DENNIS E MURRAY, SR., and DPM, LTD., Plaintiffs, vs. CONSECO, INC. and CONSECO SERVICES, LLC, Defendants. CONSECO, INC., Counterclaim Plaintiff/Third-Party Plaintiff, vs. DENNIS E. MURRAY, SR., DPM Ltd., and MARGARET MURRAY, Counterclaim Defendants/Third-Party Defendant.

1:03-cv-1701-LJM-JMS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

2008 U.S. Dist. LEXIS 85500

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CORE TERMS: fraudulent transfer, transferred, unjust enrichment, conferred, particularity, constituting, sums of money, pleading requirement, value in exchange, fraudulently, fraudulent, measurable, unjust, factual allegations, entitled to relief', constructive fraud, collectively, well-pleaded, suspicion, retention, borrowed, enriched, defraud, dollar, repay, incur, owed

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JUDGES: LARRY J. McKINNEY, United States District Judge.

OPINION BY: LARRY J. McKINNEY

OPINION

ORDER ON PLAINTIFF'S AND THIRD-PARTY DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on Plaintiffs/Counterclaim Defendant's, Dennis E. Murray, Sr. ("Murray"), and Third-Party Defendant's, Margaret Murray (collectively, the "Murrays"), Motion to Dismiss Fraudulent Transfer and Unjust Enrichment Claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)). Defendants/Counterclaim Plaintiffs, Conseco, Inc. ("Conseco") and Conseco Services, LLC ("Conseco Services") (collectively, the "Defendants"), asserted claims for fraudulent transfer and unjust enrichment under **Indiana** law in its Amended Counterclaims and Third-Party Complaint (the "Complaint"). The Court has fully considered the parties' arguments and, for the reasons discussed below, **DENIES** the Murrays' Motion to Dismiss.

I. BACKGROUND

For the purposes of this motion, the Court accepts as true the well-pleaded factual allegations from the Complaint:

In 1996, Old Conseco's [1] Board of Directors created the Conseco Director and Officer Loan Program (the "D&O Loan Program"). Compl. P 10. Under the Program, certain officers, directors, and other employees borrowed money from a syndicate of lender banks (the "Banks") to purchase large blocks of Old Conseco's stock. *Id*. Murray, as a Director, participated in the D&O Loan Program, both in his personal capacity as a director and on behalf of DPM, LTD ("DPM"), as general partner. *Id*. PP 14-15, 19-20, 33-36. Murray and DPM borrowed several million dollars from the Banks. *Id*. PP 33-34. Old Conseco executed guarantees of Murray's and DPM's obligations. Compl. P 11. Murray and DPM entered into multiple written agreements with the Banks and Old Conseco in which they promised to repay all amount loaned to them under the D&O Loan Program, plus interest. *Id*. PP 15, 19, 35-37. The loans made pursuant to the D&O Loan Program, along with their corresponding **promissory notes** and contractual agreements, were refinanced in November of 2000. *Id*. P 18. Conseco filed for bankruptcy on December 17, 2002, constituting an event of default under the **Credit Agreements** and Bank Notes. *Id*. P 22. As a result, Murray's and DPM's obligations under the Notes became due immediately. *Id*. Conseco, pursuant to the Guarantees, paid the amount owed to the Banks. *Id*. PP 23 - 24. However, the Murray Parties have failed to repay their debt to Conseco. *Id*. P 23.

1 Throughout their briefs, the parties refer to pre-bankruptcy Conseco, Inc., as "Old Conseco" and post-bankruptcy Conseco, Inc., as "Conseco." The Court does the same throughout this Order.

II. STANDARD

When ruling on this Motions to Dismiss under Rule 12(b)(6), the Court accepts as true all well-pleaded factual allegations in the Complaint and the inferences reasonable drawn from those allegations, and views them in the light most favorable to Conseco. *See Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d. 614, 618 (7th Cir. 2007). "A [] complaint need only provide a 'short and plain statement of the claim showing that the pleader is entitled to relief', sufficient to provide the defendant with 'fair notice' of the claim and its basis." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008) (citing Fed. R. Civ. P. 8(a)(2)); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)). The Complaint's "allegations must plausibly suggest that [Conseco] has a right to relief, raising that possibility above the 'speculative level.'" *EEOC v. Concentra Health Care Servs., Inc*., 496 F.3d 773, 776-77 (7th Cir. 2007) (citing *Bell Atlantic*, 127 S. Ct. 1965, 1973 n.14)). Finally, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b).

III. DISCUSSION

The Murrays argue that neither Count VIII nor Count IX satisfy Rule 12(b)(6) or Rule 9(b) of the Federal Rules of

Civil Procedure ("Rule 9(b)"). Court discusses these arguments below in turn.

A. COUNT VIII

In Count VIII, Conseco alleges that Murray fraudulently transferred certain sums of money to avoid payment of his loan obligations to Conseco. Compl. P 119-30. The Murrays argue that Count VIII does not comply with the particularity requirement of Rule 9(b) because it "fails to identify even one specific transfer that is alleged to be fraudulent and fails to provide any basis for suing Margaret Murray as a recipient of such a transfer." Pls.' Br. at 1. Conseco argues that Count VIII need not be pled with particularity under Rule 9(b) because the Complaint asserts a claim for constructive fraudulent transfer. Next, Conseco argues that, even assuming Rule 9(b) applies, the Complaint sufficiently states with particularity the circumstances constituting fraud.

The Court does not need to address whether Count VIII is subject to the pleading requirement of Rule 9(b) because, even assuming that it is, Conseco's claim for fraudulent transfer states with particularity "the circumstances constituting fraud." Fed. R. Civ. P. 9(b). The **Indiana** Uniform Fraudulent Transfer Act (the "Act") states, in part:

> Sec. 14. A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> > (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
> >
> > (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> >
> > (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> >
> > (B) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as the debts became due.

Ind. Code § 32-18-2-14. This statute protects against two kinds of fraudulent transfers: transfers with an actual intent to defraud and transfers that the law considers fraudulent (i.e. constructive fraud). *See Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1078-79 (7th Cir. 1997) (analyzing identical version of Uniform Fraudulent Transfer Act under Illinois law). The Act establishes a presumption that constructive fraud has occurred where 1) the debtor made a voluntary transfer; 2) at the time of the transfer, the debtor had incurred obligations elsewhere; 3) the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer; and 4) after the transfer, the debtor failed to retain sufficient property to pay the indebtedness. *Id*.

The Complaint avers that Murray voluntarily transferred sums of money to Margaret Murray at a time where he owed substantial sums of money to Conseco. Compl. PP 22-24, 121-22. Moreover, Conseco alleges that Murray did not receive reasonably equivalent value in exchange for the transfers and that Murray was insolvent at the time he made the transfers. Compl. PP 125-26. Additionally, Conseco alleges that Murray reported $ 29 million worth of assets in 1999; that his firm enjoyed several multi-million dollar verdicts since that time, and that now Murray claims to earn less than $ 50,000.00 a year with assets totaling less than $ 500,000.00. *Id*. P 122. These facts, argues Conseco, "indicate [] that [Murray] has fraudulently transferred his wealth[.]" *Id*. P123. The Murrays assert that these allegations are insufficient because Conseco relies only upon "information and belief" instead of pleading specific facts.

"[T]he duty to plead the circumstances constituting fraud with particularity [is] not fulfilled by pleading th[e] circumstances on 'information and belief' unless they [are] facts inaccessible to the plaintiff, in which event he ha[s] to plead the grounds for his suspicions." *Bankers Trust Co. v. Old Republic Ins. Co*., 959 F.2d 677, 684 (7th Cir. 1992). The facts Rule 9(b) requires Conseco to plead are matters exclusively within the Murrays' knowledge, especially considering Conseco alleges that Murray transferred money to family members. Compl. P 123. Evidence regarding the amount of money transferred, when the money was transferred, exactly to whom the money was transferred, and the reason why the money was transferred are matters exclusively within the Murrays' knowledge. Morever, Murray's sudden and substantial drop in worth provides sufficient "grounds for [Conseco's] suspicion." *Bankers Trust Co*., 959 F.2d at 684. Therefore, Conseco is entitled to rely on "information and belief" in pleading its claim for fraudulent transfer. *Id*. The Court concludes that Count VIII satisfies the pleading requirements of Rule 9(b). Therefore, the Murrays' Motion to Dismiss Count VIII is **DENIED**.

B. COUNT IX

In Count IX, Conseco asserts a claim for unjust enrichment against Margaret Murray. Under **Indiana** law, "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Bahy v. Sonnenburg*, 573 N.E.2d 398, 408 (**Ind.** 1991). To prevail on a claim for unjust enrichment in **Indiana,** a plaintiff "must establish that a measurable benefit has been conferred upon the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." *City of Mishawaka v. Kvale*, 819 N.E.2d 1129, 1136 (**Ind.** Ct. App. 2004) (citing *Bahy*, 573 N.E.2d at 408)). Conseco alleges that it is a creditor of Murray; that it has asserted a valid fraudulent transfer claim against him; that Murray conferred a measurable benefit on Margaret Murray through his fraudulent transfers; and that Margaret Murray has been wrongfully enriched at Conseco's expense. Compl. PP 132-36. Therefore, Conseco argues that it would be unjust for Margaret Murray to retain Murray's fraudulently transferred assets without payment to Conseco.

Margaret Murray argues that **Indiana** law requires Conseco to have directly conferred a benefit to her. She argues the Complaint fails to state a claim because the Complaint does not allege that she received any benefit directly from Conseco. However, the cases Margaret Murray cites in support of her argument did not address the issue of whether a benefit conferred by a third party could support an unjust enrichment claim under **Indiana** law. *See Bahy*, 573 N.E.2d at 408; *see also Ball v. Versar, Inc*., 454 F. Supp. 2d 783, 811 (S.D. **Ind.** 2006). Moreover, other **Indiana** courts have held that a plaintiff states a claim for unjust enrichment even where a third party conferred the benefit upon the defendant. *Dominiack v. Mech., Inc. v. Dunbar*, 757 N.E.2d 186, 190-91 (**Ind.** Ct. App. 2001) (citing *Bahy*, 573 N.E.2d at 408); *Paul v. I.S.I. Servs., Inc*., 726 N.E.2d 318, 322 (**Ind.** Ct. App. 2000) (citing *Bahy*, 573 N.E.2d at 408). The Court concludes that Conseco has stated a claim for unjust enrichment under **Indiana** law even though it alleges that Murray, and not Conseco, conferred the benefit.

Margaret Murray next argues that Count IX should be dismissed for failure to comply with Rule 9(b). However, an unjust enrichment claim under **Indiana** law does not require a showing of fraud or mistake. Rather, a plaintiff need only "establish that a measurable benefit has been conferred upon the defendant under such circumstances that the defendant's retention of the benefit without payment would be unjust." *Kvale*, 819 N.E.2d at 1136 (citing *Bahy*, 573 N.E.2d at 408). Furthermore, to the extent Conseco relies on the alleged fraudulent transfers at issue in Count VIII, as discussed above, Conseco's Complaint satisfies the pleading requirements of Rule 9(b).

The Court concludes that Count IX provides a "short and plain statement of the claim showing that [Conseco] is entitled to relief." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). Therefore, Margaret Murray's Motion to Dismiss Count IX is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs/Counterclaim Defendants', Dennis E. Murray, Sr. and DPM, LTD, and Third-Party Defendant's, Margaret Murray, Motion to Dismiss is **DENIED**.

IT IS SO ORDERED this 22nd day of October, 2008.

/s/ Larry J. McKinney

LARRY J. McKINNEY, JUDGE

United States District Court

Southern District of **Indiana**

IN THE MATTER OF MARK EDWARD LEWINSKI, DEBTOR. JACQUELINE SELLS HOMANN, TRUSTEE, PLAINTIFF, vs. R.I.H. ACQUISITIONS IN, LLC d/b/a RESORTS EAST CHICAGO, DEFENDANT.

CASE NO. 05-34537 HCD, CHAPTER 7, PROC. NO. 07-3082

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

2008 Bankr. LEXIS 2596

September 30, 2008, Decided

CORE TERMS: marker, chips, gambling, casino, preferential transfer, avoidable, contemporaneous, patron, antecedent debt, riverboat, tendered, gaming, debt owed, burden of proving, transferred, bankruptcy estate, personal check, antecedent, accounting, transferee, avoidance, currency, troubled, gamble, wagers, tokens, conclusions of law, debtor's estate, citations omitted, negotiable instrument

COUNSEL: Jacqueline S. Homann, Trustee, South Bend, **Indiana.**

Ben T. Caughey, Esq., Ice Miller, Indianapolis, **Indiana.**

JUDGES: HARRY C. DEES, JR., CHIEF JUDGE.

OPINION BY: HARRY C. DEES, JR.

OPINION

MEMORANDUM OF DECISION

At South Bend, **Indiana,** on September 30, 2008.

Before the court in this adversary proceeding is the "Complaint to Avoid and Recover an Avoidable Transfer" filed by Jacqueline Sells Homann, chapter 7 Trustee of the bankruptcy estate of debtor Mark E. Lewinski. She seeks to avoid and recover a preferential transfer made by the debtor to the casino R.I.H. Acquisitions IN, LLC, doing business as Resorts East Chicago ("Resorts" or "casino"). After the defendant answered the Complaint and asserted affirmative defenses, the court held a pre-trial conference. The parties then filed a joint stipulation of facts and simultaneous briefs and responses. The matter was taken under advisement on June 17, 2008. For the reasons articulated below, the court finds that the transfers at issue are preferential transfers that are avoidable and recoverable by the Trustee pursuant to 11 U.S.C. §§ 547 and 550.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of **Indiana** Local Rule 200.1, the United States District Court for the Northern District of **Indiana** has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(F) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The following facts have been stipulated by the parties. When the debtor filed a voluntary chapter 7 petition on August 16, 2005, Ms. Homann was appointed the Trustee of the debtor's bankruptcy estate. Resorts, a limited liability company registered to do business in **Indiana,** operates a casino, hotel, and entertainment facility in East Chicago, **Indiana.** The debtor patronized Resorts on numerous occasions during the calendar year 2005 by engaging in gaming activities at Resorts' casino. He executed a Casino Credit Cashing Application with Resorts on April 11, 2005; when approved, it allowed the debtor to obtain credit from Resorts by signing markers. The parties described a marker as essentially a counter-check that is tendered to a casino in exchange for gambling chips, which then are used in the casino to place wagers. According to the parties, when a patron satisfies a marker, the marker is returned to him. When a patron fails to satisfy a marker at the end of a gambling session, Resorts' policy, consistent with the policy in the industry, is to hold the marker for 28 days. If the marker is not satisfied during that time, Resorts deposits the marker at the patron's bank for payment.

On April 14, 2005, the debtor signed a marker for $ 25,000 but did not satisfy the marker within the 28-day period. When Resorts deposited it in the debtor's bank, the marker was returned for insufficient funds. On July 12, 2005, the debtor satisfied the marker by paying Resorts with a $ 25,000 personal check. The satisfaction of that marker by check was a cash payment to Resorts during the 90 days preceding his chapter 7 filing.

On July 15, 2005, the debtor took out four markers in the total amount of $ 150,000. In exchange, the debtor received $ 150,000 in gambling chips from Resorts. On August 4, 2005, the debtor paid $ 50,000 in gambling chips to Resorts in exchange for one of those markers, Marker Number 54401104. The other three markers remained unpaid. Resorts holds an unsecured claim against the debtor's estate for the $ 100,000 debt.

In her Complaint, the Trustee contended that the debtor paid $ 75,000 to Resorts during the 90 days prior to bankruptcy and that the payment constituted a preference that is avoidable by the Trustee pursuant to § 547 and § 550 of the Bankruptcy Code. In her brief, the Trustee specified that she sought to avoid and recover two transfers by the debtor to Resorts: the July 12, 2005 transfer of a $ 25,000 personal check to pay for a $ 25,000 marker ("the check payment"), and the August 4, 2005 transfer of $ 50,000 in gambling chips to pay for a $ 50,000 marker ("the chips payment"). In its Answer, the casino denied that it had received avoidable transfers and raised numerous affirmative defenses. The stipulated facts, briefs and record are now before the court.

Discussion

"A transfer of an interest of the debtor in property is preferential, and therefore avoidable, if it (1) was made to or for the benefit of a creditor, (2) was for or on account of an antecedent debt, (3) was made while the debtor was insolvent, (4) was made on or within 90 days before the date of the filing of the petition, and (5) allowed the creditor to receive more than it otherwise would have." [1] *Warsco v. Preferred Tech. Group*, 258 F.3d 557, 564 (7th Cir 2001) (citing 11 U.S.C. § 547(b). "However, '[n]ot all transfers that meet § 547(b)'s criteria are avoidable. Section 547(c) provides six exceptions to the avoidable preference provision.'" [2] *In re ABC-Naco, Inc.*, 483 F.3d 470, 472 (7th Cir. 2007) (quoting *Energy Coop., Inc. v SOCAP Int'l, Ltd. (In re Energy Coop., Inc.)*, 832 F.2d 997, 1000 (7th Cir. 1987)). The trustee bears the burden of proving the avoidability elements of § 547(b), and the creditor has the burden of proving the nonavoidability elements of § 547(c). *See* 11 U.S.C. § 547(g); *see also Boberschmidt v. Society Nat'l Bank (In re Jones)*, 226 F.3d 917, 921 (7th Cir. 2000); *Barber v. Golden Seed Co., Inc.*, 129 F.3d 382, 390 (7th Cir. 1997). Through their Stipulation, the parties agreed and the evidence establishes that the Trustee has satisfied all five of the elements listed in § 547(b) with respect to the check payment, and that she has satisfied paragraphs (1), (3), (4)(A), and (5) of §

547(b) with respect to the chips payment. To demonstrate the "antecedent debt" requirement of paragraph (2), the Trustee has the burden of proving that the transfer of $ 50,000 in gambling chips to pay off Marker Number 54401104 was a transfer of an interest of the debtor in property for or on account of an antecedent debt.

1 Section § 547(b) provides: . . . [T]he trustee may avoid any transfer of an interest of the debtor in property --

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made --

(A) on or within 90 days before the date of the filing of the petition; . . . and

(5) that enables such creditor to receive more than such creditor would receive if --

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

2 Section 547(c) provides, in relevant part: The trustee may not avoid under this section a transfer --

(1) to the extent that such transfer was --

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

. . .

(4) to or for the benefit of the creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor --

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

A. Avoidance of the Chips Payment Transfer as a Preferential Transfer Under § 547(b)(2)

The Trustee claimed that the August 4, 2005 payment of the $ 50,000 marker with gambling chips was a transfer made on account of an antecedent debt. She explained that the debt was created on July 15, 2005, when the debtor's marker was tendered to the casino, because the obligation to repay the marker was created at that time. *See* R. 27 at 4 (citing *Jones Truck Lines, Inc. v. Central States, Southeast & Southwest Areas Pension Fund (In re Jones Truck Lines, Inc.),* 130 F.3d 323, 329 (8th Cir. 1997)). Because the repayment of the marker was made three weeks later, she insisted that it was payment on an antecedent debt. *See id.* (citing *Warsco,* 258 F.3d at 569). All other elements of § 547(b) were met, the Trustee said, and therefore the amount paid on August 4, 2005, to Resorts by the debtor with chips was a preferential transfer.

Resorts challenged the Trustee's position under § 547(b)(2) with two arguments. It first asserted that the debtor's payment of $ 50,000 in gambling chips to pay off the marker could not be avoided because the transfer of chips was not a transfer of "an interest of the debtor in property." It defined two terms: Markers are essentially counter-checks tendered to Resorts in exchange for gambling chips, and gambling chips are placeholders used in Resorts' casino to place wagers. *See* R. 26 at 6. Resorts further defined a "counter-check" as "'a bank check for the use of customers making a withdrawal.'" R. 26 at 12 n.22 (citing American Heritage College Dictionary (4th ed. 2000)). Based on these definitions, it insisted that gambling chips were not property of the debtor: They had no economic value outside the casino, did not constitute currency, and could not be used to satisfy the claims of the debtor's creditors. Rather, they were an accounting mechanism and placeholder to evidence a debt owed by Resorts. R. 26 at 6-10 (relying primarily upon *Zarin v. Comm'r,* 916 F.2d 110, 114 (3d Cir. 1990)). Resorts also relied upon **Indiana** law to provide guidance about "the legal nature and value of gaming chips." R. 26 at 8. Resorts pointed out that "**Indiana** law provides that gambling chips may not be used as currency" and therefore that "the Trustee could not legally do anything with $ 50,000 of Resorts' gaming chips." R. 26 at 8, 9. The Trustee did not dispute that the round plastic chips themselves were not property of the debtor. She pointed out, however, the defendant's statement that the chips "evidence a debt owed by Resorts" and argued that it is the debt, evidenced by the chips, that is the property of the debtor. *See* R. 31 at 2.

A transfer is preferential only "if what was transferred constituted an interest of the debtor in property." *Warsco,* 258 F.3d at 564. In *Warsco,* the Seventh Circuit Court of Appeals noted the expansiveness of the definition of "transfer" under the Bankruptcy Code and concentrated on whether a payment by the debtor to a creditor was "an interest of the debtor in property." [3] *Id.* (citing *Barnhill v. Johnson,* 503 U.S. 393, 400, 112 S. Ct. 1386, 118 L.Ed.2d 39 (1992)). It set forth the fundamental inquiry:

> "[P]roperty of the debtor subject to the preferential transfer provision is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings. Courts considering this element of the preference provision have focused on whether the transfer diminished the debtor's estate.

Id. (citations omitted). According to *Warsco,* a transfer of a $ 50,000 payment from the debtor to a creditor within the 90-day preference period usually is considered a transfer of something of value to a particular creditor and is considered avoidable by a trustee. *See id.* In this case, the casino focused on the transfer of a $ 50,000 payment in gambling chips to satisfy its $ 50,000 marker. It asserted that the chips, which it called placeholders or accounting mechanisms without value outside the casino, were not property of the debtor subject to preferential transfer.

> 3 The Bankruptcy Code's definition of "transfer" includes "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with -- (i) property; or (ii) an interest in property." 11 U.S.C. § 101(54)(D).

The court finds that Resorts creatively attempted to divert the court's attention from the underlying negotiated transaction to the wagering process, which required gambling chips. The undisputed facts of this case reflected the essence of any transaction between a patron and a casino. The patron went to the casino to gamble and to win money.

The casino was willing to lend him money on a contractual basis. The patron first was required to execute the casino's credit application to prove his credit-worthiness. Only after it was approved and he was extended credit up to a certain amount was he allowed to execute markers with which to purchase chips that entitled him to gamble. [4] By signing each marker, the patron agreed that he was obligated to repay the funds being loaned to him. Each marker indicated the amount of credit being loaned to him, and that amount was exchanged for gambling chips. The chips therefore had clear value in the casino; they were fungible tokens used as a substitute for the cash or credit amount the debtor brought into the casino, and at the end of play they could be cashed in or used to redeem a marker. *See, e.g.,* R. 22, P 11 (stipulation that the debtor "tendered $ 50,000 in gaming chips to Resorts on August 4, 2005 in exchange for Marker Number 54401104"). However, if the marker was not paid back in the full amount -- with cash, checks, chips, or another approved mode of exchange -- within 28 days, it was the casino's policy to deposit the marker at the patron's bank for payment. [5] In this case, the debtor paid back one marker at issue with a personal check and the other marker with gambling chips. Each payment method was accepted by Resorts, and each marker was considered paid in full. In essence, then, each marker established a straightforward short-term loan transaction between the casino and the debtor, and the chips exchanged for the marker reflected the same value amount as the marker but were used specifically to gamble in the casino.

> 4 Casinos may investigate the credit status of a patron through traditional credit-reporting sources and through a Central Credit service designed particularly for casinos. That service reports the amounts of credit available to the patron in other gambling establishments, his balances in each, and basic information concerning his history of gambling play. *See* Patrick E. Ogle, "*In re Armstrong: Gambling with Other People's Money,*" 56 Ark. L. Rev. 455, 459 (2003).
>
> 5 It has been said that "[t]he marker has greater prospects for collection than non-gambling credit simply because the casino has the threat of cutting off the gambler if the marker is not paid." Richard I. Aaron, "*Gambling Markers and Bankruptcy,* " 2004 Ann. Survey of Bankr. Law Part I § D (2004).

This court finds persuasive the analysis provided by the Eighth Circuit in *Harrah's Tunica Corp. v. Meeks (In re Armstrong),* 291 F.3d 517 (8th Cir. 2002).

> When Harrah's extended a line of credit to [the debtor] Armstrong, permitted him to sign markers in exchange for chips, and promise not to present the markers to his bank for payment for a definite length of time, Harrah's made a short term loan to Armstrong.

Id. at 523. In the view of the court, therefore, Resorts' attempt to recharacterize the transaction is unpersuasive and its argument that the transfer of $ 50,000 in chips was not avoidable under § 547(b) was unsuccessful. Following *Warsco's* analysis, the court finds that the debtor's $ 50,000 payment in chips to redeem Resorts' $ 50,000 marker was a transfer of property that would have been part of the debtor's bankruptcy estate had it not been transferred within the 90-day preference period. It further determines that the transfer diminished the debtor's estate. Therefore, the chips payment transfer is a preferential transfer that is avoidable by the Trustee.

The casino's reliance on the laws of **Indiana** to demonstrate that gambling chips may not be used as currency was also ill conceived. **Indiana** has had a long history of prohibiting gambling, but has carved out a few well-regulated exceptions. *See Schrenger v. Caesars* ***Indiana,*** 825 N.E. 2d 879, 882 (**Ind.** App. 2005) (reviewing the gambling laws of **Indiana)**. One "specific, later-enacted exception to the general rule that gambling debts are void as against public policy" is found in **Indiana** Code 4-33-9-15. [6] *Id.* at 883. That section authorizes riverboat casinos operators to extend credit to patrons for the specific purpose of gambling. *See id.* In fact, the provisions throughout Chapter 9, entitled "Gambling Operations," set up tight controls on gambling. For example, there are regulations limiting the length of time of a riverboat gambling cruise, *see* **Ind.** Code 4-33-9-3, and the forms of wagering permitted on gambling games, *see* **Ind.** Code 4-33-9-9. To the same purpose, the limitation of subsection 15 -- requiring that chips be purchased only from the owner or agent of the riverboat -- is simply another restraint or control on gambling activities. Subsection 15 also makes clear that tokens, chips, and electronic cards are the acceptable non-monetary substitutes that are available for making wagers on the riverboat and that they may be purchased by means of a **credit agreement.** The provision does not suggest in any way that gambling chips may not be used as currency, as Resorts asserts.

6 **Indiana** Code 4-33-9-15 provides as follows:

> (a) All tokens, chips, or electronic cards that are used to make wagers must be purchased from the owner or operating agent of the riverboat:
>
> (1) while on board the riverboat; or
>
> (2) at an on-short facility that:
>
> (A) has been approved by the commission; and
>
> (B) is located where the riverboat docks.
>
> (b) The tokens, chips, or electronic cards may be purchased by means of an agreement under which the owner or operating agent extends credit to the patron.

Resorts' reliance on a Third Circuit tax case, *Zarin v. Comm'r*, 916 F.2d 110 (3rd Cir. 1990), was unhelpful to the casino in this bankruptcy context. *Zarin* found that gambling chips "are merely an accounting mechanism to evidence debt" and "not the property of [the taxpayer Zarin]." *Id.* at 113, 114. However, the case arose under the Internal Revenue Code, not the Bankruptcy Code. It concerned the issue of recognized income after a settlement of gambling debts, and it focused on the tax code's definition of gross income under § 108 of the Internal Revenue Code. The court finds the discussion of gambling chips in *Zarin* to be inapposite to the case before it.

Resorts presented a second argument to show that the chips transfer, pursuant to § 547(b)(2), was not a "transfer made on account of an antecedent debt." It reported that the debtor had satisfied the marker within the 28-day period during which Resorts was holding the marker. The casino then concluded (without citation to supporting cases) that, because the debtor "took advantage of that opportunity" to exchange the gambling chips within the 28 days, "there was no satisfaction of an antecedent debt under § 547(b)(2)." R. 26 at 11.

The term "antecedent debt" is not defined in the Bankruptcy Code. A "debt" is defined as a "liability on a claim," *see* § 101(12), and a "claim" means a "right to payment," *see* § 101(5(A)). A debt is considered to be antecedent, for purposes of § 547(b), "if it was incurred before the allegedly preferential transfer." *In re Bridge Info. Sys., Inc.*, 474 F.3d 1063, 1066-67 (8th Cir. 2007) (citation omitted). "An antecedent debt exists when a creditor has a claim against the debtor, even if the claim is unliquidated, unfixed, or contingent." *Warsco*, 258 F.3d at 569 (citing *Energy Coop., Inc. v. SOCAP Int'l, Ltd. (In re Energy Coop. Inc.),* 832 F.2d 997, 1001 (7th Cir. 1987)). Courts interpreting § 547 generally hold that a debt is incurred on "the date upon which the debtor first becomes legally bound to pay." *In re Bridge Info. Sys., Inc.*, 474 F.3d at 1067 (citation omitted); *see also* 5 Collier on Bankruptcy P 547.03[4] at 547-35, -36 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev'd 2008) (citing cases).

Because the debtor created a debt owed to Resorts that he was legally bound to pay when he signed Resorts' $ 50,000 marker on July 15, 2005, the court finds that the debtor's payment of the $ 50,000 marker on August 4, 2005, with gambling chips was a payment for or on account of an antecedent debt owed by the debtor on July 15, 2008. *See In re Armstrong*, 291 F.3d at 524 ("Because the debt here was incurred thirty days before payment, we find the payment of the casino markers constituted the payment of antecedent debt for purposes of 11 U.S.C. § 547(b).") (citing *Jones Truck Lines, Inc.*, 130 F.3d at 329). The court concludes that the transfer on August 4, 2005, constituted an avoidable preference.

B. Nonavoidability of Chips Payment Transfer Pursuant to § 547(c)(1)

Resorts argued that the gambling chips payment was a "contemporaneous exchange for new value" under § 547(c)(1) and therefore not avoidable by the Trustee. In its view, there was a simultaneous exchange of the debtor's tendering of $ 50,000 in gambling chips to Resorts and Resorts' tendering of Marker Number 54401104 to the debtor. It asserted that "the simultaneous exchange of a negotiable instrument (the marker) for gaming chips is a contemporaneous exchange for new value protected from avoidance by Section 547(c)(1)." R. 26 at 11. The "new value," Resorts pointed out, was the debtor's receipt of the marker, which was a negotiable instrument, in return for his tendering $ 50,000 of gambling chips.

Under § 547(c)(1), the trustee may not avoid a transfer if that transfer was intended, by both the debtor and the creditor for whose benefit the transfer was made, "to be a contemporaneous exchange for new value given to the debtor." The term "new value" is defined in subsection (a) of the preference provision:

> In this section "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property but does not include an obligation substituted for an existing obligation.

11 U.S.C. § 547(a)(2). To receive the protection of § 547(c)(1), Resorts has the burden of establishing its elements: that both parties intended a contemporaneous exchange, that the exchange was in fact contemporaneous, and that the exchange was for new value. *See In re Armstrong,* 291 F.3d at 525. The theory underlying this exception to avoidance is that, "to the extent new value is offered, the preference is repaid to the estate." *In re Prescott,* 805 F.2d 719, 727 (7th Cir. 1986). However, the creditor must give evidence of the parties' intent that the transaction be substantially contemporaneous. *See id.* (concluding that creditor failed to give any evidence of intent). In this case, Resorts and the debtor agreed, when the debtor signed the marker on July 14, 2005, that the loan would not become due and that the casino would not cash the marker for 28 days. That agreement reflects that the parties did not intend a contemporaneous exchange for new value. *See In re Armstrong,* 291 F.3d at 525.

The creditor must also show that new value was given. *See In re Energy Coop., Inc.,* 832 F.2d. at 1003 (concluding that debtor's receipt of a release and good will did not fall within the § 547(a)(2) definition of new value). In this case the debtor paid off the marker, thereby paying off his obligation to Resorts on that marker. His receipt of the marker when he paid the debt is not "money or money's worth in goods, services, or new credit." The court finds that the return of the marker to the debtor does not fall within § 547(a)(2)'s definition and does not reflect any new value to the debtor. [7]

> 7 The court finds both the casino's "lawn mower" scenario and the Trustee's fictitious "opera tickets" analogy unhelpful and declines to address those theories. *See* R. 26 at 13; R. 27 at 8.

"The purpose of the contemporaneous exchange exception, like that of other section 547(c) exceptions, is to encourage creditors to continue to deal with troubled debtors without fear that they will have to disgorge payments received for value given." 5 Collier on Bankruptcy P 547.04[1] at 547-49 ; *see also In re Jones Truck Line, Inc.,* 130 F.3d at 326 ("Section 547 is intended to discourage creditors from racing to dismember a debtor sliding into bankruptcy and to promote equality of distribution to creditors in bankruptcy."). The Eighth Circuit, in *In re Armstrong,* commented that such policy considerations are not met "by encouraging casinos to issue credit to troubled debtors so they may, with the odds against them, gamble away their remaining assets and increase their debt." 291 F.3d at 525.

The court finds that Resorts has not met its burden of proving an exception to avoidability by showing that the chips payment transfer was a contemporaneous exchange for new value pursuant to § 547(c)(1). Because the Trustee successfully met her burden of proving that the debtor's payment of the Resorts $ 50,000 marker with $ 50,000 worth of gambling chips constituted a transfer of an interest of the debtor in property for or on account of an antecedent debt owed by the debtor before such transfer was made for purposes of 11 U.S.C. § 547(b)(2), she may avoid that preferential transfer and recover the value of that transfer, $ 50,000, from Resorts for the benefit of the debtor's bankruptcy estate pursuant to 11 U.S.C. § 550. [8]

8 Section 550 of the Bankruptcy Code provides that, "to the extent that a transfer is avoided under section . . . 547 . . ., the trustee may recover, for the benefit of the estate, the property transferred or, if the court so orders, the value of such property, from (1) the initial transferee of such entity."

C. Nonavoidability of Check Payment Transfer pursuant to § 547(c)(1) and (c)(4)

Resorts stipulated that the § 547(b) elements of a preferential transfer were proven concerning the $ 25,000 check payment. However, it insisted that the same arguments that protected the chips payment transfer as a contemporaneous exchange for new value likewise protected the check payment. It argued that the debtor tendered a personal check for $ 25,000 to Resorts in satisfaction of a $ 25,000 marker, an exchange of one negotiable instrument for another. In addition, Resorts claimed, in return for the check transfer the debtor received an equivalent value in the form of the release of the marker. The court finds that the casino again failed to provide any authority to support its argument. It did not demonstrate that a debt incurred on April 14, 2005 (when the marker was signed) and discharged on July 12, 2005 (when the check was tendered to Resorts) was a contemporaneous exchange. It did not show any new value to the debtor for the exchange. The return of the marker does not constitute new value, as the court previously concluded. The casino failed in its burden of proving the elements of § 547(c)(1) to insulate the check payment transfer from avoidance.

Resorts proffered a final argument arising from the other "new value" defense found in § 547(c)(4). This argument had, as its premise, that the court found that gambling chips constituted property of the debtor. The casino claimed: "To the extent that gaming chips constitute property of the Debtor (not merely an accounting mechanism and evidence of indebtedness as established by Resorts in Section I), the $ 100,000 in gaming chips [that were tendered to the debtor in exchange for three markers that were not satisfied and that remain unpaid] constitute subsequent new value that protect the Check Transfer." R. 26 at 14. Because the court made no finding that gambling chips were (or were not) property of the debtor, the argument fails for lack of a correct premise. Moreover, it was an improperly developed argument unsupported by any case law. The court reminds the casino that this exception, like the others in § 547(c), is meant to help creditors continue to work with financially risky debtors; it is not meant to allow casinos to encourage troubled debtors to continue gambling. *See In re Armstrong*, 219 F.3d at 525-26; *see also McKloskey v. Schabel (In re Schabel),* 338 B.R. 376, 380 (Bankr. E.D. Wis. 2005) (explaining the intent of Congress "to encourage creditors to continue doing business with troubled debtors by protecting transfers received by creditors from preference actions, to the extent that the creditors provided goods that replenished the estate during the preference period").

In any case, the casino's position is without merit. Under the § 547(c)(4) exception, a preferential transfer is not avoidable to the extent that the transferee (Resorts) gives new value to the debtor after the transfer on an unsecured basis. *See In re Prescott,* 805 F.2d at 728. Resorts failed to demonstrate that the gambling chips received in exchange for the three unsatisfied markers provided new value to the debtor. If new value had been provided, the casino did not show that it was provided to the debtor after the preferential transfer. *See In re Schabel,* 338 B.R. at 380. The debtor obtained four markers on July 15, 2005, and redeemed one of those markers on August 4, 2005, the date of the preferential transfer. There is no evidence that the three unpaid markers constituted an extension of new value provided by Resorts to the debtor after that transfer. Resorts' proof of claim, seeking repayment for the outstanding $ 100,000 debt on those markers, indicates that the creditor did not intend to replenish the debtor's estate. Resorts is simply a creditor that received a payment from the debtor on a pre-existing obligation, as evidenced by the $ 50,000 marker, during the preference period. *See Gouveia v. RDI Group (In re Globe Bldg. Materials, Inc.),* 484 F.3d 946, 951 (7th Cir. 2007) (affirming preferential transfer). The fact that other markers were not paid does not create new value.

In conclusion, the court finds that Resorts has not established a defense under § 547(c) to the Trustee's right to avoid preferential transfers. It determines that the Trustee is entitled to avoid and to recover the two payments the debtor made to Resorts during the preference period, one with a check and the other with $ 50,000 worth of gambling chips.

The Trustee's request for interest, as provided under the Bankruptcy Code, without objection from Resorts, is also granted. *See Feltman v. City Nat'l Bank (In re Sophisticated Communications, Inc.*, 2007 WL 3216613 at *8 (Bankr. S.D. Fla. 2007) (unpub'd).

CONCLUSION

For the reasons presented above, the court grants judgment plus interest, pursuant to 11 U.S.C. §§ 547(b) and 550, in favor of the Trustee Jacqueline Sells Homann and against the defendant R.I.H. Acquisitions IN, LLC d/b/a Resorts East Chicago on the Trustee's Complaint to Avoid and Recover an Avoidable Transfer.

SO ORDERED.

/s/ Harry C. Dees, Jr.

HARRY C. DEES, JR., CHIEF JUDGE

UNITED STATES BANKRUPTCY COURT

IN THE MATTER OF STEPHEN L. YOUNG and DEBRA A. YOUNG, DEBTORS. JEROME (JERRY) OSBORN, BRAD PIERSON and MARK A. COOPER, PLAINTIFFS, vs. DEBRA A. YOUNG and UNITED STATES TRUSTEE, DEFENDANTS.

CASE NO. 07-32071 HCD, CHAPTER 7, PROC. NO. 07-3136

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION

2008 Bankr. LEXIS 2591

June 26, 2008, Decided

CORE TERMS: fraudulent, adversary proceeding, pro se, real estate, mortgage, class action, misrepresentation, counseling, notice, false representations, particularity, Older Americans Act, failed to state, nondischargeability, concert, false pretense, citations omitted, class certification, dischargeability, conversion, enjoyment, consumers, prayer, promissory, conclusions of law, real estate, fraudulent conduct, working in concert, actual fraud, failure to state a claim

COUNSEL: Jerome (Jerry) Osborn, plaintiff, Pro se, South Bend, **Indiana.**

Brad Pierson, plaintiff, Pro se, Mishawaka, **Indiana.**

Mark Cooper, plaintiff, Pro se, South Bend, **Indiana.**

Debra Voltz-Miller, Esq., counsel for defendant Debra A. Young, South Bend, **Indiana.**

United States Trustee, defendant, South Bend, **Indiana.**

Jacqueline S. Homann, Chapter 7 Trustee, putative defendant, South Bend, **Indiana.**

JUDGES: HARRY C. DEES, JR., CHIEF JUDGE.

OPINION BY: HARRY C. DEES, JR.

OPINION

MEMORANDUM OF DECISION

At South Bend, **Indiana,** on June 26, 2008.

Before the court are two motions in this adversary proceeding. The first is a Motion to Dismiss Pursuant to Rule 12(b)(6), filed by Debra Young, debtor and defendant herein ("defendant"). It asks for dismissal of the Complaint filed against her and the United States Trustee ("second defendant") by three plaintiffs, Jerome (Jerry) Osborn, Brad Pierson, and Mark A. Cooper ("plaintiffs"), representing themselves ("*pro se*"). The second is a Motion to Substitute Defendant filed by the plaintiffs, seeking to remove the United States Trustee and to substitute the Chapter 7 Trustee, Jacqueline S. Homann, as the second defendant in the Complaint. For the reasons that follow, the court grants the Motion to Dismiss and denies the Motion to Substitute Defendant.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of **Indiana** Local Rule 200.1, the United States District Court for the Northern District of **Indiana** has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

In the related bankruptcy, Debra A. Young and Stephen L. Young filed their voluntary chapter 7 petition on August 14, 2007. On Schedule A, the debtors listed 20 rental properties. On their Statement of Intention, they declared their intent to surrender 18 of the rental properties and reaffirmed the mortgage of their residential real estate. Two rental properties in South Bend, **Indiana** -- at 54427 Quince Road and at 741 27th Street -- were not included in that Statement. Plaintiff Osborn was listed on Schedule F and on the debtors' matrix as an unsecured creditor holding a **promissory note** in the amount of $ 23,000.00. [1] Plaintiffs Pierson and Cooper were not named as creditors in the Youngs' bankruptcy case. On November 19, 2007, the debtors received a discharge. On January 2, 2008, the plaintiffs filed proofs of claim as unsecured creditors in the Youngs' bankruptcy: Osborn's claim was in the amount of $ 30,000.00; Cooper's claim was $ 16.84; and Pierson's was $ 24,000.00. *See* Claims 8, 9, and 10, Case No. 07-32071.

1 Exhibit 2, attached to the Complaint, is the **promissory note** executed on July 22, 2006, by Debra Young and Osborn. *See* R. 1, Ex. 2 ("**Promissory Note**"). In it, Debra Young promised to pay Osborn $ 23,000 on or before July 19, 2007. On June 30, 2007, Osborn executed two documents entitled "Partial Assignment of Proceeds," written on the back of the **Promissory Note,** assigning a portion of the Note to plaintiff Cooper, *see id.*, Ex. 3 ("Cooper Assignment"), and another portion to plaintiff Pierson. *See id.*, Ex. 4 ("Pierson Assignment").

On November 13, 2007, the three plaintiffs filed a Complaint to Determine Dischargeability of Debt and Objection to Debtor's Discharge. *See* R. 1. In recognition of the *pro se* plaintiffs' status, the court describes the pleading in detail and holds it to a less exacting standard than one prepared by counsel. *See Greer v. Board of Education of City of Chicago, Ill.*, 267 F.3d 723, 727 (7th Cir. 2001) (stating that a court liberally construes the pleadings of individuals who proceed *pro se*). The Complaint contained numerous broad allegations as background and one count of nondischargeability. It alleged that the defendant [2] was a real estate agent with Trinity Century 21 Real Estate Company, Inc., who "took an active part in the fraudulent activities entered into by Trinity and those other persons and entities acting together and in concert with Trinity with respect to alleged real estate sales and transfers, financial counseling and mortgage lending fraud." *Id.* at P 12. Those fraudulent activities included "alleged fraudulent real estate, fraud counseling and lending and mortgage activities" and "residential properties that mainly were in a 'distressed' condition or otherwise valued in a low amount." [3] *Id.* PP 13, 14. The "Factual Background" of the Complaint presented this specific allegation of the defendant's fraudulent activity:

> Defendant in the instant action counseled Plaintiff Osborn in fraudulent methods to convert and shelter assets from his alleged creditors by Quit Claim Deed, filed, on the 13th day of July, 2006, with the St. Joseph County Recorder, for a parcel of real estate property commonly known as 741 26th Street, South Bend, **Indiana** 46615 (see Exhibit '1a') to and for Defendant's personal enjoyment and potential profit and/or others acting in concert with Defendant. Defendant admitted this fraudulent activity in open court at the 1st Meeting of Creditors.

Id. P 15. It also alleged that the defendant worked in concert with Title Express, Inc., to prepare the Quit Claim Deed. [4] Finally, after describing Osborn, aged 74, as elderly, with only a 6th grade education, and mentally challenged because of a head injury he suffered in June 2002, it alleged that the defendant took advantage of him as one who is protected under the Older Americans Act, 42 U.S.C.A. § 3001. *See id.* PP 17, 33.

2 Throughout the Complaint, the plaintiffs refer to "the defendant," even though there are two defendants charged in the pleading. It appears that "the defendant" is Debra Young. The second defendant, the United States Trustee, is expressly named only in the prayer of the Complaint.

3 Those fraudulent activities, according to the Complaint, were described in a state court case (which the plaintiffs failed to append to the Complaint as Exhibit 1) and in another adversary proceeding (which was dismissed with prejudice by stipulation of all seven plaintiffs). This evidence is therefore not before the court.

4 The Quit-Claim Deed by which the plaintiff Osborn transferred property to defendant Young on July 13, 2006, was attached to the Complaint. *See* R. 1, Ex. 2 ("Quit-Claim Deed" or "Deed"). Only the legal description of the property was recorded on the Deed; however, the plaintiffs' Complaint stated that the property was "commonly known as 741 26th Street" in South Bend, **Indiana.** R. 1 P 15. Osborn received $ 10.00 "and other valuable consideration" for the property. The Quit-Claim Deed was notarized and the transfer recorded in the St. Joseph County Recorder's Office on that date. *See id.*

The Complaint's "Fraudulent and Unlawful Conduct" background section alleged that the defendant acted in concert with others when she "made false representations and/or omissions and otherwise engaged in conduct for the purpose of undertaking the fraudulent purchase for sale of the residence in question and to misappropriate funds from such transaction to her and others working in concert from this transaction to her own use, enjoyment and benefit." *Id.* P 27. It further alleged that (a) the defendant (along with others) knew that her representations were false; (b) the plaintiffs reasonably relied on the misrepresentations; and (c) the plaintiffs suffered damages. *Id.* P 27-P 30. This prefatory section of the Complaint listed, without explication, state law claims of property conversion, criminal deception, and criminal conversion against the defendant and those acting in concert with her, in violation of **Indiana** Code 35-43-5-3(a)(2) and (3) and **Indiana** Code 35-43-4-3. *Id.* PP 31-32. It also alleged a violation of the Older Americans Act and added (again with no comment) the citation of **Indiana's** Bureau of Aging Services, **Indiana** Code 12-10-1 to -5.

The sole count of the Complaint charged that the defendant's "debt to plaintiffs is not dischargeable pursuant U.S.C.A. et. seq; U.S.C.A. § 523(a)" for the following reason:

> Defendant and other[s] working in concert with her in their individual capacity by fraud and criminal conduct. Misappropriated the aforesaid real property with intent to deprive plaintiff of its enjoyment and usage of Plaintiff Osborn by engaging in act of false pretense, false representation, false credit counseling and actual fraud. Defendant and others working in concert with her engaged in conduct involving wilful and malicious injury to plaintiffs.

Id. P 35- P 36. The court takes notice that, although the title of the Complaint included an "Objection to Debtor's Discharge," no count in that pleading raised a charge under § 727 of the Bankruptcy Code, and there are no allegations objecting to the debtor's discharge. The court therefore construes the Complaint as one brought solely under 11 U.S.C. § 523(a). In addition, it notes that only in the final prayer for relief was the second defendant, the United States Trustee, named:

> That the U.S. Trustee be order[ed] by Declaratory Judgment not to sell Plaintiffs' Real Estate for the benefit of Creditors in this instant bankruptcy and Plaintiff allowed to **replevin** said real estate.

Id. P 36(c). The prayer of the Complaint requested an order that the defendant's debt to the plaintiffs be non-dischargeable, that the Trustee not sell the property, and that costs be assessed to the defendant. The Complaint also sought joinder to and certification of a class action pending in state court. It described the class as "a nationwide class of all 'victims of Trinity Century 21 and Title Express, Inc.' which is defined as consumers of defendants' real estate, mortgage, title and closing service (and the instant claim of fraudulent Credit Counseling and conversion to defraud creditors)." *Id.* at P 20.

The defendant Young, by counsel, filed an Answer to the Complaint on February 13, 2008. *See* R. 18. She admitted that she had been a real estate agent working for Trinity Century 21, but denied or was without information concerning the other allegations. She denied all allegations of fraudulent conduct. As one of her affirmative defenses, the defendant asserted that the complaint failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). She also filed a Motion to Dismiss on that ground. *See* R. 15, 16 (Motion, Memorandum of Law). In it, she asserted the following reasons for dismissal: (a) insufficient factual allegations to support a claim of nondischargeability; (b) failure to meet the notice pleading requirements of Federal Rule of Civil Procedure 8 or the fraud particularity requirements of Federal Rule 9; (c) the plaintiffs' lack of standing to bring this case by relying on a St. Joseph Superior Court case and an adversary proceeding to which they were not parties; (d) lack of jurisdiction to determine issues under the Older Americans Act; and (e) failure to meet the requirements for class certification.

The plaintiffs did not respond to the Motion to Dismiss by the thirty-day deadline of March 13, 2008. *See* N.D. **Ind.** L.B.R. B-7007-1(a). On March 8, 2008, the plaintiffs had filed a "Motion for Expansion of Time to File All Plaintiff's [*sic*] Reply and Objection to Motion to Dismiss And Other Defendant's Filings." *See* R. 19. The court denied the Motion on the ground that no reason was given to justify the extension. *See* R. 20; *see also* N.D. **Ind.** L.B.R. B-7007-1(a) ("Extensions of time shall only be upon order of the court, for good cause shown."). Without asking the court to reconsider the denial of a time extension, the plaintiffs filed a belated Objection to Motion to Dismiss and an Amended Table of Exhibits on March 25, 2008. *See* R. 22, 23.

The court could dismiss this adversary proceeding based solely upon a lack of timely response to the motion to dismiss. *See* N.D. **Ind.** L.B.R. B-7007-1(a) ("The failure to respond or reply within the time required will be deemed a waiver of the opportunity to do so and may subject the motion to a ruling without further submissions."). Because the plaintiffs are proceeding *pro se,* however, it considers the Complaint and the Motion to Dismiss it on their merits.

Discussion

The question before the court is whether the plaintiffs' Complaint must be dismissed as a matter of law pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. [5] In order to state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." [6] Fed. R. Civ. P. 8(a)(2). Until recently, courts relied on the Supreme Court's analysis of Rule 8(a) in *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957), and in particular on its mandate that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46; 78 S. Ct. at 102. However, the Court last year criticized the "no set of facts" language in *Conley* and set forth what it considered a more plausible test for satisfying Rule 8(a)(2):

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Bell Atlantic Corp. v. Twombly, U.S. , 127 S. Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007) (citations omitted) (effectively overruling *Conley v. Gibson*). According to the Court, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 1965 n.3.

5 Federal Rule of Bankruptcy Procedure 7012(b) states that Rule 12 (b)-(h) of the Federal Rules of Civil Procedure are applicable in adversary proceedings. Rule 12(b)(6) is the affirmative defense that the complaint must be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

6 Federal Rule of Bankruptcy Procedure 7008 states that Rule 8 of the Federal Rules of Civil Procedure applies in adversary proceedings. Rule 8(a) states that a pleading "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a).

The Seventh Circuit Court of Appeals explained that, "[i]n *Bell Atlantic,* the Supreme Court retooled federal pleading standards, retiring the oft-quoted *Conley* formulation." *Killingsworth v. H.S.B.C. Bank of Nevada, N.A.,* 507 F.3d 614, 618 (7th Cir. 2007) (citing *Conley,* 355 U.S. at 45-46, and *Bell Atlantic,* 127 S. Ct. at 1969).

> In *Airborne Beepers [& Video, Inc. v. A.T. & T Mobility, LLC,* 499 F.3d 663 (7th Cir. 2007)], we read [*Bell Atlantic Corp. v.*] *Twombly* together with the Supreme Court's decision two weeks later in *Ericson v. Pardus,* U.S. , 127 S. Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007), and observed that "we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *Airborne Beepers,* 499 F.3d at 667.

Id., 507 F.3d at 619. Following the Supreme Court and the Seventh Circuit, therefore, this court accepts as true the factual allegations contained in a complaint and will dismiss the complaint only if it fails to set forth enough facts to state a claim for relief that is "plausible on its face." *St John's United Church of Christ v. City of Chicago,* 502 F.3d 616, 625 (7th Cir. 2007) (quoting *Twombly), cert. denied,* 2008 WL 593773 (2008).

In this case, to survive dismissal the Complaint must satisfy both Rules 8 and 9(b) of the Federal Rules of Civil Procedure. The plaintiffs' claim for relief is based upon allegations of fraudulent activity: mortgage lending fraud, fraud counseling, and fraudulent methods of sheltering assets, to name some of the charges. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). This rule of civil procedure is made applicable in adversary proceedings by Rule 7009 of the Federal Rules of Bankruptcy Procedure.

> In order to withstand a motion to dismiss, a complaint alleging fraud must, at a minimum, state "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." A complaint which fails to identify the fraudulent statements or the reasons why they are fraudulent does not satisfy the particularity requirement of Rule 9(b). That requirement applies equally to all claims which are based upon an underlying fraud, including all three aspects of 11 U.S.C. § 523(a)(2)(A) (false pretenses, false representations, and actual fraud), and complaints under § 523(a)(4) concerning fraud in a fiduciary capacity.

S & L Enters. I, LLC, v. Eisaman (In re Eisaman), B.R. , 2008 WL 1945534 at *2 (Bankr. N.D. **Ind.**) (citations omitted). Particularity, under Rule 9(b), "means the who, what, when, where, and how" of the circumstances at issue. *DiLeo v. Ernst & Young,* 901 F.2d 624, 627 (7th Cir.), *cert. denied,* 498 U.S. 941 (1990).

With the fundamental principles of pleading under Rules 8 and 9(b) set forth, the court now turns to the Complaint before it, recognizing that the *pro se* plaintiffs' pleadings are held to less strict standards than those filed by attorneys for their clients. *See Greer v. Board of Education of City of Chicago, Ill.,* 267 F.3d 723, 727 (7th Cir. 2001). *Greer* reminds courts that "'[t]he essence of liberal construction is to give a *pro se* plaintiff a break when, although he stumbles on a technicality, his pleading is otherwise understandable.'" *Id.* (quoting *Hudson v. McHugh,* 148 F.3d 859, 864 (7th Cir. 1998)). Nevertheless, "[p]laintiffs' voluntary *pro se* status does not give them any privilege to engage in sloppy litigation, or any extra entitlement to amend the complaint." *Denlinger v. Brennan,* 87 F.3d 214, 217 (7th Cir. 1996).

In this case, the court finds that even the most generous reading of this nondischargeability Complaint cannot save it from dismissal. To prevail on a claim of nondischargeability, the plaintiffs have the burden of proof by a preponderance of the evidence. *See Grogan v. Gardner,* 498 U.S. 279, 285, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991). By generically citing only § 523(a), which excepts from discharge many different categories of debts (including domestic support obligations, educational loans, certain tax debts, and several kinds of liabilities based on fraud), the plaintiffs gave "only a passing reference to the Bankruptcy Code" without indicating which subsection provided the basis for excepting their debt from discharge. *McCready v. eBay, Inc.,* 453 F.3d 882, 890 (7th Cir. 2006) (concluding that McCready's passing reference to the Code failed to provide notice of his claim).

If the plaintiffs intended to argue, for example, that the debt owed to them by the defendant was one "for fraud or defalcation while acting in a fiduciary capacity" under § 523(a)(4), the plaintiffs did not state in their Complaint that there was a fiduciary relationship between them and the defendant. *See In re Frain,* 230 F.3d 1014, 1017 (7th Cir. 2000). If they meant that the debt was obtained by a materially false statement written about the defendant's financial condition with the intent to deceive the plaintiffs, as required under § 523(a)(2)(B), they did not produce such a document. *See Fischer Inv. Capital, Inc. v. Cohen (In re Cohen),* 507 F.3d 610, 613 (7th Cir. 2007). If they intended to claim that the debt was obtained by "false pretenses, a false representation, or actual fraud" under § 523(a)(2)(A), the plaintiffs were required to establish that (1) the defendant obtained the plaintiffs' property or money through representations that the defendant either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendant acted with an intent to deceive the plaintiffs; and (3) the plaintiffs justifiably relied on the defendant's false representations to their detriment. *See, e.g., Mayer v. Spanel Int'l, Ltd. (In re Mayer),* 51 F.3d 670, 673 (7th Cir.), *cert. denied,* 516 U.S. 1008 (1995); *see also Field v. Mans,* 516 U.S. 59, 74-75, 116 S. Ct. 437, 446, 133 L.Ed.2d 351 (1995) (creditor's reliance need only be justifiable). The plaintiffs' Complaint, however, presented only cursory allegations of misrepresentations, detrimental reliance, and damages, unsupported by any explanation. It used the term "intent" once, in Count 1, alleging the defendant's "intent to deprive plaintiff" Osborn of enjoyment of his property.

The Supreme Court, in *Twombly,* stated that "a formulaic recitation of the elements of a cause of action" does not provide sufficient grounds for entitlement to relief. *Bell Atlantic Corp. v. Twombly,* U.S. at , 127 S. Ct. at 1964-65. The court finds that this Complaint did not provide even a complete formulaic recitation of the elements of the cause of action: There is no allegation of an intent to defraud, for example. Moreover, the Complaint alleged that the defendant "engag[ed] in act[s] of false pretense, false representation, false credit counseling and actual fraud," but it offered no description at all of those acts or representations. Nor does it point to a statement in any document that reflects an underlying fraud. In fact, the factual detail presented by the plaintiffs is so poorly worded and sketchy that it fails to notify the defendant of the specific actions she allegedly made against the plaintiffs. The court determines, therefore, that the Complaint does not provide sufficient notice to the defendant of the claim against her and thus does not satisfy Civil Procedure Rule 8. *See McCready,* 453 F.3d at 890 ("Although we construe complaints by pro se litigants liberally, *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972), we must do so while keeping in mind the purpose of the federal pleading system is to provide notice of all claims, *see* Fed. R. Civ. P.8.").

Because fraud was alleged, as well, the plaintiffs were required under Rule 9(b) to set forth more specific details than Rule 8 requires, details of what the defendant did, when, where, and to whom. *See In re Doctors Hosp. of Hyde Park, Inc.*, 308 B.R. 311, 322 (Bankr. N.D. Ill. 2004) ("Fraud is a serious charge, easy to allege and hard to prove."). The single count of the Complaint asserts an undefined fraud claim, and the Complaint's allegations do not set forth the necessary details of the defendant's actions. It does not even make clear who is charged with fraud. It alleged that "the defendant" made misrepresentations, without clarifying whether the defendant was Young or the Trustee. *See Speights v. State,* 2000 WL 263700 (N.D. Ill. 2000) (unpub'd) (finding complaint deficient because it failed to identify which defendants were responsible for the definite harms enumerated). Nor does it pinpoint what was fraudulent. The Complaint described the Quit-Claim Deed but did not allege fraud concerning that Deed or its execution and recording. The court, having examined the Deed, does not find anything reflective of fraud on its face. The court further takes note that the identification of the property being transferred is ambiguous: The Complaint describes property at "741 26th Street" but the debtors' schedules list property at "741 27th Street," and the Deed itself presents only the legal description. Without clear facts concerning which defendant and which property are involved, the Complaint lacks the most basic necessary information. The Complaint also does not identify any fraudulent statement or fraudulent conduct by the defendant; it merely labels the transfer of property from plaintiff Osborn to the defendant as a fraudulent activity. 7 *See, e.g., Cross v. Simons*, 729 F. Supp. 588, 594 (N.D. Ill. 1989) (stating general rule that, to satisfy Rule 9(b), complaint must "inform each defendant of the specific fraudulent acts" constituting the claim against that particular defendant) (citations omitted).

7 In the view of this court, the Complaint's allegation that the defendant "counseled plaintiff Osborn in fraudulent methods to convert and shelter assets from his alleged creditors" suggests that plaintiff Osborn, by following Young's counsel and by transferring the property to Young, was complicit in some fraudulent plan to hide his assets from creditors. *See* R. 1, P 15.

Without sufficient explanation of the acts constituting fraud, stated with particularity, this Complaint does not satisfy the requirements of Rule 9(b). *See In re Rockefeller Ctr. Props., Inc. Sec. Litig. v. Rockefeller*, 311 F.3d 198, 217 (3d Cir. 2002) (stating that Rule 9(b) "requires at a minimum" that plaintiffs support fraud complaints with the "who, what, when, where and how" of the events at issue). The court concludes that the Complaint must be dismissed pursuant to Rule 12(b)(6) because it failed to give sufficient notice of the plaintiffs' claim to the defendant and failed to plead fraud with sufficient particularity and clarity, pursuant to Federal Rules of Civil Procedure 8 and 9(b).

In addition, the court must dismiss the Complaint against the second defendant individually. Even though "a Complaint may group individual defendants to a certain degree for the purpose of stating a claim for relief when each defendant is explicitly connected to the underlying allegations supporting that claim," it fails when the allegations linking the defendants to the claims against them are insufficient. *In re Verestar, Inc.*, 343 B.R. 444, 481 (Bankr. S.D.N.Y. 2006). The plaintiffs in this case failed to state any claim at all against the United States Trustee: There were no allegations of her personal involvement, of any act by her toward the plaintiffs, or of any wrongdoing on her part. *See, e.g., Indemnified Capital Investments, S.A. v. R..J. O'Brien & Assocs., Inc.*, 12 F.3d 1406, 1407 n.2 (7th Cir. 1993); *Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974). The Complaint therefore is dismissed as to the second defendant.

The court further finds that it lacks jurisdiction over any claim by the plaintiffs under the Older Americans Act, 42 U.S.C. §§ 3001-3058ee. That Act gives the federal government the power to distribute funds to the states each year, and the states in turn provide funds for services to "older individuals," defined under the Act as individuals 60 years of age or older. *See* 42 U.S.C. § 3002(38); *City of Chicago v. Lindley*, 66 F.3d 819, 820-21 (7th Cir. 1995). Governmental agencies on aging have standing to raise claims under the Act. *See id.* at 824 n.6. However, no private right of action, express or implied, is available under the Act. *See Community & Econ. Dev Ass'n of Cook County, Inc v. Suburban Cook County Area Agency on Aging*, 770 F.2d 662, 668 (7th Cir. 1985); *Osborn v. American Ass'n of Retired Persons*, 660 F.2d 740, 745-46 (9th Cir. 1981) (finding no implied private right of action by individuals). Whatever claim plaintiff Osborn believes he may have under the Older Americans Act, it is not a claim that arises under or is related to any proceeding under the Bankruptcy Code, and it is not within this court's jurisdiction. *Cf In re Mandalay Shores Co-op. Housing Ass'n, Inc.*, 17 B.R. 33, 35 (Bankr. Fla. 1981).

It is also the finding of the court that the plaintiffs' mere citation to statutes is insufficient to state a claim for relief under those statutes. *See, e.g., Walker v. Michael W. Colton Trust*, 47 F. Supp. 2d 858, 864 (E.D. Mich. 1999) (stating that citations, without more, are insufficient to satisfy pleading requirements under Rule 8.); *cf United States v. Williams*, 429 F.3d 767, 775 (8th Cir. 2005) (stating that a citation to a statute, without more, does not cure the omission of an essential element of the charge in an indictment). Therefore none of the citations to state statutes or to the Older Americans Act pleads a claim in the Complaint.

The plaintiffs' attempt at class certification fares no better. The plaintiffs define the class as "a nationwide class of all 'victims of Trinity Century 21 and Title Express, Inc.' which is further defined as consumers of defendants' real estate, mortgage, title and closing service (and the instant claim of fraudulent Credit Counseling and conversion to defraud creditors)." R. 1 P 20. They ask the court to certify the class or to join the "state class action" that was stayed by

Deborah Young's bankruptcy filing.

This court may certify representatives of a class of plaintiffs "if the putative class satisfies all four requirements of Federal Rule of Civil Procedure 23(a) -- numerosity, commonality, typicality, and adequacy of representation -- and any one of the conditions of Rule 23(b)." [8] *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 2952 (2007). Bankruptcy Rule 7023, which applies Rule 23 of the Federal Rules of Civil Procedure in adversary proceedings, allows class action lawsuits in bankruptcy cases. Although in the past some courts refused to allow class actions for nondischargeability claims under § 523(a), *see Sweet v. Hanson (In re Hanson)*, 104 B.R. 261, 262-63 (Bankr. N.D. Cal. 1989); *In re Woodmore Corp.*, 4 B.R. 186, 190-92 (Bankr. D. Colo. 1980), most courts now recognize that dischargeability proceedings are adversary actions that may be prosecuted as class actions under Bankruptcy Rule 7023. *See, e.g., Turner v. Talbert (In re Talbert)*, 347 B.R. 804, 807 (Bankr. E.D. La. 2005). The plaintiffs have the burden of satisfying all the elements of Rule 23(a). *See Oshana*, 472 F.3d at 513; *In re Talbert*, 347 B.R. at 808.

8 The statutory requirements are as follows:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

For these plaintiffs, the adequate representation requirement of Rule 23(a)(4) is dispositive. A plaintiff who is not an attorney and who is proceeding *pro se* cannot be a class representative who fairly and adequately protects the interests of the class under Rule 23(a)(4). *See Fymbo v. State Farm Fire & Cas. Co.*, 213 F.3d 1320, 1321 (10th Cir. 2000) ("A litigant may bring his own claims to federal court without counsel, but not the claims of others.") (citations omitted); *see also Rutledge v. Lane*, 215 F.3d 1330 (unpub'd) (7th Cir. 2000) (concluding that pro se plaintiff does not fulfill the Rule 23(a)(4) requirement). Although the court finds other requirements of Rule 23(a) unfulfilled as well, it denies the plaintiffs' class action request based upon their inability to satisfy this criterion of fair representation of the class.

It is clear to the court, too, that the plaintiffs' definition of a class cannot apply in this adversary proceeding against the defendants Young and the U.S. Trustee. The United States Trustee does not have a real estate, mortgage, title and closing service. There are no consumers of the Trustee's services. In addition, neither Trinity Century 21 nor Title Express, Inc., is a defendant in this proceeding. It appears that only "consumers" who could show a valid claim against the defendant Young, based upon her alleged undefined fraudulent activity in providing real estate, mortgage, title or closing services, could qualify as members of the plaintiffs' putative class. Since the plaintiffs in this adversary proceeding have failed to state a claim against defendant Young, this court refuses to consider further a class certification. *See Oshana*, 472 F.3d at 512-13 (affirming district court's determination that proposed class was not sufficiently definite to warrant certification).

One last matter must be considered. The plaintiffs filed a Motion to Substitute defendants, seeking to substitute the Chapter 7 Trustee for the U.S. Trustee as the second defendant in the Complaint. They gave no reason for the request and submitted no affidavit accompanying the Motion. Earlier in this Memorandum of Decision, the court determined that the Complaint must be dismissed against the U.S. Trustee on the ground that the pleading presented no allegations of the Trustee's wrongdoing and failed to state any claim whatsoever against the Trustee. Indeed, she was named for the first time in the prayer for relief. The plaintiffs have presented no justification for removing the U.S. Trustee and for substituting the Chapter 7 Trustee in this case, and have made no showing of excusable neglect for having filed the action initially against the U.S. Trustee, rather than the Chapter 7 Trustee. The court, in its discretion, therefore denies the Motion for Substitution. *See Russell v. City of Milwaukee*, 338 F.3d 662, 667 (7th Cir. 2003) (affirming refusal to substitute parties).

In summary, the court determined that the plaintiffs' Complaint, with its blanket vague allegations of fraud, failed to state a claim upon which relief can be granted. It pointed out the Complaint's many shortcomings: The Complaint failed to identify which defendant was charged with particular fraudulent conduct, which property allegedly was fraudulently transferred, what acts and representations were alleged to be fraudulent, and under which dischargeability exception of § 523(a) the Complaint was brought. The court also dismissed the Complaint against the second defendant, the U.S. Trustee, and denied the plaintiffs' Motion to Substitute the chapter 7 Trustee for the U.S. Trustee. The court's dismissal encompassed all nonbankruptcy citations in the Compaint because they were merely listed as citations, without more. Finally, the court denied the plaintiffs' request for class certification.

Rules 8 and 9(b) of the Federal Rules of Civil Procedure justify dismissal of the Complaint pursuant to Rule 12(b)(6). The court grants the Motion to Dismiss filed by defendant Debra A. Young and denies the Motion to Substitute Defendant filed by the plaintiffs.

Conclusion

For the reasons stated above, the court grants the Motion to Dismiss Pursuant to Rule 12(b)(6) filed by defendant Debra A. Young. The plaintiffs' Complaint to Determine Dischargeability of Debt is dismissed. The court also denies the plaintiffs' Motion to Substitute Defendant.

SO ORDERED.

/s/ Harry C. Dees, Jr.

HARRY C. DEES, JR., CHIEF JUDGE

UNITED STATES BANKRUPTCY COURT