (Dkt. No. 35.) In their motion, the Herrs raise several arguments regarding the Amended Complaint's pleading deficiencies, including that the Amended Complaint fails to plead a prepetition debt or claim. (Dkt. No. 35.) On April 13, 2026, the Court issued an order requiring the Lee Parties to file a response to the motion to dismiss.

[1] The initial complaint also included a claim seeking a declaration that the Property is not property of the bankruptcy estate. (Dkt. No. 1 at 10-11.) The Court previously dismissed that claim as moot, with consent of the Lee Parties, based on developments in the main bankruptcy case.

[2] In response to the Amended Complaint, the Herrs also filed a document they called a "Protective Answer." (Dkt. No. 34.) Because the Herrs are proceeding pro se, the Court has considered their motion to dismiss despite the procedural irregularity of filing a motion to dismiss and an answer.

The Court held a hearing on the motion to dismiss on July 8, 2022, and accepted a supplemental brief from the Lee Parties.

JURISDICTION

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and the order of reference from the district court pursuant to 28 U.S.C. § 157(a). *See* 84-1 Order of Reference (E.D. Wis. July 10, 1984) (available at https://www.wieb.uscourts.gov/general-orders) (last visited August 5, 2026). The determination as to the dischargeability of particular debts is a core proceeding over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(I) and 1334.

DISCUSSION

Federal Rule of Civil Procedure 12(b)(6), which is applicable in bankruptcy adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012(b), provides that a complaint may be dismissed based on "failure to state a claim upon which relief can be granted." The Herrs argue that the Lee Parties have not stated a claim for nondischargeability because the Herrs do not owe the Lee Parties an underlying debt. The Lee Parties respond that they need not identify with certainty the underlying cause of action at this stage in the litigation, and that they have sufficiently identified several causes of action for which the Herrs could be liable.

I. PLEADING STANDARDS

A. Federal Pleading Requirements Generally

Federal Rule of Civil Procedure 8(a), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7008, requires a plaintiff in federal court to plead "a short and plain statement of the claim showing that the pleader is entitled

to relief." Fed. R. Civ. P. 8. Rule 8 applies in a bankruptcy court adversary proceeding. Fed. R. Bankr. P. 7008.

The Supreme Court addressed the federal pleading standards under Rule 8 in its seminal decisions of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In *Twombly*, the Court observed that the purpose of Rule 8's pleading standard is to give the defendant both "fair notice of what the . . . claim is" as well as "the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quotation omitted); *see id.* at 555 n.3 ("Rule 8(a)(2) still requires a 'showing' . . . of entitlement to relief."). *See also Bissessur v. Indiana Univ. Bd. of Trs.*, 581 F.3d 599, 603 (7th Cir. 2009) ("Our system operates on a notice pleading standard; *Twombly* and its progeny do not change this fact.").

In *Iqbal*, the Supreme Court held that under Rule 8 a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570). A claim has "facial plausibility" 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.* (citing *Twombly*, 550 U.S. at 556).

In addition, the heightened requirements imposed by Civil Rule 9(b), made applicable here by Bankruptcy Rule 7009, apply to claims grounded in fraud. Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). "A complaint which

fails to identify the fraudulent statements or the reasons why they are fraudulent does not satisfy the particularity requirements of Rule 9(b)." *Iwaszczenko v. Neale (In re Neale)*, 440 B.R. 510, 518 (Bankr. W.D. Wis. 2010) (citing *Skycom Corp. v. Telstar Corp.,* 813 F.2d 810, 818 (7th Cir. 1987)).

B. Pleading Standards in Nondischargeability Cases

Section 523(a) of the Bankruptcy Code excepts from discharge certain categories of debts. 11 U.S.C. § 523(a). The term "debt" is defined as "liability on a claim." 11 U.S.C. § 101(12). The term "liability" is not defined in the Bankruptcy Code, but dictionaries generally define the term as the state of being responsible or obligated by law. *See, e.g.*, *Liability*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/liability (last visited August 5, 2026) ("something for which one is liable"); *Liable*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/liable (last visited August 5, 2026) ("obligated according to law or equity"); *Liability*, Black's Law Dictionary (11th ed. 2019) ("The quality, state, or condition of being legally obligated or accountable[.]"). A "claim" is simply a "right to payment." 11 U.S.C. § 101(5). Applying those definitions, the debtor must first be obligated by law to pay the creditor for the debt to be excepted from discharge under § 523(a).

The court in *S & L Enters. I, LLC v. Eisaman (In re Eisaman)*, 387 B.R. 219 (Bankr. N.D. Ind. 2008), explained:

> The provisions of § 523(a) do not make a debtor liable to a creditor. They merely determine whether an existing liability is a dischargeable one. That liability – the debt – is determined by non-bankruptcy law. Thus, the first step in determining whether or not a particular debt is dischargeable is to make

> certain that there is, indeed, a debt owing by the debtor to the creditor. Without such an obligation, there is no debt which could be excepted from the scope of the debtors' discharge.

Id. at 224.

Bankruptcy courts widely recognize this fundamental principle that an adversary complaint under § 523 must plead the existence of an underlying debt. *See Go-Mart, Inc. v. Bazell (In re Bazell)*, No. 25-50346, 2026 WL 570467, at *3 (Bankr. S.D. Ohio Feb. 27, 2026) ("[F]irst [the court] must determine whether [the creditor] has adequately pleaded facts that, if true, would establish that [the debtor] owes it a debt, which is a required element for both causes of action [for a declaration of nondischargeability]."); *Feldman v. Pearl (In re Pearl)*, 577 B.R. 513, 529 (Bankr. E.D. Ky. 2017) ("A claim under § 523(a)(4) has the same fundamental prerequisite as a claim under § 523(a)(2)(A): the existence of a debt."); *Orumwense–Lawrence v. Osula (In re Osula)*, 519 B.R. 361, 377 (Bankr. D. Mass. 2014) ("A plaintiff is required to establish both that he has a valid claim against a debtor *and* that the claim should not be discharged in bankruptcy.") (emphasis in original); *Le Van–Voegler v. Myrtle (In re Myrtle)*, No. 12-51281, 2013 WL 6670548, at *15 (Bankr. W.D. Va. Dec. 17, 2013) ("The existence of a debt is an essential element of Plaintiffs' section 523(a)(2)(A) action."); *Allen v. Scott (In re Scott)*, 481 B.R. 119, 138 (Bankr. N.D. Ala. 2012) ("Whether a plaintiff has standing to object to the dischargeability of a debt is, of course, based on whether that party *has* a debt to object to."); *Birriel v. Odeh (In re Odeh)*, 431 B.R. 807, 811 (Bankr. N.D. Ill. 2010) ("First, the creditor must prove a 'debt' under applicable non-bankruptcy law. Second, the creditor must show that the debt falls within one of the categories listed

in § 523(a)."); *Purviance v. Region 1 Self Reliance Program (In re Purviance)*, No. 04-20665-TLM, 2005 WL 2178802, at *3 (Bankr. D. Idaho June 9, 2005) ("In general, before the Court can consider whether a debt should be excepted from discharge under one of the subsections of § 523(a), the creditor must prove that the debtor is indebted to it.").

A claim seeking a declaration of nondischargeability therefore requires a plaintiff to plead sufficient facts to support "two separate and distinct causes of action"—one on the underlying debt under nonbankruptcy law and the other on the dischargeability on that debt under the applicable subsection of § 523(a). *Resolution Trust Corp. v. McKendry (In re McKendry)*, 40 F.3d 331, 337 (10th Cir. 1994). The plaintiff creditor must allege facts supporting an inference that the debtor is liable to the creditor under nonbankruptcy law for the misconduct alleged *and* sufficient facts supporting an inference that the resulting debt is not dischargeable under § 523(a).[3]

The Lee Parties offer several arguments why their pleading meets this standard without an analysis of their underlying state-law claims. First, they

[3] Some case law appears to gloss over the requirement to plead and prove the underlying debt, but they do not jettison it entirely. In some cases, courts collapse similar tests for fraud claims into a single analysis because the elements of the nonbankruptcy claim for fraud and the elements of a nondischargeability claim under § 523(a)(2)(A) often are substantially similar. *See, e.g.*, *Newman v. Donnell (In re Donnell)*, No. 10-12517, 2011 WL 2294186 at *2 (Bankr. D. Colo. 2011) ("Because elements of common law fraud liability under state law are virtually identical to the elements of fraud under § 523(a)(2)(A) of the Bankruptcy Code, proof of the underlying debt is often coincident with proof of nondischargeability under § 523(a)(2)(A)."), *aff'd in part*, 479 B.R. 592 (D. Colo. 2012). In other cases, the complaint or evidence may not be sufficient to support a nondischargeability claim, so the court need not address whether there exists an underlying debt. *Holton v. Zaidel (In re Zaidel)*, 553 B.R. 655, 658 n.1 (Bank. E.D. Wis. 2016) ("Because the court finds that the alleged debt is dischargeable, regardless of the amount, it need not determine any remaining issues of state law, such as liability or the amount of damages, if any.").

argue that the Herrs' invocation of the Fifth Amendment in response to the Lee Parties' cross claims in the Foreclosure Litigation is sufficient for the Court to draw an inference that the Herrs are liable to them. (Dkt. No. 38 at 9.) It is true that in civil cases, unlike in criminal cases, a litigant's invocation of their Fifth Amendment privilege against self-incrimination can lead to an adverse inference as to the facts relevant to the invocation. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them[.]"). But that evidentiary rule does not displace the relevant pleading standards. "[A] judgment imposing liability cannot rest solely upon a privileged refusal to admit or deny at the pleading stage." *Nat'l Acceptance Co. of Am. v. Bathalter*, 705 F.2d 924, 932 (7th Cir. 1983); *see also LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 390 (7th Cir. 1995) ("Silence is a relevant factor to be considered in light of the proffered evidence, but the direct inference of guilt from silence is forbidden."). The mere fact that the Herrs invoked the Fifth Amendment does not excuse the Lee Parties from identifying a legal basis for the Herrs' purported liability.

Second, the Lee Parties point to the Supreme Court's decision in *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 355 (2016), in which the Court rejected the notion that the separate subsections of 11 U.S.C. § 523(a) are mutually exclusive, and the same conduct may lead to a finding of nondischargeability under multiple subsections. *Id.* at 363. Fair enough. It is by now not controversial that the same underlying

prepetition debt may be excepted from discharge under more than one subsection of § 523(a), but there must be an underlying debt to except from the discharge.

Third, the Lee Parties argue that, under Seventh Circuit precedent, they need not plead specific theories at this point in the litigation. (Dkt. No. 38 at 10 (citing *In re Generac Solar Power Sys. Mktg., Sales Pracs., & Prods. Liab. Litig.*, 735 F. Supp. 3d 1047, 1052 (E.D. Wis. 2024) (noting that "a plaintiff does not need to plead facts that correspond to every element of a cause of action")).) The Seventh Circuit has, indeed, held that "the complaint need not identify a legal theory, and specifying an incorrect theory is not fatal." *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992). However, the defendant and the court must be able to understand and evaluate the legal basis for the claim. *See Taylor v. Salvation Army Nat'l Corp.*, 110 F.4th 1017, 1028 (7th Cir. 2024) ("[Assessing the sufficiency of a complaint] requires that we understand the statutory text on which the claims of the complaint are predicated. If the cause of action relies on a broad-gauged statute, more factual particularity may be required in the complaint to give adequate notice of the gravamen of the plaintiffs' grievance.").

"Implausibility" under *Iqbal* exists when "the complaint fails to include essential facts about the elements of a claim." *In re Neale*, 440 B.R. 510, 518 (Bankr. W.D. Wis. 2010). Thus, it is "necessary to determine the elements of the causes of action asserted in the complaint and to compare those elements with the plaintiff's allegations." *Id.* at 519. "[B]ecause a plaintiff does not need to plead facts that correspond to every element of a cause of action, a court may not reject a legal

theory at the pleading stage simply because the plaintiff did not plead a fact that he must prove to prevail on that theory at trial." *Generac Solar Power Sys.*, 735 F. Supp. 3d at 1053. "Still, on a motion to dismiss, a court can resolve pure legal questions that relate to the pleaded facts." *Id.* at 1052.

One purpose of notice pleading is to "give the defendant fair notice of what the . . . claim is . . . ." *Twombly*, 550 U.S. at 555; *see also id.* at 555 n.3 (noting that a plaintiff must give "fair notice" of the "nature of the claim"). A plaintiff must put the defendant on notice whether the claim is based on, for example, breach of contract or based on fraud. The same set of facts may support one cause of action but not the other. The defendant is entitled to know whether she must defend against a claim that she breached a contract or a claim that she committed fraud.

It is up to the plaintiff to tell the court what the nature of his claim is and why his complaint has legal merit. Courts are not themselves required to identify the possible causes of action that might be supported by the facts in the complaint. *See, e.g.*, *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) ("Our system of justice is adversarial, and our judges are busy people. If they are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff's research and try to discover whether there might be something to say against the defendants' reasoning."). If the causes of action identified by a plaintiff are not legally cognizable based on the facts pleaded in the complaint, then the complaint should be dismissed, regardless of whether there might exist some other cause of action

supported by the same facts but not identified in the complaint or even in the plaintiff's response to the defendant's motion to dismiss.

II. THE LEE PARTIES' CLAIMS

In describing the Herrs' alleged wrongful conduct vis-à-vis the Lee Parties, the Amended Complaint includes scattered references to a panoply of statutes and legal theories. These include a claim under property-related statutes Wis. Stat. §§ 708.01 and 943.84(1) (Resp. Br. at 4 (citing Am. Compl. ¶¶ 66, 110, 112, 125)); a claim for theft by fraud under Wis. Stat. §§ 895.446 and 943.20(1)(d) (Am. Compl. ¶¶ 112, 115); claims asserted by reference to the Lee Parties' cross claims against the Herrs in Wilshire's Milwaukee Circuit Court Case No. 24-CV-3866 (Am. Compl. ¶¶ 10-18); and conspiracy claims under Wis. Stat. § 134.01 and Wisconsin common law (Am. Compl. ¶¶ 113-14, 127). None is legally sufficient to state a claim under Wisconsin law, with the exception of the Lee Parties' contingent claim against Ms. Herr.

A. Wis. Stat. § 134.01

The Lee Parties first cite Wis. Stat. § 134.01. (Dkt. No. 38 at 2-3.) That statute provides:

> Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his or her will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500.

Wis. Stat. § 134.01. "The statute is a criminal statute, but Wisconsin courts have found an implied private right of action for victims of such conspiracies." *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011), as amended (Jan. 3, 2012) (citing *Radue v. Dill*, 74 Wis.2d 239, 246 N.W.2d 507, 511 (1976)).

The Lee Parties point to the portion of the statute prohibiting conspiracies "for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession." (Dkt. No. 38 at 2 ("The statute prohibits conspiracies between two or more people to 'willfully or maliciously injure the reputation, trade, business or profession of another.'" (quoting *Virnich*, 664 F.3d at 212)).) The elements of such a claim are: "(1) the defendants acted together; (2) with a common purpose to injure the plaintiff's reputation or business; (3) with malice; and (4) the plaintiff suffered financial harm." *Virnich*, 664 F.3d at 213.

The Lee Parties' claim falls short on the second element. They plead that the Herrs acted together to injure them, but the statute requires an injury to their "reputation, trade, business or profession." Wis. Stat. § 134.01. The Lee Parties did not plead facts suggesting that they had a "reputation, trade, business or profession" that was or would be injured by the alleged conspiracy. Therefore, the Lee Parties have not pleaded sufficient facts to maintain a claim under Wis. Stat. § 134.01 as described in their response brief.

B. Wis. Stat. § 939.31

The Lee Parties next cite Wis. Stat. § 939.31. (Dkt. 38 at 3.) Section 939.31 is also a criminal statute that provides, "[W]hoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that

crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both . . . ." Unlike their purported claim under § 134.01, the Lee Parties do not point to any case law suggesting there is an implied private cause of action under § 939.31. *See Cohn v. Zippel*, 12 Wis. 2d 258, 259, 107 N.W.2d 184, 185 (1961) (noting that an action for criminal conspiracy is different from an action for civil conspiracy). The Lee Parties do not explain how the Herrs' alleged violation of the criminal statute means that the Herrs owe them a debt under Wisconsin law.

C. Civil Conspiracy

The Lee Parties next rely on common law civil conspiracy to establish an underlying debt. (Dkt. No. 38 at 3-4.) "In Wisconsin civil conspiracy has been defined as a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful." *Radue v. Dill*, 74 Wis. 2d 239, 241, 246 N.W.2d 507, 509 (1976). "[C]ivil conspiracy is not a separate cause of action, but rather a theory of liability." *Ferris v. Location 3 Corp.*, 2011 WI App 134, ¶ 9, 337 Wis. 2d 155, 163-64, 804 N.W.2d 822, 826. The legal theory is a mechanism used to hold multiple individuals accountable for an underlying civil wrong when those individuals acted in concert. *Id.* For liability to attach to any of the conspirators, there must be an underlying wrong committed by one of the conspirators. *Onderdonk v. Lamb*, 79 Wis. 2d 241, 247, 255 N.W.2d 507, 510 (1977) (holding that a complaint must allege "the wrongful act or acts done pursuant" to the conspiracy).

The Lee Parties argue that "[s]imilar to *Ferris*, the Amended Complaint sufficiently pleads that the Herrs' acted in concert to achieve their desired result." (Dkt. No. 38 at 4.) But it is not enough to plead that the Herrs acted in concert to achieve a certain result; there must also be an underlying wrongful act for which one of them could be legally liable to the Lee Parties. Even if their actions seem unjust, improper, or even illegal under criminal law, the Herrs cannot be civilly liable to the Lee Parties simply because they acted together unless the Lee Parties have a cognizable legal claim against at least one of them.

As explained herein, the only cognizable legal claim against either of the Herrs is the Lee Parties' contingent claim against Ms. Herr for sanctions. The Lee Parties do not rely on this claim for Mr. Herr's liability under state law. Instead, the Lee Parties state that they rely only on "the claims asserted by the Lee Parties against Candie Herr and Eric Herr in [the Foreclosure Litigation]." (Dkt. No. 46 at 3.) The Lee Parties have identified no other underlying wrong that would render either of the Herrs liable for common law civil conspiracy.

D. Wis. Stat. § 943.84(1)

The Lee Parties next say that Wis. Stat. § 708.01 and Wis. Stat. § 943.84(1) are "statutes that provide a basis for determining that the Herrs' actions to obtain the Wilshire loan and hinder the Lee Parties' collection efforts were wrongful acts." (Dkt. No. 38 at 4 (citing Am. Compl. ¶¶ 66, 110, 112, 125).)

Section 708.01 addresses the legal effect of a mortgage on property. It provides that "[a] mortgage on real property creates a lien on the property mortgaged; except for the lien and subject to s. 708.11, the mortgagor retains the

interest that the mortgagor had at the time of mortgage until that interest is divested by some later act." Wis. Stat. § 708.01. The Lee Parties do not explain whether or how the Herrs violated this statute, nor do they explain how the statute gives them a cause of action against the Herrs.

Section 943.84(1) is a criminal statute addressing the transfer of encumbered property. It provides, "Whoever, with intent to defraud, conveys real property which he or she knows is encumbered, without informing the grantee of the existence of the encumbrance may be penalized as provided in s. 943.91." Wis. Stat. § 943.84(1). The Lee Parties allege in the Amended Complaint that "Mr. and Ms. Herr violated this statute when they failed to disclose the 2022 judgment in Ozaukee County Case No. 22-CV-162 to Wilshire." (Am. Compl. ¶¶ 110-11; *see also* Am. Compl. ¶ 125.) The Lee Parties do not explain how the Herrs' alleged violation of the criminal statute gives them a civil cause of action against the Herrs.

E. Wis. Stat. § 706.13

The Lee Parties next cite Wis. Stat. § 706.13. (Dkt. No. 38 at 4.) Section 706.13 codifies the common law cause of action for slander of title. *See* Wis. Stat. § 706.13; *Kensington Dev. Corp. v. Israel*, 142 Wis. 2d 894, 902, 419 N.W.2d 241, 244 (1988). The statute creates liability for "any person who submits for filing, entering in the judgment and lien docket or recording, any lien, claim of lien, lis pendens, writ of attachment, financing statement or any other instrument relating to a security interest in or the title to real or personal property, and who knows or should have known that the contents or any part of the contents of the instrument are false, a sham or frivolous." Wis. Stat. § 706.13(1). The statute also imposes

liability for any person who causes another person to act in such a manner. Wis. Stat. § 706.13(2). The Amended Complaint does not once mention Wis. Stat. § 706.13 or a cause of action for slander of title. (*See generally* Am. Compl.) If the debt that the Herrs owe to the Lee Parties is based on a slander of title claim, the Lee Parties waited until their response brief to say so, and even then not explicitly. If the Lee Parties intend to prove that the underlying debt to be excepted from discharge is based on slander of title, the Amended Complaint does not give the Herrs fair notice of the nature of that claim and therefore does not satisfy Rule 8.

Even if the Amended Complaint could be construed to give fair notice of such a claim, the Amended Complaint does not plead facts that would support a slander of title claim under Wis. Stat. § 706.13. The elements of such a claim are: (1) a person submitted for recording an "instrument relating to a security interest in or the title to real or personal property"; (2) that person knew or should have known that some or all of the contents of the instrument "are false, a sham or frivolous"; (3) the party claiming slander of title has an interest in the property; and (4) that party's title was impaired by the recording of the instrument. Wis. Stat. § 706.13(1); *see also Bank of New York Mellon v. Nelson*, 2026 WI App 27, ¶ 25 (unpublished per curiam).

The Lee Parties must have had a legal interest in the Property at the time of the mortgage to Wilshire Quinn to support a claim for slander of title. The state court entered the Attachment Order in Ozaukee County Case No. 2022-CV-162 ordering that the Lee Parties were "entitled to a Writ of Attachment" for the

Property and that the Property was "attached by a lien" in favor of the Lee Parties that "may be filed with the appropriate Register of Deeds." (Am. Compl. Ex. 3.) The Lee Parties did not record any documents purporting to perfect the lien before the mortgage to Wilshire Quinn was granted. Nor do the Lee Parties allege that a state court issued a writ of attachment to the sheriff consistent with chapter 811 of the Wisconsin Statutes before the mortgage. *See* Wis. Stat. § 811.02 (a writ of attachment "shall be directed to the sheriff of some county in which the property of the defendant is supposed to be, and shall require the sheriff to attach all the property of the defendant within the county or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses"). The Lee Parties seem to agree that the Attachment Order did not give them an ownership interest in the Property. They appear to argue that the Attachment Order instead somehow gave them an unperfected lien on the Property contingent on success in a later enforcement action. They did not file that "enforcement action" in the Milwaukee County Circuit Court until June 6, 2023, some nine months after the Attachment Order was entered and nearly eight months after the mortgage was recorded. (Am. Compl. ¶ 61.) The Lee Parties' single sentence in their response brief regarding their purported claim under Wis. Stat. § 706.13(2) does not explain how such a contingent interest that was not enforced for many months after the mortgage at issue was sufficient to support a slander of title claim.

F. Wis. Stat. §§ 895.446 and 943.20(1)(d)

The Lee Parties next argue that they have a claim against the Herrs based on Wis. Stat. §§ 895.446 and 943.20(1)(d). (Dkt. No. 38 at 5-8.) Taken together, the

statutes create a civil cause of action for criminal theft by fraud. Section 943.20(1)(d) is a criminal theft statute which, in relevant part, provides criminal penalties for whoever "[o]btains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made." Wis. Stat. § 943.20(1)(d). Section 895.446, which creates the related civil cause of action, provides: "(1) Any person who suffers damage or loss by reason of intentional conduct . . . prohibited under s. . . . 943.20 . . . has a cause of action against the person who caused the damage or loss." Wis. Stat. § 895.446.

The elements of a claim for theft by fraud are: (1) the defendant made a false representation ***to the plaintiff***; (2) the defendant knew the representation was false; (3) the defendant intended to deceive and defraud ***the plaintiff***; (4) ***the plaintiff*** was deceived; (5) ***the plaintiff*** was defrauded; and (6) the defendant obtained money through the sale of property ***to the plaintiff***. *Pagoudis v. Keidl*, 2023 WI 27, ¶ 15, 406 Wis. 2d 542, 555-56, 988 N.W.2d 606, 613 (citing *Ferris v. Location 3 Corp.*, 2011 WI App 134, ¶ 8, 337 Wis. 2d 155, 804 N.W.2d 822) (emphasis added); *see also* Wis. JI-Civil 2419.

The Amended Complaint alleges that the Herrs made a false representation to Wilshire Quinn (*see* Am. Compl. ¶ 69), but the Lee Parties do not allege that the Herrs made any false representation ***to them***. Therefore, the Amended Complaint does not plead a claim for theft by fraud.

The Lee Parties cite two criminal cases in support of their argument that the Herrs nevertheless can be liable to them for theft by fraud. (Dkt. No. 38 at 5-6 (citing *State v. O'Neil*, 141 Wis. 2d 535, 416 N.W.2d 77 (Wis. Ct. App. 1987), and *State v. Ploeckelman*, 2007 WI App. 31, 299 Wis. 2d 251, 729 N.W.2d 784).) Neither of these cases provides the necessary support for their argument.

In *State v. O'Neil*, the Wisconsin Court of Appeals addressed the narrow issue whether § 943.20(1)(d) requires the recipient of the funds received through misrepresentation to be the same person as the person who made the misrepresentation. *O'Neil*, 141 Wis. 2d at 536 ("We are asked only to decide the narrow issue of whether the defendant . . . 'obtains title to property' if she arranges for the fraudulent payment of money to a corporation of which she is the interim director, but does not herself personally receive that money."). There, the criminal defendant altered records, causing her company to overbill a county agency. *Id.* The defendant's company received the fraudulently-obtained funds, not the defendant herself. *Id.* The defendant argued that because the misappropriated funds did not pass to her, she did not "obtain" title within the meaning of the statute. *Id.* at 539. The Court held that to be liable under § 943.20(1)(d), the person making the misrepresentation need not be the person who receives the funds from the person defrauded. *Id.* at 542 ("[T]o sustain a charge of obtaining title to property by false pretenses, the title to property of another need not be obtained by the accused for herself. It is sufficient if, as a result of her false representations, the property is delivered either for her own benefit or for the benefit of another."). The

legal principle that one can be liable for fraud even if another person receives the fraudulently-obtained property does not help the Lee Parties. In *O'Neil*, the recipient of the misrepresentation and the person damaged by the fraud were the same, i.e., the county agency. Here, in contrast, the Lee Parties allege that the Herrs made a misrepresentation to Wilshire Quinn by failing to disclose the Attachment Order and that the Lee Parties were damaged by that fraud.

State v. Ploeckelman is similarly unhelpful. In that case, a dairy farmer was aware that the trucking company picking up his milk was mixing milk samples to make the farmer's milk appear higher quality, thereby obtaining a higher price from the purchaser of the milk. *Ploeckelman*, 2007 WI App 31, ¶¶ 2-6. The farmer argued that he could not be liable under § 943.20(1)(d) because he made no affirmative statement or act to the milk purchaser regarding the quality of his milk. *Id.* ¶ 15. The Court of Appeals held that the dairy farmer had a duty to disclose the tampering and his failure to correct the purchaser's false impression of the milk's quality therefore constituted a representation. *Id.* ¶¶ 18-20.

The Lee Parties cite *Ploeckelman* for the proposition that omissions can be representations for purposes of civil liability. (Dkt. No. 38 at 6.) They may be right about this. But even assuming that omissions can render a civil defendant liable under §§ 895.446 and 943.20(1)(d) and that the Herrs had a duty to disclose the Attachment Order to Wilshire Quinn, *Ploeckelman* does not help the Lee Parties. As in *O'Neil*, the person who was entitled to the omitted information and the person damaged by the omission were the same.

The issue raised by the Lee Parties' complaint is whether a third party impacted by a fraudulent representation or omission has a cause of action under § 895.446 if the third party was not the recipient of the representation or omission. On this issue, the Lee Parties cite no case, and the Court has found none.

Section 895.446(1) provides a cause of action to "[a]ny person who suffers damage or loss by reason of intentional conduct" prohibited under Wis. Stat. § 943.20. It may be plausible that the Wisconsin legislature intended that third persons who were not deceived by any representation or omission might have a cause of action, but the Lee Parties have not sufficiently explained why the Court should read the statute so expansively.

"When interpreting state law, a federal court's task is to determine how the state's highest court would rule." *Rodas v. Seidlin*, 656 F.3d 610, 626 (7th Cir. 2011). In the absence of a coherent argument by the Lee Parties or a statement from a Wisconsin court extending liability as the Lee Parties advocate, this Court is bound to follow the available Wisconsin precedent. The Court finds the available precedent to be a good predictor of how the Wisconsin Supreme Court would rule in this case. In *Pagoudis*, the Wisconsin Supreme Court specifically stated that a claim under Wis. Stat. §§ 895.446 and 943.20(1)(d) requires a representation ***to the plaintiff***. 2023 WI 27, ¶ 15. In *Malzewski v. Rapkin*, 2006 WI App 183, 296 Wis. 2d 98, 723 N.W.2d 156, the Wisconsin Court of Appeals described the statute as "theft-by-fraud" and determined that the claim has the following elements: "(1) the defendant made a false representation ***to the owner of the property***; (2) the

defendant knew that the representation was false; (3) the defendant made the representation with the intent to deceive and defraud the property's owner; (4) the defendant got title to the property as a result of the false representation; (5) the owner of the property was deceived by the representation; and (6) ***the owner of the property was thus defrauded***." *Id.* ¶ 21 (emphasis added). Two Wisconsin courts have determined that the plaintiff must be the recipient of the misrepresentation or omission and must be the one defrauded (i.e., the one to have acted to his detriment in reliance on the misrepresentation). The Court therefore concludes that the Wisconsin Supreme Court would require the plaintiff bringing a cause of action based on a violation of Wis. Stat. § 943.20(1)(d) to be the recipient of the allegedly fraudulent misrepresentation or omission.

The Amended Complaint does not allege that either of the Herrs made any false representation to the Lee Parties or failed to disclose any facts to them that the Herrs had a duty to disclose. Nor does the Amended Complaint allege that the Lee Parties took any action to their detriment based on any misrepresentation or omission by the Herrs. Therefore, the Amended Complaint does not state a claim under Wis. Stat. §§ 895.446 and 943.20(1)(d).

G. State Court Cross Claims

The Amended Complaint alleges that the Lee Parties filed cross claims against the Herrs in the Foreclosure Litigation, and that these cross claims serve as the underlying debt necessary for a nondischargeability claim. (Am. Compl. ¶¶ 10-19.) The Lee Parties addressed these cross claims only in a footnote in their response brief. (Dkt. No. 38 at 2 n.1.) The footnote does not address the merits of

the cross claims. It instead says simply that paragraph 99 of the Amended Complaint "incorporates all prior allegations of the pleading" and that "[t]hose incorporated allegations include without limitation the Lee Parties' claims asserted in [the Foreclosure Litigation]." (*Id.*)[4] Though the Lee Parties did not sufficiently address these claims, the Court gave the Lee Parties an opportunity to submit an additional brief addressing the basis for those claims. Based on the Lee Parties' arguments in their supplemental brief (Dkt. No. 46), the cross claims in the Foreclosure Litigation do not give rise to an underlying debt that the Court can declare nondischargeable.

1. Public Policy Claim

Count IV of the Lee Parties' cross claims is labeled "Public Policy (Request for Equitable Relief – Fruit of Fraud)." (Am. Compl. Ex. 1 at 26.) The Lee Parties allege that Enduring Love and the Herrs committed criminal fraud when they gave the mortgage to Wilshire Quinn, that the mortgage is therefore an illegal contract, and that the contract should be avoided. (*Id.* at 27, ¶ 117 ("The mortgage given by Enduring Love to Wilshire contemplated or necessarily involved defrauding [the Lee Parties] as its ultimate result, and therefore the mortgage is unenforceable as the fruit of the fraud by Wilshire.").) The Lee Parties also allege that enforcement

[4] The Lee Parties' allegations in paragraphs 11-14 of the Amended Complaint may not be sufficient to give the Herrs fair notice that the Lee Parties would rely on those claims for the underlying debt. The Court has assumed without deciding that the allegations gave sufficient notice because neither the Amended Complaint here nor the Lee Parties' pleading in the Foreclosure Litigation states a claim that the Herrs owe the Lee Parties a debt.

of the mortgage is contrary to public policy because Wilshire Quinn did not take sufficient steps to discover the existence of the Attachment Order. (*Id.* ¶¶ 119-20.)

In support of this claim, the Lee Parties cite *Shea v. Grafe*, 88 Wis. 2d 538, 274 N.W.2d 670 (1979), in which the Wisconsin Supreme Court held that "[a]n agreement which contemplates or necessarily involves the defrauding or victimizing of third persons as its ultimate result is void as against public policy." *Id.* at 544 (internal quotation marks omitted); *see also Assoc. Wis. Contractors v. Lathers*, 235 Wis. 14, 291 N.W. 770, 771 (1940) ("If the mere tendency or purpose of a contract works against public policy, it is illegal, even though no actual damage be shown."); *Blossom Farm Prods. Co. v. Kasson Cheese Co.*, 133 Wis. 2d 386, 395, 395 N.W.2d 619 (Ct. App. 1986) ("A promise may be unenforceable if it involves conduct offensive to public policy, even though the promise does not actually induce the conduct."). These cases do provide support for the argument that the mortgage could be declared unenforceable (whether the mortgage is in fact unenforceable or whether the Lee Parties as third parties to the contract can obtain such a declaration are not matters for this Court to decide). But the mortgage is between Enduring Love and Wilshire Quinn. The Lee Parties do not explain why the Herrs are necessary parties to a claim seeking a declaration that the mortgage (a contract to which the Herrs are not parties) is unenforceable or how such a declaration would result in the Herrs owing a debt to the Lee Parties under state law.

The Lee Parties say that "the Herr's [sic] exposure is possible under a restitution theory." (Dkt. No. 46 at 6.) Restitution is a remedy, not a cause of

action. *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 205 (2002) ("Restitution is a legal remedy when ordered in a case at law and an equitable remedy when ordered in an equity case . . . ."); *State v. Muth*, 2020 WI 65, ¶ 91, 392 Wis. 2d 578, 628, 945 N.W.2d 645, 670 (Kelly, J., concurring) ("Understanding that restitution is a remedy is critical because a remedy is simply the mechanism by which to operationalize a cause of action."). "The purpose of restitution as a remedy for breach is the restoration of the status quo ante as far as is practicable." *Wisconsin Mut. Plate Glass Ins. Co. v. Guaranteed Bond Co.*, 218 Wis. 197, 260 N.W. 484, 486 (1935) (quoting *Restatement of Law of Contracts* § 349). The Lee Parties must have a cause of action against the Herrs before the Herrs can be ordered to restore the Lee Parties to the status quo ante. Count IV of the cross claims, seeking to declare the mortgage to be void, does not appear to be a cause of action against the Herrs because they are not parties to the mortgage. The Herrs therefore cannot have restitution liability to the Lee Parties.

2. Loan Fraud Claim

Count V of the Lee Parties' cross claims is labeled "Loan Fraud." (Am. Compl. Ex. 1 at 28.) The claim refers to Wis. Stat. § 943.83. This is a criminal statute that provides, "Whoever with intent to defraud a financial institution knowingly overvalues or makes a false statement concerning any land, security, or other property for the purpose of influencing the financial institution to take or defer any action in connection with a loan or loan application may be penalized as provided in s. 943.91 according to the value of the loan." Wis. Stat. § 943.83. The Lee Parties have not explained how the Herrs' alleged violation of the criminal

statute gives them a civil cause of action against the Herrs. Count V of the Lee Parties' cross claim for "Loan Fraud" cannot serve as the underlying debt for the nondischargeability claim.

3. Statutory Fraud

Count VI of the Lee Parties' cross claims is a claim for "Statutory Fraud." (Am. Compl. Ex. 1 at 29.) The Lee Parties allege only that "Enduring Love, the Herrs, and 7-Fold Return Trust violated . . . Wisconsin Statutes sections 895.446 and 943.20(1)(d)." (*Id.* at 30, ¶ 128.) In their supplemental brief, the Lee Parties assert that "the proof of statutory fraud and the proof of a public policy claim are essentially the same." (Dkt. No. 46 at 6.) As discussed above, the Lee Parties do not have a "public policy claim" against the Herrs because their "public policy" claim is to have the mortgage declared void and the Herrs are not parties to the mortgage. As explained above, the Lee Parties also do not have a statutory fraud claim against the Herrs under Wis. Stat. §§ 895.446 and 943.20(1)(d) because they do not allege that the Herrs made any fraudulent representations to the Lee Parties in connection with the mortgage transaction. The Lee Parties' "statutory fraud" claim cannot serve as the underlying debt for their nondischargeability claim.

H. Contingent Contempt Claim

The Lee Parties' Amended Complaint refers to their motion for sanctions against Ms. Herr, which was pending in Ozaukee County on the petition date. (Am. Compl. ¶¶ 8-9, 93-97.) The Court previously held that the Sanctions Order was a post-petition debt that could not form the basis for a nondischargeability claim, in large part because the Lee Parties could not explain the basis for the debt if the

Sanctions Order was void because it was entered in violation of the automatic stay. (*See* Dkt. No. 29.) Further research, unassisted by the Lee Parties, has revealed that the Lee Parties do have a contingent pre-petition claim related to their request for sanctions against Ms. Herr.

The Seventh Circuit has adopted the "conduct" theory, under which the date of a claim—and the corresponding debt owed to the creditor—is determined by the date of the conduct giving rise to the claim. *Saint Catherine Hosp. of Indiana, LLC v. Indiana Fam. & Soc. Servs. Admin.*, 800 F.3d 312, 316 (7th Cir. 2015). In a case that pre-dates *Saint Catherine Hospital* but applies the same "conduct" principle, the court in *Aldrich v. Papi (In re Papi)*, 427 B.R. 457 (Bankr. N.D. Ill. 2010), addressed a situation similar to this case. The creditor filed a motion for sanctions in state court based on the debtor's prepetition violations of a state court order, and the debtor filed bankruptcy before the court addressed the motion. The creditor sought to proceed with her request for sanctions in state court, arguing that her claim for sanctions based on the debtor's prepetition conduct was nondischargeable. The court held that the creditor had a contingent claim that could be declared nondischargeable: "Applying the conduct theory to the contingent claim here, from the moment the Debtor purportedly filed motions wrongfully in the state court, the Plaintiff had a claim for sanctions, contingent on the Circuit Court finding in the Plaintiff's favor on the sanctions motion. If the Circuit Court ultimately grants the Plaintiff's motion, the claim for sanctions will constitute a claim that arose before the commencement of the bankruptcy case." *Id.* at 466.

Here, the Lee Parties' claim for sanctions is based on Ms. Herr's allegedly contemptuous conduct before the petition: her use of the Property as security to obtain a loan from Wilshire Quinn after the Attachment Order was entered. When the Herrs filed their bankruptcy petition, the Lee Parties had a claim that was contingent on the state court finding Ms. Herr's conduct to be contemptuous and imposing a sanction. The allegations in the Amended Complaint are sufficient to support this contingent claim. Therefore, the Lee Parties may proceed in their nondischargeability action on a theory that their pending motion for sanctions is a contingent claim under state law that is nondischargeable.

IV. SUFFICIENCY UNDER 11 U.S.C. § 523(a)

The Herrs also request dismissal on the basis that the Amended Complaint does not plead facts that state a plausible claim for nondischargeability under 11 U.S.C. § 523(a). The Amended Complaint cites §§ 523(a)(2)(A), (a)(4), and (a)(6). Each subsection in § 523(a) gives rise to a distinct cause of action. *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 355, 360-64 (2016) (noting, despite any overlap, the different subsections of § 523 have "meaningful distinctions" and cover different types of conduct). The Lee Parties are correct that they do not need to choose which theory to proceed under at this stage in the litigation, but their complaint must include sufficient facts to support each separate cause of action.

As discussed, the only non-bankruptcy debt pleaded in the complaint is the Lee Parties' contingent claim against Ms. Herr for violation of the Attachment Order. The Court will allow the Lee Parties to proceed with claims that this debt is

nondischargeable under §§ 523(a)(2)(A) and (a)(6), but the Lee Parties do not sufficiently plead or argue that the claim is nondischargeable under § 523(a)(4).

A. 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) excepts from discharge debts that are "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). "To except a debt from discharge under this section of the Code, a creditor must prove either: (1) the debtor made a deliberate misrepresentation or a deliberately misleading omission on which the creditor justifiably relied (in other words, the debt was fraudulently induced); or (2) the debtor perpetrated a 'positive' fraud against the creditor, meaning an intentional fraud 'involving moral turpitude.'" *CoVantage Credit Union v. Stangel (In re Stangel)*, 593 B.R. 607, 612 (Bankr. E.D. Wis. 2018).

The Amended Complaint does not state a claim based on misrepresentation. The Lee Parties do not allege that Ms. Herr made a misrepresentation (or misleading omission) to them. Nor do the Lee Parties allege that they justifiably relied on any statement or omission made by Ms. Herr. The Attachment Order was entered before Ms. Herr took any steps to obtain the Wilshire Quinn mortgage on behalf of Enduring Love.

The case is closer for actual fraud. The exception in § 523(a)(2)(A) encompasses "any fraud that involves moral turpitude or intentional wrong." *Husky*, 578 U.S. at 360. "Although 'fraud' connotes deception or trickery generally, the term is difficult to define more precisely." *Id.* The Supreme Court did not

define actual fraud in *Husky*. The Seventh Circuit has said, "Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) (quoting *Stapleton v. Holt*, 207 Okla. 443, 250 P.2d 451, 453-54 (Okla. 1952)).

The Lee Parties say their claim under § 523(a)(2)(A) includes actual fraud, but they devote exactly one sentence to explaining how the Amended Complaint states a claim for actual fraud. (Dkt. No. 38 at 12.) They do not say how Ms. Herr's contingent debt for contempt of the Attachment Order is based on actual fraud.[5] This is understandable, however, because the Court previously held that the debt could not serve as the underlying debt for a nondischargeability claim. Therefore, the Court will not dismiss the claim under § 523(a)(2)(A) at this point. The Lee Parties are cautioned that they must be able to explain at a later stage how the contingent claim for sanctions is nondischargeable under § 523(a)(2)(A). It is

[5] The Court notes that debts for intentional fraudulent transfers may be excepted from discharge based on a theory of actual fraud. *Husky*, 578 U.S. at 366 ("[W]e interpret 'actual fraud' to encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation."); *McClellan*, 217 F.3d at 895 (fraudulent transfer). The Lee Parties have at various points in this litigation characterized the Herrs' conduct in mortgaging and transferring the Property to be fraudulent transfers. But the Lee Parties did not plead or argue that either of the Herrs is liable under non-bankruptcy law for fraudulent transfer.

unclear at this point how Ms. Herr's contempt of the Attachment Order involved the sort of trick or deception connoted by the term fraud.

B. 11 U.S.C. § 523(a)(4)

Section 523(a)(4) excepts from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). The Lee Parties rely on the "larceny" prong of the statute to argue that Ms. Herr's debt to them should be declared nondischargeable. (Dkt. No. 38 at 14-15.) "Larceny is proven for § 523(a)(4) purposes if the debtor has wrongfully and with fraudulent intent taken property from its owner." *Kaye v. Rose (In re Rose)*, 934 F.2d 901, 903 (7th Cir. 1991); *see also Bank Calumet v. Whiters (In re Whiters)*, 337 B.R. 326, 331-32 (Bankr. N.D. Ind. 2006) ("'Larceny' involves a concept in which the debtor has wrongfully acquired property of which another person or entity is the owner[.]").

The Lee Parties say that "[t]heft from a financial institution, fraud against a financial institution, loan fraud and transferring encumbered property . . . are forms of larceny." (Dkt. No. 38 at 14-15.) They provide no citations for this assertion. The Lee Parties do not have claims against the Herrs for theft or fraud against a financial institution or for loan fraud. They also do not explain how the Property was "encumbered" by their interest when they failed to record the Attachment Order or a lis pendens and they required a decision from another court to effectuate their interest in the Property.

The Lee Parties have not sufficiently pleaded a claim that Ms. Herr's contingent debt for contempt of the Attachment Order is nondischargeable under § 523(a)(4).

C. 11 U.S.C. § 523(a)(6)

Section 523(a)(6) excepts from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6).

"The term 'injury,' while not defined in the Code, is understood to mean a violation of another's legal right, for which the law provides a remedy." *First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013) (internal quotation marks omitted). Willfulness requires "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). Maliciousness "requires that the debtor acted 'in conscious disregard of his duties or without just cause or excuse; it does not require ill-will or specific intent to do harm.'" *Horsfall*, 788 F.3d at 774 (quoting *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994)).

The Lee Parties' allegation that Ms. Herr deliberately took action to affect the Lee Parties' rights under the Attachment Order fits within these definitions. *See Papi*, 427 B.R. at 466 (recognizing that a contingent claim for contempt may be nondischargeable under § 523(a)(6)). The Lee Parties will need to prove each of these elements at trial, but their pleading includes sufficient facts to allow the claim to proceed.

CONCLUSION

In sum, the Lee Parties may proceed with a nondischargeability claim against Ms. Herr under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6) based on her alleged contemptuous conduct in relation to the Lee Parties' rights under the Attachment

Order. The Lee Parties have not pleaded sufficient facts to proceed with any of the other underlying debts they identified against either of the Herrs, so Mr. Herr must be dismissed from this adversary proceeding.

To be clear, if the Lee Parties' allegations are true, the Herrs did not act admirably or perhaps even lawfully. However, with the exception of their allegations regarding Ms. Herr's contempt, the Lee Parties have not identified a non-bankruptcy cause of action against either of the Herrs. There may be such a claim, but it is not the Court's responsibility to identify it. The Lee Parties will be given one final chance to amend their complaint to plead a nondischargeability claim against the Herrs.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. The motion to dismiss is granted in part.

2. The claims against Mr. Herr are dismissed.

3. The claim against Ms. Herr under 11 U.S.C. § 523(a)(4) is dismissed.

4. The claims against Ms. Herr under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6) may proceed with respect to the claim that Ms. Herr owes an underlying debt to the Lee Parties based on her allegedly contemptuous conduct in violation of the Attachment Order.

5. The Lee Parties are granted leave to amend their complaint within 30 days after entry of this order.

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