Dated: June 02, 2014
The following is SO ORDERED:

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re: CYNTHIA M. LEMONS	)	**Case No. 13-10370**
	)	
Debtor.	)	**Chapter 7**
	)	
FIRST NATIONAL BANK OF OMAHA	)	
	)	
Plaintiff,	)	**Adv. Pro. No. 13-5071**
v.	)	
	)	
CYNTHIA M. LEMONS,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION re: COMPLAINT SEEKING EXCEPTION TO DISCHARGE PURSUANT TO 11 U.S.C. § 523(a)(2)(A), 523(a)(2)(B) and/or 523(a)(2)(C)

At issue in this case is whether a credit card debt Cynthia Lemons ("Debtor") owes to First National Bank of Omaha ("Bank") should be excepted from the Debtor's discharge pursuant to 11 U.S.C. § 523(a)(2)(A), (B), or (C). The Bank asserts that the Debtor did not intend to repay the debts at the time she incurred them and that she made material

misstatements about her income at the time of applying for the credit card. The Debtor disputes the Bank's assertions and claims that she intended to pay the credit card debt at the time she incurred the charges.

The Court conducted a trial on the Bank's complaint on May 14, 2014, pursuant to Federal Rule of Bankruptcy Procedure 7001.

I. JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30 in the United States District Court for the Western District of Tennessee, Western and Eastern Divisions, and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). This Court has jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and 1334 and, thus, may enter a final order in this matter. This memorandum opinion shall serve as the Court's findings of facts and conclusions of law. Fed. R. Bankr. P. 7052.

II. FACTS

The facts in this case are essentially undisputed. In early May 2012 the Debtor applied for a credit card with the Bank over the telephone. During the application process, the Debtor reported that she was currently employed and that she earned $5,416.00 per month. Her credit score at the time of applying for the card was 752. Based on the Debtor's income, credit report, and credit score, the Bank approved the application and opened an account for the Debtor on May 3, 2012. The Bank set the Debtor's credit limit at $7,000.00. The Debtor initially used the credit card sparingly and regularly made payments above the minimum amount due.

At the time of applying for the credit card, the Debtor had been employed at Dyersburg Manor as a licensed practical nurse ("LPN") for ten years. Her gross annual income at that time ranged from $50,000.00 to $54,000.00. This income consisted of regular and overtime compensation. The Debtor's husband also contributed approximately $1,800.00 each month towards household expenses.

The Debtor's financial circumstances unexpectedly began to deteriorate in July 2012 when her employer reduced both her regular and overtime work hours by almost 50%. This reduction resulted from budget cuts made by the Debtor's employer and not through any fault of the Debtor.

Because of the decrease in her income, the Debtor began using her credit card more heavily in the late summer and early fall of 2012. Between August 18, 2012, and October 8, 2012, the Debtor incurred $7,239.48 in charges on the credit card. The credit card statements indicate that the Debtor used the card to pay for groceries, gasoline, eating out, and other miscellaneous items. The Debtor also took out a $1,400.00 cash advance on the account on September 13, 2012.

The Debtor's husband abandoned the family in early October 2012. This departure resulted in the loss of the husband's monthly contribution towards the household expenses. After the Debtor's husband left, the Debtor stopped using the credit card.

The Debtor continued to make credit card payments to the Bank after incurring the $7,239.48 in charges. She paid $275.00 on August 24, 2012, $50.00 on October 15, 2012, $40.00 on November 2, 2012, and $25.00 on December 12, 2012. With the exception of the payment made in August, all of the payments were significantly less than the minimum amount due on the account. The Debtor did not make any payments after December 2012.

With late fees and finance charges, the balance due on the credit card as of February 2013 was $7,914.03.

On February 14, 2013, the Debtor filed a Chapter 7 petition for bankruptcy relief. She listed $60,533.59 in unsecured nonpriority debt on Schedule F of her petition. This total included a credit card balance of $7,646.00 owed to the Bank. The Debtor also indicated on Schedules I and J of her petition that her monthly income was $3,189.42 and that her monthly expenses were $3,151.00.

On May 13, 2013, the Bank filed a complaint seeking to except its unsecured claim from the Debtor's discharge pursuant to 11 U.S.C. § 523(a)(2)(A), (B), and/or (C). In support of its complaint, the Bank alleged that the Debtor either incurred the credit card debt with the intention of discharging the debt in bankruptcy or that she should have known at the time of

incurring the charges that she would not have the ability to pay for them. The Bank argued that either of these behaviors entitled it to a non-dischargeable judgment for the entire amount of the credit card debt pursuant to 11 U.S.C. § 523(a)(2)(A) and/or (a)(2)(C). The Bank also asserted that the Debtor overstated her annual income by approximately $18,000.00 when applying for the credit card and that this statement was made with the intention of deceiving the Bank. The Bank argued that this alleged intent also entitled it to a non-dischargeable judgment for the entire amount of the credit card debt pursuant to 11 U.S.C. § 523(a)(2)(B).

During the trial on the Bank's complaint, the Debtor testified that she used the credit card to pay for day-to-day living expenses and to purchase Christmas gifts for her children. The Debtor testified that she always purchased Christmas gifts in the late summer/early fall in order to avoid shopping during the hectic holiday season. As for the $1,400.00 cash advance, the Debtor testified that she withdrew that money to reimburse her father for an obligation he had previously paid for the Debtor and her husband. The Debtor stated that she always intended to pay the charges she incurred on the credit card, but that she eventually became unable to do so once her husband left.

III. ANALYSIS

Although a bankruptcy discharge under § 727 is broad, it is not without some boundaries. Section 523(a) of the Bankruptcy Code excepts 19 categories of debts from a debtor's bankruptcy discharge based either on the type of debt or the debtor's behavior in incurring the debt. Based on the Bankruptcy Code's self-espoused policy of granting the "honest but unfortunate debtor" a fresh start, exceptions to discharge are generally construed narrowly in favor of the debtor. *Meyers v. Internal Revenue Serv.* (*In re Meyers*), 196 F.3d 622, 624 (6th Cir. 1999).

Section 523(a)(2) specifically excepts "debts traceable to falsity or fraud or to a materially false financial statement" from a Debtor's Chapter 7 discharge. *Field v. Mans*, 516 U.S. 59, 63 (1995). In the proceeding before the Court, the Bank seeks to have the Debtor's credit card debt declared non-dischargeable pursuant to three subsections of § 523(a)(2): (A), (B) and/or (C). Preliminarily, the Court concludes that the Bank's claims for relief under § 523(a)(2)(B) and (C) are without merit.

Section 523(a)(2)(B) excepts debts that were obtained by false statements about a debtor's financial condition from a debtor's discharge. Specifically, subsection (B) provides that a debt based on a "materially false" "statement in writing" is excepted from discharge. The important element of this subsection for purposes of this case is the "in writing" requirement. "[O]ral statements made by the debtor which led to a computer generated form are not to be regarded as the functional equivalent of a 'writing' within the meaning of § 523(a)(2)(B)." *Bellco First Fed. Credit Union v. Kaspar* (*In re Kaspar*), 125 F.3d 1358, 1359 (10th Cir. 1997). In *Kaspar*, the debtor provided financial information in applying for a credit card over the telephone. The representative for the credit card company input the information into the company's computer system which then generated a loan application. Although the debtor in *Kaspar* verified the information provided to the credit card company representative, the debtor never saw or signed the application. *Kaspar*, 125 F.3d at 1359. The Tenth Circuit relied on "unvarnished hornbook law" in determining that the debtor's oral representations did not constitute a "writing" for purposes of § 523(a)(2)(B):

> "To come within the exception of section 523(a)(2)(B), the statement, to be 'in writing,' must have been either written by the debtor, signed by the debtor, or written by someone else but adopted and used by the debtor. The requirement of a writing is a basic precondition to nondischargeability under section 523(a)(2)(B)."

Kaspar, 125 F.3d at 1361 (quoting 4 Collier on Bankruptcy ¶ 523.08 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)).

In the current adversary proceeding, the Court can discern no reason to depart from this interpretation of § 523(a)(2)(B)'s writing requirement. The Debtor orally provided the information about her income to the Bank's representative. The Bank then input that information into its computer system and generated a credit card application document. The Debtor never saw or signed the application. Accordingly, the Court concludes that the information the Debtor orally provided about her income to the Bank does not constitute a "writing" for purposes of § 523(a)(2)(B). As such, the Bank's claim for relief under § 523(a)(2)(B) fails.[1]

[1]Even if there were a document in this case that would qualify as a "statement in writing" under § 523(a)(2)(B), the uncontroverted evidence of the Debtor's income indicates

Section 523(a)(2)(C) does not provide a separate basis for excepting a debt from discharge. Rather, it provides for a rebuttable presumption of nondischargeability in § 523(a)(2)(A) actions for (1) consumer debts incurred for luxury goods or services within 90 days of filing bankruptcy and (2) cash advances that are obtained within 70 days of filing bankruptcy. In the adversary proceeding at bar, the last charge on the credit card was made on October 8, 2012. The Debtor did not file her bankruptcy petition until February 14, 2013. More than 120 days elapsed between the last charge on the card and the filing of the petition in this case. As a result, no presumption of nondischargeability has arisen in this case under § 523(a)(2)(C).

Having disposed of the Bank's claims for relief under § 523(a)(2)(B) and (C), the Court must now turn its attention to the claims under § 523(a)(2)(A). Section 523(a)(2)(A) provides that

> (a) A discharge under section 727, 1141, 1228[a] 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -
>
> . . .
>
> (2) for money, property, services, an extension, renewal, or refinancing of credit, to the extent obtained, by -
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

11 U.S.C. § 523(a)(2)(A). The party seeking the exception to discharge bears the burden of proof in a § 523(a)(2)(A) cause of action and must satisfy that burden by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991); *Rembert v. A T & T Universal Card Servs., Inc.* (*In re Rembert*), 141 F.3d 277, 281 (6th Cir. 1998). Exceptions to discharge

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that the Debtor did not misrepresent her financial condition at the time of applying for the credit card. The application indicated that the Debtor told the Bank's representative that her monthly income was $5,416.00. The earning statements introduced into evidence by the Debtor corroborate her testimony that she made between $50,000.00 and $54,000.00 per year at her job as an LPN. In addition, at the time of applying for the card, the Debtor's husband was contributing $1,800.00 per month towards household expenses. Dividing $50,000.00 by 12 and then adding the husband's contribution towards the household income results in a monthly income number of $5967.00.

are to be strictly construed against the creditor and liberally in favor of the debtor. *Rembert*, 141 F.3d at 281.

In pursuing a § 523(a)(2)(A) action, a creditor must prove (1) the debtor made a material representation, (2) the debtor knew the representation was false at the time of making it, or made the representation with gross recklessness as to the truth, (3) the debtor made the representation with the intention of deceiving the creditor, (4) the creditor justifiably relied upon such representation, and (5) the creditor sustained loss and damage as the proximate result of the representations. *Longo v. McLaren* (*In re McLaren*), 3 F.3d 958, 961 (6th Cir. 1993). The first issue the Court will address in this adversary proceeding is the third element of the *McLaren* test: that of the debtor's intent.

In analyzing credit card debt, a court must examine the debtor's intent at the time each individual charge is made. *Id.* The Bank in this proceeding has argued that the credit card debt the Debtor incurred should be excepted from discharge under § 523(a)(2)(A) because she did not have the ability to repay the debt at the time of making the purchases. The Sixth Circuit, however, has rejected the use of "ability to repay" as a guidepost for measuring a debtor's intent in § 523(a)(2)(A) actions:

> We believe that the representation made by the cardholder in a credit card transaction is not that he has an ability to repay the debt; it is that he has an intention to repay. To measure a debtor's intention to repay by her ability to do so, without more, would be contrary to one of the main reasons consumers use credit cards: because they often lack the ability to pay in full at the time they desire credit.

Id. (internal quotation marks and citations omitted). In so holding, the Sixth Circuit relied on the Ninth Circuit's reasoning in *Anastas v. American Savings Bank* (*In re Anastas*), 94 F.3d 1280 (9th Cir. 1996):

> "[In § 523(a)(2)(A) actions], the focus should not be on whether the debtor was hopelessly insolvent at the time he made the credit card charges. A person on the verge of bankruptcy may have been brought to that point by a series of unwise financial choices, such as spending beyond his means, and if ability to repay were the focus of the fraud inquiry, too often would there be an unfounded judgment of non-dischargeability of credit card debt. Rather, the express focus must be solely on whether the debtor maliciously and in bad faith incurred credit card debt with the intention of petitioning for bankruptcy and avoiding the debt. A finding that a debt is non-dischargeable under 523(a)(2)(A) requires a showing

> of actual or positive fraud, not merely fraud implied by law. . . . While we recognize that a view to the debtor's overall financial condition is a necessary part of inferring whether or not the debtor incurred the debt maliciously and in bad faith, ... the hopeless state of a debtor's financial condition should never become a substitute for an actual finding of bad faith."

Rembert, 141 F.3d at 281 (quoting *Anastas*, 94 F.3d at 1285-86 (internal citations omitted)).

In the Sixth Circuit, "[w]hether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard . . . ." *Rembert*, 141 F.3d at 281. Consequently, "the proper inquiry to determine a debtor's fraudulent intent is whether the debtor subjectively intended to repay the debt" at the time of the purchase. *Id.* Because "debtors have an incentive to make self-serving statements and will rarely admit an intent not to repay," a court must look to a totality of the circumstances in determining whether a debtor had the intent to repay the debt at the time she incurred the credit card charges. *Id.* at 282. Circumstantial evidence which may indicate the debtor possessed the requisite subjective intent not to repay the debt includes "the traditional indicia of fraud – e.g., the suspicious timing of events." *Citibank v. Stephens* (*In re Stephens*), 302 B.R. 227, 233 (Bankr. N.D. Ohio 2003) (citation omitted). As the Sixth Circuit recognized in *Rembert*,

> "What courts need to do is determine whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent. This determination will require a review of the circumstances of the case at hand, but not a comparison with circumstances (a/k/a/ 'factors') of other cases."

141 F.3d at 282 (quoting *Chase Manhattan Bank v. Murphy* (*In re Murphy*), 190 B.R. 327, 334 (Bankr. N.D. Ill. 1995)).

Turning to the present adversary proceeding, the Court concludes that the Bank has not demonstrated by a preponderance of the evidence that the Debtor's credit card debt should be excepted from the Debtor's discharge pursuant to 11 U.S.C. § 523(a)(2)(A). Although the Debtor may not have had the ability to pay for the charges at the time she incurred them, the Court concludes that the uncontroverted evidence firmly establishes that the Debtor did have the requisite intent to pay the credit card debt at the time she made the purchases. Although it is true that the Debtor's work hours had been reduced at the time she incurred the charges , her husband was still living in the family home and contributing money

towards the household expenses every month. Trial exhibit 1 demonstrates that after her work hours were reduced, but before her husband moved out, the Debtor made a $275.00 payment on her credit card account. In the Court's opinion, this demonstrates that she not only had the intent to repay the credit card debt, but also the ability--even after the reduction in her work hours and pay. All of the purchases at issue in this case were made during the window of time after her income decreased but before her husband left. The Debtor testified that she intended to repay the credit card debt incurred during this time. The fact that she made a significant payment in late August 2012 supports her stated intention. In addition, the Debtor testified that she stopped using the credit card after her husband unexpectedly left and ceased his contribution to the family's household expenses in October 2012. Although the payments she made after his departure were for less than the minimum amount due on the account, the fact that the Debtor continued making payments on the account through December 2012 supports her stated intention.

After analyzing a totality of the circumstances in this case, the Court concludes that the evidence clearly establishes that the Debtor intended to repay the credit card debt at the time she made the various purchases. While her use of the card may seem unwise in hindsight, this conclusion does not justify a finding of nondischargeability under § 523(a)(2)(A) under Sixth Circuit law. The Bank did not demonstrate that the Debtor made these purchases with the intent of not paying for them or with the intent of discharging them in bankruptcy. These were necessary elements of the Bank's claim. As such, the Court cannot grant the Bank's claim for relief under § 523(a)(2)(A).

Because the Court has determined that the Bank did not carry its burden of proof with respect to the third element of its § 523(a)(2)(A) claim, it is unnecessary to address the other elements of the inquiry.

IV. Conclusion

For the reasons stated herein, the relief requested by the Bank in its Complaint Seeking Exception to Discharge Pursuant to 11 U.S.C. § 523(a)(2)(a), 523(a)(2)(b) and/or 523(a)(2)(C) is denied. The $7,532.48 debt owed by the Debtor to the Bank is discharged pursuant to 11 U.S.C. § 727(b).

The Court will enter a separate order in accordance herewith

Mailing list

Thomas H. Strawn, attorney for Debtor
Phillip L. Robertson, attorney for First National Bank of Omaha
United States Trustee

Dated: June 02, 2014
The following is SO ORDERED:

Jimmy L. Croom
Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re: CYNTHIA M. LEMONS	)	**Case No. 13-10370**
	)	
Debtor.	)	**Chapter 7**
	)	
FIRST NATIONAL BANK OF OMAHA	)	
	)	
Plaintiff,	)	**Adv. Pro. No. 13-5071**
v.	)	
	)	
CYNTHIA M. LEMONS,	)	
	)	
Defendant.	)	

ORDER re: COMPLAINT SEEKING EXCEPTION TO DISCHARGE PURSUANT TO 11 U.S.C. § 523(a)(2)(A), 523(a)(2)(B) and/or 523(a)(2)(C)

For the reasons set forth in the Court's Memorandum Opinion entered in accordance herewith, the Plaintiff's claims for relief under 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), and (a)(2)(C) are **DENIED.** The debt owed by the Debtor to the Plaintiff in the amount of $7,532.48, plus any interest, costs, or fees, is **DISCHARGED PURSUANT TO 11 U.S.C. § 727(b).**

IT IS SO ORDERED.

Mailing list

Thomas H. Strawn, attorney for Debtor
Phillip L. Robertson, attorney for First National Bank of Omaha
United States Trustee