The relief described hereinbelow is SO ORDERED.

SIGNED this 11th day of August, 2023.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

ANTHONY JOSEPH PENNY, Case No.22-20865
Chapter 13

Debtor.

HARDWIRE LOW VOLTAGE, LLC, Adv. No. 22-06052

Plaintiff,

v.

ANTHONY JOSEPH PENNY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION
TO DISMISS OR FOR MORE DEFINITE STATEMENT

Debtor Anthony Penny filed for bankruptcy under Chapter 13 on September 8, 2022. Creditor Hardwire Low Voltage, LLC, then filed this adversary proceeding to determine whether its claim against Penny is for nondischargeable "larceny" under 11 U.S.C. § 523(a)(4).[1] This matter comes before the Court on Penny's motion to dismiss Hardwire's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), or in the alternative, for a more definite statement under Fed. R. Civ. P. 12(e).[2]

Hardwire's complaint alleges:

- Hardwire has a business checking account with Arvest Bank (the "**Arvest Account**");
- Penny is not and has never been an owner of the Arvest Account;
- Penny is not and has never been an authorized signer, or named in any other capacity, on the Arvest Account;
- Penny is not and has never been a member or manager of Hardwire;
- Neither Hardwire nor any member or manager of Hardwire has ever given Penny the authority to sign checks, make withdrawals, or check balances on the Arvest Account, or to otherwise access the Arvest Account;

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[1] Debts "of the kind specified in" § 523(a)(4) are excepted from discharge in Chapter 13. *See* 11 U.S.C. § 1328(a)(2), (c)(2). Section 523(a)(4) specifies debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."

[2] ECF 16. Fed. R. Civ. P. 12(b)(6) applies to this adversary proceeding under Fed. R. Bankr. P. 7012(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Venue in the District of Kansas is appropriate under 28 U.S.C. § 1409. Penny appears by attorney Colin Gotham. Hardwire appears by attorney B. Scott Tschudy.

- Between July 23, 2020, and March 5, 2021, despite having no authority to do so, Penny wrote and signed checks totaling $112,200 from the Arvest Account for his own use and/or for the use of businesses in which he was an owner;
- Penny wrongfully took Hardwire's property, funds from the Arvest Account, with the intent to convert those funds to his own use and/or the use of businesses in which he was an owner;
- Penny's actions constituted larceny; and
- Hardwire suffered a pecuniary loss as a direct result of Penny's larceny.

Hardwire's complaint seeks a judgment against Penny for $112,200 plus pre- and post-judgment interest, along with a determination that the judgment represents a nondischargeable debt for "larceny" under 11 U.S.C. §§ 523(a)(4) and 1328(a)(2).[3]

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 571 (2007)). A claim is plausible on its face "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). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.

[3] ECF 1 ¶¶ 8-16. Hardwire also requests costs and attorney's fees. *Id.* ¶ 16(d).

1. "Fraudulent appropriation" does not require actual fraud.

Section 523(a)(4) of the Bankruptcy Code excepts from discharge any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.[4] "Fraudulent appropriation" is an element of embezzlement. *See Klemens v. Wallace (In re Wallace)*, 840 F.2d 762, 765 (10th Cir. 1988). The difference between embezzlement and larceny is that "with embezzlement, the debtor initially acquires the property lawfully," whereas "with larceny, the property is unlawfully obtained." *See Kim v. Sun (In re Sun)*, 535 B.R. 358, 367 (B.A.P. 10th Cir. 2015). "Fraudulent appropriation" is thus an element of larceny under § 523(a)(4) as well.

Penny argues that that Hardwire's complaint fails to state a claim for larceny under § 523(a)(4) because it does not plead that Penny's conduct was "fraudulent."[5] To support his position, Penny cites *Tague & Beem, P.C. v. Tague (In re Tague)*, 137 B.R. 495, 500 (Bankr. D. Colo. 1991), in which a bankruptcy court held that to state a claim for larceny, a plaintiff must allege that the defendant "deceived plaintiff through intentional misrepresentations on which plaintiff reasonably relied or otherwise in appropriating plaintiff's property to her own use."[6] Put differently, *In*

[4] The terms used in § 523(a)(4) are defined under federal common law. *See Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1371 (10th Cir. 1996) (fiduciary); *In re Wallace*, 840 F.2d at 765 (embezzlement); *Kaye v. Rose (In re Rose)*, 934 F.2d 901, 903 n.2 (7th Cir. 1991) (larceny).

[5] ECF 16 at 4.

[6] *Id.* (citing *Tague & Beem, P.C. v. Tague (In re Tague)*, 137 B.R. 495, 500 (Bankr. D. Colo. 1991)).

re Tague held that the "fraudulent appropriation" element of larceny under § 523(a)(4) requires a plaintiff to allege "actual fraud." 137 B.R. at 500.[7]

However, a subsequent bankruptcy case, *Bryant v. Lynch (In re Lynch)*, 315 B.R. 173 (Bankr. D. Colo. 2004), observed that *Tague*'s holding is not supported by "any reason or stated intention in the federal common law." *In re Lynch*, 315 B.R. at 180-81. The holding not only "exclude[s] from the definition of larceny, all forms of larceny, except larceny by trick," *id.* at 181—it also renders the inclusion of larceny in § 523(a)(4) superfluous. *See id.* at 180 (observing that § 523(a)(2) "already provides an exception to dischargeability based on various forms of fraud, including obtaining money or property by false pretenses").[8]

This Court agrees with *In re Lynch* that "fraudulent appropriation" does not require actual fraud. Rather, it means that the defendant appropriated the property with the "intention to steal." *See In re Lynch*, 315 B.R. at 181. In other words, the modifier "fraudulent" means that the defendant's actions involved "moral turpitude or intentional wrong."[9] *Cf. Driggs v. Black (In re Black)*, 787 F.2d 503, 507 (10th Cir. 1986), *abrogated on other grounds by Grogan v. Garner*, 498 U.S. 279 (1991).

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[7] *Cf. actual fraud*, *Black's Law Dictionary* (11th ed. 2019) ("A concealment or false representation through an intentional or reckless statement or conduct that injures another who relies on it in acting.").

[8] "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *McDaniel v. Navient Sols., LLC (In re McDaniel)*, 973 F.3d 1083, 1103 (10th Cir. 2020) (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013)).

[9] *Cf. Alternity Cap. Offering 2, LLC v. Ghaemi (In re Ghaemi)*, 492 B.R. 321, 326-27 (Bankr. D. Colo. 2013) ("[T]he Court does not construe the Tenth Circuit's instruction [in *In re Black*] that embezzlement requires 'fraud in fact, involving moral turpitude or intentional wrong' as imposing an intent requirement different

Here, the facts alleged in Hardwire's complaint allow the Court to draw the reasonable inference that Penny appropriated Hardwire's property with the intent to steal it.[10] The complaint thus adequately alleges "fraudulent appropriation" for purposes of larceny under § 523(a)(4).

2. Fed. R. Civ. P. 9(b) does not apply to larceny under § 523(a)(4).

Fed. R. Civ. P. 9(b) provides that [i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."[11] Penny argues that Rule 9(b) applies to Hardwire's complaint because "fraud" is an "essential element" of its claim.[12] However, as explained above, the "fraudulent appropriation" required to establish larceny under § 523(a)(4) is not the "fraud"

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from that recognized at federal common law."); *Neal v. Clark*, 95 U.S. 704, 709 (1878) ("[T]he 'fraud' referred to in [section 33 of the Bankruptcy Act of 1867] means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality."); *fraudulent act*, *Black's Law Dictionary* (11th ed. 2019) ("**1.** Conduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude.").

[10] "To steal means to take away from one in lawful possession without right with the intention to keep wrongfully." *Morissette v. United States*, 342 U.S. 246, 271 (1952) (quoting *Irving Trust Co. v. Leff*, 171 N.E. 569, 571 (N.Y. 1930)).

[11] Fed. R. Civ. P. 9(b) applies in adversary proceedings under Fed. R. Bankr. P. 7009. The primary purpose of Rule 9(b) is to ensure that the complaint provides the minimum degree of detail necessary to begin a competent defense. *Fulghum v. Embarq Corp.*, 785 F.3d 395, 416 (10th Cir. 2015). A complaint alleging fraud must set forth the time, place and contents of the false representation, the identify of the party making the false statement, and the consequences thereof. *Lawrence Nat. Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991) (citations omitted).

[12] ECF 16 at 4.

contemplated by Rule 9(b). Thus, Rule 9(b) does not apply to Hardwire's complaint.[13] *Cf. Chowdary v. Ozcelebi (In re Ozcelebi)*, 635 B.R. 467, 477 (Bankr. S.D. Tex. 2021) (applying Rule 8(a)(2) to larceny claim under § 523(a)(4)); *Sierra Chems., L.C. v. Moseley (In re Moseley)*, Bankr. No. 11-15299-J7, Adv. No. 12-1166 J, 2012 WL 5193956, at *6-7 (Bankr. D.N.M. Oct. 19, 2012) (same); *Wilson Fam. Foods, Inc. v. Brown (In re Brown)*; 457 B.R. 919, 926 (Bankr. M.D. Ga. 2011) (same).

3. Penny is not entitled to a more definite statement under Rule 12(e).

Under Fed. R. Civ. P. 12(e), "[a] party may move for a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response." Motions under Rule 12(e) are not favored, because pleadings are to be construed liberally to do substantial justice. 2 *Moore's Federal Practice* § 12.36 (Matthew Bender 3d ed.).

Here, Penny argues that he "cannot accurately and properly respond to the allegations as they are written."[14] However, Hardwire alleges that (a) Penny wrote and signed checks (b) totaling $112,200 (c) on the Arvest Account (d) for Penny's use and/or for the use of businesses in which he was an owner (e) between July 23, 2020, and March 5, 2021. No component of that allegation is vague or ambiguous.

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[13] Rule 9(b) *would* apply if Hardwire's larceny theory were itself based on fraud. *See Mills v. Caisse (In re Caisse)*, 568 B.R. 6, 15-16 (Bankr. S.D.N.Y. 2017) (applying Rule 9(b) where complaint under § 523(a)(4) alleged larceny by false pretenses and larceny by false promise).

[14] ECF 16 at 6.

And while Penny argues that "it is impossible for [him] to guess which party Hardwire alleges committed larceny,"[15] the complaint is clear: "Penny committed larceny."[16] Because Hardwire's allegations are neither vague nor ambiguous, Penny is reasonably able to respond to them. For that reason, and because motions under Rule 12(e) are not to be used as a substitute for discovery, 5C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 1376 (3d ed.), Penny's motion for a more definite statement under Rule 12(e) will be denied.

4. Conclusion

Penny's motion to dismiss Hardwire's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), or for a more definite statement under Fed. R. Civ. P. 12(e), is hereby denied.

IT IS SO ORDERED.

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[15] ECF 16 at 6.

[16] ECF 1 ¶ 15; *see also id.* ¶ 16 (referring to "Penny's larceny").