SO ORDERED.

SIGNED this 31 day of October, 2006.

Dale L. Somers
Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
MARK J. and DELISA R. HICKMAN,	**CASE NO. 05-25265**
	CHAPTER 7
DEBTORS.	
CHASE BANK USA, N.A.,	
PLAINTIFF,	
v.	**ADV. NO. 05-6242**
MARK J. HICKMAN,	
DEFENDANT.	

MEMORANDUM AND ORDER DENYING
COMPLAINT OBJECTING TO DISCHARGE OF INDEBTEDNESS

The matter before the Court is the Complaint Objecting to Dischargeability of Indebtedness pursuant to 11 U.S.C. § 523[1] (hereinafter "Complaint") filed by Plaintiff, Chase Bank USA, N.A. (hereinafter "Chase"). Plaintiff appears by Ronald S. Weiss of Berman, DeLeve, Kuchan and Chapman, LC. Defendant Debtor, Mark. J. Hickman (hereinafter "Debtor"), appears pro se. There are no other appearances. The Court has jurisdiction.[2]

The Complaint alleges that prepetition Debtor had a charge account with Plaintiff and incurred charges and cash advances on the account totaling $4,965.44, including interest, as of October 5, 2005, date that Debtor filed for relief under Chapter 7. It is alleged that $2,620 of this amount is consumer debt arising from retail charges between July 21, 2005 and September 25, 2005, which is not dischargeable pursuant to 11 U.S.C. § 523 (a)(2)(A) because the credit was obtained by false pretenses, false representations and/or actual fraud. Debtor answered, denying that the debt is excepted from discharge under § 523(a)(2)(A). Trial to the Court was held. Although the Court granted Chase leave to file a post trial brief, none has been filed. The Court's understanding of Chase's theory is therefore based upon oral argument.

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[1] This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to 11 U.S.C. §§ 101 - 1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

[2] This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy Judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984. Determination as to the dischargeability of a particular debt is a core proceeding which this Court may hear and determine as provided in 28 U.S.C. § 157(b)(2)(I). There is no objection to venue or jurisdiction over the parties.

FINDINGS OF FACT.

In the pretrial order, the parties agreed that Debtor is indebted to Plaintiff in the sum of $4965.44 as a result of purchases or cash advances charged by Debtor on a credit card issued by Plaintiff Chase. Between July 21 and September 25, 2005, Debtor accumulated charges on the card in the amount of $2620 that have not been paid. Chase and Debtor stipulated that by obtaining an extension of credit and the use of the credit card from Chase, Debtor represented an intention to repay the amounts charged and Chase reasonably relied upon that representation.

Based upon trial to the Court, at which Debtor was the only witness, the Court finds the following additional facts. Chase issued its credit card to Debtor and his wife approximately six years ago. Approximately one year prepetition, Debtor had consolidated his debts and paid all credit cards, except two, to a zero balance. As to the active cards, one was used by Debtor and one was used by his wife.[3] Although Debtor's financial condition continued to deteriorate, he made at least the minimum monthly payments on both cards. On July 20, 2005, Debtor paid $800.00 to Chase. During July and August the cards were used more than in previous months because it was back-to-school time for Debtor's three children. Between July 22 and September, 2005, the credit card issued by Chase was used approximately 54 times for school supplies, ongoing living expenses, groceries and the like. No cash advances were obtained, and no extravagant items were charged. The new charges exceeded the minimum monthly payments of $50.00 credited on August 17 and $80.00 credited on September 21,

[3] At least some of the charges in issue were incurred by Debtor's wife with Debtor's authorization and approval. Debtor does not dispute liability for these charges and does not raise any defenses to the nondischargeability complaint related to his wife's having entered into the transactions in issue.

2005. Other than making payments in excess of the minimum when excess cash accumulated, Debtor had no plan about how he would pay the credit card balance. Debtor first consulted an attorney about filing bankruptcy during the week of September 20, 2005. Between September 22 and 25, six credit card purchases were made. According to the schedules, as of October 5, 2005, the date of filing, the family monthly expenses, excluding the payments on credit cards and other unsecured debt, were approximately equal to the monthly income. Debtor's testimony as a whole leads the Court to conclude that only in retrospect did Debtor realize that his financial condition was such that he would not have the ability to pay Chase in full in the foreseeable future.

ANALYSIS.

Subsection 523(a)(2)(A), the sole basis for Chase's claim, provides as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt --
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> * * *
>
> (2) for money, property, services, or 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;

The Supreme Court in *Field v. Mans* construed the terms in § 523(a)(2)(A) to incorporate the general common law of torts as stated in the Restatement (Second) of Torts (1976).[4] The Tenth Circuit BAP, following the *Field v. Mans* analysis, when considering whether alleged misrepresentations were sufficient to deny discharge of credit card debt, relied on the Restatement § 525, addressing liability for fraudulent misrepresentation.[5] It provides:

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[4] *Field v. Mans*, 516 U.S. 59, 70-72 (1995).

[5] *Chevy Chase Bank FSB v. Kukuk (In re Kukuk)*, 225 B.R. 778, 784 (10th Cir BAP 1998).

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.[6]

A misrepresentation is fraudulent if the maker has knowledge of the untrue character of his representation.[7] The frauds included within misrepresentations sufficient to deny discharge must "involve moral turpitude or intentional wrong; fraud implied in law, which may be established without imputation of bad faith or immorality, is insufficient."[8] Fraudulent intent need not be shown by direct evidence and may be inferred from the circumstances. "The bankruptcy court must consider whether the totality of the circumstances 'presents a picture of deceptive conduct by the debtor which indicates an intent to deceive the creditor.'"[9]

Establishing an exception to discharge based upon misrepresentation is often stated to require the following elements: (1) The debtor made a representation; (2) at the time of the representation, the debtor knew it to be false; (3) the debtor made the representation with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor

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[6] Restatement (Second) of Torts § 525 (1976).

[7] *Id.* at § 526, cmt. a.

[8] 4 *Collier on Bankruptcy* ¶ 523.08[1][d](Alan N. Resnick & Henry J.Sommer eds.-in-chief, 15th ed. rev. 2006).

[9] *Groetken v. Davis (In re Davis)*, 246 B.R. 246, 652 (10th Cir. 2000), *quoting* 3 William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d 47:16, n. 62 (1999).

sustained the alleged loss and damage as a proximate result of the representation having been made.[10] The Creditor has the burden of proof on all elements by a preponderance of the evidence.[11]

These elements of fraud are difficult to apply to the credit card context.[12] The agreement between the card issuer and the debtor usually is made based upon correspondence, not in person meetings. The debt is incurred in transactions with third parties, often long after the agreement has been made. Generally, the debtor's use of the card and payment status is monitored only by remote means.

In this case, Chase's counsel argued that the debt should be excepted from discharge because Debtor's use of the Chase credit card gave rise to an implied representation that he had a present intention to repay and an implied representation that he had the ability to repay. Chase also asserts that the circumstances evidence intent to deceive.[13]

As to the first representation, Chase relies upon the stipulation of Debtor in the pretrial order that by "obtaining an extension of credit and the use of the credit card from [Chase], [Debtor] represented an intention to repay the amounts charged." This Court agrees with other courts in this

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[10] *E.g.*, *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996) (stating five elements but requiring that creditor's reliance be reasonable); *Field v. Mans*, 516 U.S. at 74 (holding that creditor reliance must be justifiable).

[11] *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

[12] *See* 3 *Collier on Bankruptcy* ¶523.08[6](Alan N. Resnick and Henry J. Sommer eds-in-chief, 15th ed. Rev. 2006); Margaret Howard, *Shifting Risk and Fixing Blame: The Vexing Problem of Credit Card Obligations in Bankruptcy*, 75 Am. Bankr. L.J. 63 (2001).

[13] Counsel referred to *Mercantile Bank. v. Hoyle (In re Hoyle)*, 183 B.R. 635 (Bankr. D. Kan. 1995) and *Household Credit Servs., Inc. v. Peterson (In re Peterson)*, 182 B.R. 877 (Bankr. N.D. Ok. 1995).

jurisdiction that the use of a credit card gives rise to such a representation.[14] This representation arises at the time of use of the card and is a representation of intent to perform a future act. "An implied representation of intent to repay will be fraudulent [for purposes of § 523(a)(2)(A)] if the credit card issuer demonstrates that at the time the debtor used a credit card he or she had no intent to repay the debt incurred."[15] The debtor's intention to mislead the creditor need not be proven with direct evidence; it may be inferred from the circumstances. The following is a nonexclusive list of factors frequently considered by the courts:

> (1) the length of time between the charges made and the filing of bankruptcy; (2) whether the debtor consulted an attorney regarding bankruptcy prior to the charges being made; (3) the number of charges made; (4) the amount of the charges; (5) the financial condition of the debtor at the time the charges were made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on any given day; (8) whether or not the debtor was employee; (9) the debtor's employment prospects; (10) the debtor's financial sophistication; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases were made for luxuries or necessities.[16]

When those factors are applied to the facts of this case, the Court finds that Chase has not sustained its burden to prove the element of a fraudulent representation of intent to pay. All of the charges in issue were made within two months of the Debtor's filing for bankruptcy, but at most only six of the charges in issue were made after consultation with a bankruptcy attorney. All of the charges

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[14] Courts in this jurisdiction find such an implied representation. *E.g.*, *In re Kukuk*, 225 B.R. at 785; *In re Hoyle*, 183 B.R. at 638.

[15] *In re Kukuk*, 225 B.R. at 786.

[16] *Id.; accord In re Hoyle*, 183 B.R. at 638.

were for ongoing living expenses, such as groceries. The evidence fails to establish a change in the Debtor's buying patterns or that extravagant items were charged. The charges did not exceed the credit limit of the account, and there were no cash advances. Debtor was employed when the charges were incurred and had always paid at least the minimum monthly balance. About one year before filing, Debtor had consolidated his debt to facilitate repayment. Just two days before the start of the period during which Chase asserts the charges were fraudulent, Debtor paid $800 to Chase. It was only in retrospect that Debtor realized his financial condition was such that he did not have the ability to pay the debt in full in the foreseeable future.

The second implied representation recognized in some credit card dischargeability cases is an implied representation arising from the use of a credit card that the card user had the present ability to pay the debt incurred. Chase relies upon such a decision by former Bankruptcy Judge Robinson in *In re Hoyle*,[17] that held that by using a credit card a debtor impliedly represents both intent and ability to repay. The Tenth Circuit BAP, however in *In re Kukuk*,[18] reversed a bankruptcy court which had relied upon the theory of an implied representation of ability to pay. It reasoned that an implied representation of ability to pay is not permitted because it contravenes the phrase of § 523(a)(2)(A) that expressly excludes "statement[s] respecting the debtor's or insider's financial condition" from the scope of misrepresentation which can be the basis for a finding of nondischargeability. The BAP stated:

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[17] *In re Hoyle*, 183 B.R. at 638, *citing In re Pressgrove*, 147 B.R. 244, 247 (Bankr. D. Kan. 1992) (holding that when debtor used a credit card to obtain money to gamble he impliedly represented his intent and ability to repay, but finding creditor failed to establish reasonable reliance).

[18] *In re Kukuk*, 225 B.R. at 785.

> As noted, the bankruptcy court held, in accord with numerous other courts, that as to the Cash Advance Debt, Kukuk had made an implied representation as to his intent to repay *and* his ability to repay the Cash Advance Debt. While both such implied representations may be actionable under the Restatement's definition of "misrepresentation," an implied representation regarding the debtor's ability to repay is not grounds for nondischargeability under § 523(a)(2)(A). In particular, § 523(a)(2)(A) expressly modifies the common law definition of "false misrepresentation" by exempting "statement[s] respecting the debtor's or insider's financial condition[.]" . . . Thus we hold that, for purposes of dischargeability under § 523(a)(2)(A), the use of a credit card creates an implied representation that the debtor intends to repay the debt incurred thereby, but does not create any representation regarding the debtor's ability to repay the debt. [19]

The BAP noted that its holding was supported by the fact that in general an implied representation of ability to repay would not be actionable under § 523(a)(2)(A). It characterized as "well-known" the fact that "credit cards are marketed by issuers and often used by consumers because they lack the ability to pay at the time they use the card."[20] Thus, a credit card company could not establish the required element of justifiable reliance. This Court finds the reasoning of the BAP persuasive and declines to find an implied representation of ability to pay.

For the foregoing reasons, the Court denies the Complaint and holds that the claim of Creditor Chase arising from Debtor's use of the Chase credit card is not excepted from discharge by § 523(a)(2)(A).

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A

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[19] *Id*.

[20] *Id*.

judgment based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

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