SO ORDERED.

SIGNED this 3rd day of September, 2013.

Janice Miller Karlin
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re: **Kelly Aileen McCahon,** **Debtor.**	**Case No. 12-22428** **Chapter 7**
Nebraska Furniture Mart, **Plaintiff,** **v.** **Kelly Aileen McCahon,** **Defendant.**	**Case No. 13-6011** **Adversary Proceeding**

Memorandum Opinion and Order Entering Judgment for Defendant/Debtor on Plaintiff's Claim under 11 U.S.C. § 523(a)(2)(A) and Requiring Further Briefing on Defendant/Debtor's Request for Costs and Attorney's Fees under § 523(d)

Nebraska Furniture Mart ("NFM") asks this court to deem the debt that Defendant/Debtor Kelly McCahon owes it nondischargeable under 11 U.S.C. § 523(a)(2)(A), claiming she falsely represented how she intended to use the purchased merchandise. Because NFM woefully failed to carry its burden to show a false

representation made by Debtor with the intent to deceive, the Court enters judgment for Debtor in this adversary proceeding. The Court then requires further briefing on Debtor's request for attorney's fees under § 523(d).

I. Findings of Fact

In October 2009, Debtor had recently purchased a new house and wanted to buy some furniture for it. She went to NFM and picked out some furniture. An NFM employee asked if she wanted to open a revolving charge agreement to purchase the furniture, which she did. The agreement, consisting of twenty-four single-space paragraphs with rather small font,[1] contained the following provision in paragraph 2:

> I grant to Nebraska Furniture Mart, Inc. a purchase money security interest under the Uniform Commercial Code and Kansas UCCC in all merchandise charged to the account. I agree that the purchase of such merchandise is for personal, family, or household use only.

NFM relies on customer's credit applications to extend credit. Debtor's corresponding credit application for the NFM account stated that she was employed at Grabas Limited as the Director of Sales, with an annual income exceeding $70,000. Jeremy Quick, the Assistant Collections Manager for NFM, testified that NFM does not verify the employment stated on the credit application. Mr. Quick testified that after a customer completes an application at the finance desk, the customer then uses a dedicated phone to speak with a credit analyst before the credit application process is complete. Mr. Quick also testified that the credit application and account agreement

[1] NFM attached a copy of this Agreement to its Complaint as Exhibit 1, and the copy presented at trial was equally difficult to read.

are often presented to customers after shopping, at checkout.

Debtor completed the paperwork for the account but probably typical of most consumers, she did not read it all. Instead, she was told it was just a "standard agreement;" no one discussed with her the differences between a consumer account and a commercial account.

Debtor used the NFM account regularly throughout the next several years and paid at least the minimum monthly payment required through June 2012. Each time she made a purchase, she was issued an invoice. Those invoices stated: "My purchase is subject to the terms of my NFM REVOLVING CHARGE AGREEMENT[.]" Debtor last purchased goods on the NFM account on August 11, 2012. The balance due on Debtor's NFM account is $5523.75.

There is no dispute that Debtor's account was a consumer account. Under NFM consumer accounts, the customer grants to NFM a purchase money security interest on purchases. Under this agreement, NFM retains security in the purchases, and can repossess purchases if payments are not made. To contrast, Mr. Quick testified that commercial accounts are not revolving accounts, and instead require payment within 30 days of billing statements. Mr. Quick also testified that commercial account applications are different, and require references.

NFM sells much merchandise that can be used at or in a business, such as computers or desks or printers, but it also sells wholly consumer merchandise, such as beds. NFM cashiers do not question customers who purchase merchandise on a consumer account whether the merchandise will be used at or in a business. There was

no testimony by Mr. Quick or anyone else that NFM makes any effort, by signage or otherwise, to warn consumers not to use merchandise purchased there at their businesses.

In October 2011, two years after Debtor opened the NFM account, she started her own business—an indoor cycling studio. Debtor attempted, but was unable, to obtain bank financing for her business startup, so her parents loaned her the startup money to buy the necessary equipment. This business failed within a year.

The focus of the testimony at trial was on the merchandise Debtor purchased on her NFM account between October 2011 and August 2012, and how she intended to use the items when she purchased them. Debtor stated in interrogatories admitted into evidence that she did not purchase from NFM any items *solely* for her business. To the contrary, the interrogatory answers show that all items were purchased solely for personal use, or for *both* personal and business use. Debtor also testified at trial that the NFM account was used primarily for personal use, and that she bought nothing from NFM for her business.

After questioning at trial concerning each purchase Debtor made for which she still had an account balance—approximately seventy items over the course of almost two years—Debtor testified that the vast majority of the merchandise was purchased for use at her home. Some of the items, for example, a vacuum and a futon, were originally purchased for Debtor's home, but she later brought them to use in her office at the cycling studio. Much of the merchandise was purchased for gifts, for example, a TV stand, a fireplace, a loft bed, and many gift cards. Debtor testified about only one

item—a mini refrigerator for $109.99—purchased exclusively for her business, on October 14, 2011. Debtor testified about additional purchases made January 19, 2012 and March 24, 2012, of certain "consumables"—mostly coffee pods—that were purchased for her personal consumption while she worked at her cycle studio. NFM certainly did not establish that these consumable items were purchased for use in Debtor's business.

Debtor did not inform NFM that she intended to start a new business in October 2011, and did not inform NFM that she ended up using some of the merchandise purchased from NFM at her office—e.g., the vacuum and futon that she purchased for home use but that she later used at her business. Debtor also never informed NFM that she intended to purchase the mini refrigerator for the office she had at the cycling studio. Debtor was very credible when she testified that she had no idea that the agreement she signed when she opened the account in 2009 would somehow bar her from using any item at her business. She also credibly testified she had absolutely no intent to deceive NFM, and NFM wholly failed to impeach her testimony.

On September 4, 2012, Debtor filed her chapter 7 bankruptcy petition, listing her debt to NFM as an unsecured nonpriority claim. On February 1, 2013, NFM filed this adversary proceeding, alleging that the debt owed by Debtor was not dischargeable under § 523(a)(2) of the Bankruptcy Code and claiming that the "majority of the merchandise purchased on the account was purchased specifically for her business,

BPM Studios, Inc., EIN: *5526."[2] After a period of discovery, the parties entered their agreed pretrial order, and NFM narrowed its claim for damages to the "purchase price of all merchandise purchased for business use."[3] At trial, counsel for NFM confirmed that its claim for damages was limited to the value of the merchandise purchased specifically for Debtor's use at her business.

Debtor's original answer sought attorney's fees, and Debtor's counsel again orally asked for those fees at trial, under 11 U.S.C. § 523(d). But no party made a claim for attorney's fees in the agreed pretrial order.[4]

II. Conclusions of Law

This matter constitutes a core proceeding over which the Court has the jurisdiction and authority to enter a final order.[5]

Subsection 523(a)(2)(A) of title 11, the basis for NFM's nondischargeability

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[2] Doc. 1 at ¶ 9. The Complaint also alleged that "[m]uch of the merchandise [purchased at NFM] was repossessed by a lien holder on the business and/or a bona fide purchaser." Doc. 1 at ¶ 11. There was absolutely zero evidence at trial that any merchandise Debtor purchased from NFM was ever repossessed by anyone, and in light of the nature of much of the merchandise, it seems highly unlikely even NFM would have successfully repossessed it (gift cards given as gifts and likely long ago spent, printer paper, candles, coffee, and the like).

[3] Doc. 16 at ¶ 10(a). Unfortunately, counsel used a form Pretrial Order from the U.S. District Court, rather than this Court's much shorter form. *See* Doc. 16. This Court did not require the parties to re-do the order, as it knew that would only increase the parties' costs. As a result, however, NFM never articulated the amount of damages it sought in that Pretrial Order or, for that matter, at trial.

[4] Doc. 16.

[5] *See* 28 U.S.C. § 157(b)(2)(I) (stating that "determinations as to the dischargeability of particular debts" are core proceedings); § 157(b)(1) (granting authority to bankruptcy judges to hear core proceedings).

claim, prohibits discharge of any debt "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[.]" Under this subsection, the analysis begins "with the recognition that exceptions to discharge are narrowly construed, and because of the fresh start objectives of bankruptcy, doubt as to the meaning and breadth of a statutory exception is to be resolved in the debtor's favor."[6] Section 523 balances the competing policies of allowing a fresh start while preventing a debtor from prospering from her own bad acts.[7] The party opposing the discharge of debt, here NFM, bears the burden of proof by a preponderance of the evidence.[8]

To except debt from discharge based on a false representation under § 523(a)(2)(A), NFM must prove, by a preponderance of the evidence, that: (1) Debtor made a false representation; (2) the representation was made with the intent to deceive NFM; (3) NFM justifiably relied on this representation; and (4) NFM sustained a loss as a result of the false representation.[9] Under this subsection, the "debtor must have

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[6] *DSC Nat'l Props., LLC v. Johnson (In re Johnson)*, 477 B.R. 156, 168 (10th Cir. BAP 2012) (internal quotations and alterations omitted); *see also Bellco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997) (stating that exceptions to discharge, such as that imposed by § 523(a)(2)(A), are to be narrowly construed, and "because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor's favor").

[7] *Field v. Mans*, 157 F.3d 35, 44 (1st Cir. 1998).

[8] *See Grogan v. Garner*, 498 U.S. 279, 291 (1991) (holding that preponderance of the evidence standard, not clear and convincing standard, applies to all exceptions to discharge).

[9] *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996).

acted with the subjective intent to deceive the creditor."[10]

A debtor's intent to deceive a creditor in making false representations, within the meaning of the fraud discharge exception, may be inferred from the totality of circumstances, or from a knowingly made false statement.[11] Intent to deceive may also be demonstrated by a debtor's reckless disregard for the truth or accuracy of her representations.[12] "The Court is mindful, however, that reckless disregard for the truth or accuracy of the representations as a basis for satisfying the intent requirement under 11 U.S.C. § 523(a)(2)(A) should be construed narrowly."[13] A finding under § 523(a)(2)(A) requires some indication as a whole that "'presents a picture of deceptive conduct by the debtor which indicates an intent to deceive the creditor.'"[14] In addition, whether a creditor's reliance is justifiable is also measured "from a subjective standpoint."[15] To determine whether reliance is justifiable, a court should "examine the

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[10] *In re Johnson*, 477 B.R. at 169.

[11] *In re Young*, 91 F.3d at 1375.

[12] *Columbia State Bank, N.A. v. Daviscourt (In re Daviscourt)*, 353 B.R. 674, 685 (10th Cir. BAP 2006) ("Intent to deceive under this subsection [§ 523(a)(2)(A)] may be inferred from the totality of the circumstances, and includes reckless disregard of the truth."); *Wolf v. McGuire (In re McGuire)*, 284 B.R. 481, 493 (Bankr. D. Colo. 2002) (noting that "the Tenth Circuit has held that a finding of reckless disregard may satisfy the scienter element" under § 523(a)(2)).

[13] *FTC v. Abeyta (In re Abeyta)*, 387 B.R. 846 (Bankr. D.N.M. 2008) (citing *Wolf v. McGuire (In re McGuire)*, 284 B.R. 481, 493 (Bankr. D. Colo. 2002)).

[14] *Groetken v. Davis (In re Davis)*, 246 B.R. 646, 652 (10th Cir. BAP 2000) aff'd in part and vacated in part by 35 Fed. A'ppx 826 (10th Cir. 2002) (quoting 3 William L. Norton, Jr. Norton Bankruptcy Law and Practice 2d § 47:16, n.62 (1999) (citations omitted)).

[15] *Johnson v. Riebesell (In re Riebesell)*, 586 F.3d 782, 791 (10th Cir. 2009).

qualities and characteristics of the particular plaintiff, and the circumstances of the particular case."[16]

Although NFM was wise to ultimately limit its request for damages to only those items specifically purchased for use at Debtor's business,[17] even this approach has its flaws. NFM must show not only that Debtor made a false representation, but also that she made the representation with the intent to deceive NFM.[18] The evidence wasn't even close. What statements did Debtor make? In October 2009, a full two years before the purchase at issue, Debtor signed the revolving charge agreement stating that her purchase of merchandise was "for personal, family, or household use only." But when Debtor actually purchased the mini refrigerator for her cycling studio office in October 2011, Creditor's evidence was that Debtor made no statements at all regarding her use of the merchandise, let alone false representations. Admittedly Debtor received an invoice stating that her purchase was governed by the charge agreement, but the invoice is an unsigned statement from NFM to Debtor, and NFM's own witness testified that customers are not asked at the time of purchase how merchandise is to be used.

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[16] *Id.* at 792.

[17] The alternative, seeking damages for merchandise purchased by customers for home use but that later ends up being used in a customer's business, is, of course, even quicker to fail than the theory pursued in this case. It is frankly disingenuous for NFM to argue that a consumer breaches her contract, and commits actual fraud based on an actual subjective intent to deceive, when she expressly purchases a vacuum for home use on a consumer account but then later brings that vacuum to an office for use on an area rug.

[18] *See In re Young*, 91 F.3d at 1373 (requiring each element of nondischargeability be shown by a preponderance of the evidence).

Similarly, NFM introduced absolutely no evidence that Debtor intended to deceive NFM about the intended use of the merchandise she purchased. To the contrary, the evidence shows that Debtor opened her NFM account initially—and two years before she even opened a business— so she could buy furniture for her new home. Debtor then regularly used the account over the next several years, buying additional merchandise for her home, gift cards, candles, and gifts. When Debtor opened her business, she took some items from her home to outfit her new office. Although it is true that some of those items were initially purchased from NFM for her home, this is not a surrounding circumstance that implies Debtor acted fraudulently or with intent to deceive. And NFM put on literally no evidence implying a devious intent by Debtor regarding even the purchase of the one item Debtor ultimately acknowledged she had intended to buy expressly for her to use at her office—the $109 mini refrigerator.[19]

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[19] Perhaps, if Debtor had purchased all the *equipment* for her cycling studio from NFM on a just-opened consumer account, and if NFM put on some evidence—any evidence—of Debtor's intent with the purchase, then NFM could have at least arguably attempted to meet the standards of § 523(a)(2)(A). But this hypothetical shares no characteristics of the facts actually present in this case.

In addition, the facts of this case are nothing like the facts in the cases cited by NFM in its trial brief. For example, NFM cited an unpublished Tenth Circuit BAP opinion, *Brown v. Kuwazaki (In re Kwazaki)*, 2010 WL 3706004, at *3, *1–2 (10th Cir. BAP 2010), but in that case, the bankruptcy court specifically found that the debtors' testimony was "inconsistent, evasive, and lacking credibility" concerning statements made to induce the plaintiff to make a loan, including the purpose of the loan and what the debtors' company would use the loan proceeds for. The facts here demonstrate not even a suggestion of an intent to deceive. *See also Merchants Nat'l Bank & Trust Co. of Indianapolis v. Pappas (In re Pappas)*, 661 F.2d 82, 86 (7th Cir. 1981) (affirming bankruptcy court finding that repeated false statements meant to induce various loans when debtor had no intention of using money for the stated purpose caused the loans to be nondischargeable); *Kansas Nat'l Bank & Trust Co v. Kroh (In re Kroh)*, 88 B.R. 972, 983 (Bankr. W.D. Mo. 1988) (finding that "material misrepresentations" as to what the proceeds of a loan are to be used for is sufficient to render a debt nondischargeable).

Regarding the consumables purchased by Debtor in early 2012—i.e., the coffee pods—NFM similarly failed to carry its burden. It simply cannot be said that the purchase of coffee pods that you intend to brew and you intend to consume, yourself, at work is a business purchase. There is no dispute that the coffee was for Debtor's consumption, not her clients'. The local grocery store, for good reason, does not file a UCC statement on the merchandise its clients use to pack their lunch to take to work each day; the food is going to be consumed, not making it the kind of collateral that could later be repossessed and sold to cover the debt.

And if NFM intends to argue in future cases that customers making consumable purchases on a consumer account that are used at the office are nondischargeable debts under § 523(a)(2)(A), then this Court suggests NFM should be prepared to drastically modify its consumer charge agreement and business model. Otherwise, the hot dog charged at the NFM lunch counter on the NFM consumer charge account ought to be labeled with a warning that if carried to the customer's office to consume, then NFM will pursue that customer not only for breach of her contract with NFM, but also for fraud.

NFM's action fails for another reason. At no point during trial did NFM actually quantify the injury it suffered and the damages it was seeking. Despite a pretrial order that narrowed the damages requested to "[t]he purchase price of all merchandise purchased for business use," NFM at trial continued to put on evidence of the products purchased by Debtor for her home use and later used at her office. It was not until repeated questioning by this judge during closing argument that NFM finally agreed

that it was only seeking damages equal to the cost of the merchandise purchased to furnish Debtor's office. But even then, NFM was unable to compute for the Court what those exact damages were. As stated throughout, NFM carries the burden to establish each element of its case, and its failure to establish its purported damages is yet another element for which it failed to carry its burden.

Because NFM has failed to carry its burden of proof, it is not entitled to judgment under § 523(a)(2)(A). Therefore, the Court enters judgment for Debtor in this adversary proceeding. The debt at issue shall be discharged.

III. Attorney's Fees

At the close of trial, Debtor moved for an award of attorney's fees under 11 U.S.C. § 523(d). That section states:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court **shall** grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.[20]

The purpose of § 523(d) is to protect debtors from "unreasonable challenges to dischargeability of debts," while not deterring "creditors from making challenges when it is reasonable to do so."[21] Although Debtor prayed for reasonable attorney's fees under

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[20] (emphasis added).

[21] *Citizens National Bank v. Burns (In re Burns)*, 894 F.2d 361, 362 n.2 (10th Cir. 1990) (internal quotations omitted).

§ 523(d) in her answer,[22] she failed to include this request for costs and fees in the pretrial order.[23] At trial, NFM objected to the requested fees because they were not requested in the pretrial order.

Federal Rule of Bankruptcy Procedure 7008(b) requires that requests for attorney's fees be pleaded in a party's complaint or any answer thereto. This provision is mandatory: the Rule states that the request for attorney's fees "shall be pleaded." On the other hand, § 523(d) uses equally strong language to require an award of attorney's fees if the provisions of § 523(d) are met. Courts are split as to whether a debtor must specifically request attorney's fees under § 523(d) in an answer to a complaint, or whether the request for fees must simply be timely made. Here, the parties' entered into a pretrial order, and, as a result, the pretrial order became controlling.[24]

In *First Nat'l Bank of Lincolnshire v. Bernhardy (In re Bernhardy)*,[25] the bankruptcy court considered whether a defendant/debtor must request attorney's fees in an answer to a § 523(a)(2)(A) complaint, or whether the bankruptcy court could consider a request after trial of the § 523(a)(2) matter. The *Bernhardy* court considered

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[22] Doc. 8 at p. 2.

[23] Doc. 16.

[24] *See* Fed. R. Civ. P. 16(d) (stating that a pretrial order "controls the course of the action unless the court modifies it"); *Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997) (noting that the pretrial order "supercedes the pleadings and controls the subsequent course of litigation").

[25] 103 B.R. 198 (Bankr. N.D. Ill. 1989).

the cases addressing this matter to that point,[26] and concluded that the better view was that a debtor need not plead a request for fees in an answer. The *Berhnardy* court noted that there is no provision in the Bankruptcy Code, itself, that requires a debtor to request § 523(d) attorney's fees in an answer; instead, § 523(d) itself provides notice that plaintiffs filing nondischargeability proceedings may be subject to an award of costs and reasonable attorney's fees.[27] In addition, § 523(d) provides that a bankruptcy court "shall grant judgment" to a debtor for costs and fees, if the statute's provisions are met.[28] The *Bernhardy* court did not, however, address Rule 7008(b).

More recent cases acknowledge the conflict with Rule 7008(b). In *In re Malone*,[29] a recent case discussing the conflict, the bankruptcy court considered the impact of Rule 7008(b) on § 523(d), and concluded that "the language of § 523(d) 'puts plaintiff-creditors on notice that a debtor may seek an award of attorney's fees, and that such notice is sufficient to satisfy the principles behind the requirements of specific pleading rules.'"[30] Other courts have noted that they do "not require the debtor to specifically

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[26] *See West Springfield M.E. Credit Union v. Finnie (In re Finnie)*, 21 B.R. 368, 371 (Bankr. D. Mass. 1982) (requiring requests for costs and fees under § 523(d) be made in an answer to encourage early dismissal of weak complaints; requiring renewal of request within ten days of judgment on the nondischargeability complaint); *Commercial Union Ins. Co. v. Sidore (In re Sidore)*, 41 B.R. 206, 209 (Bankr. W.D.N.Y. 1984) (determining that § 523(d) need not be plead in an answer, because the entitlement to fees is not known until after the dischargeability trial).

[27] *In re Bernhardy*, 103 B.R. at 199.

[28] *Id.*

[29] Case No. 10-02470-HB, 2011 WL 3800121 (Bankr. D.S.C. 2011).

[30] *Id.* at *3 (quoting *Hartford Police Fed. Credit Union v. DeMaio (In re DeMaio)*, 158 B.R. 890, 893 (Bankr. D. Conn. 1993)).

request attorney's fees at the outset in a § 523(a) case, reasoning that '[s]ince § 523(d) clearly states that the debtor is entitled to costs and reasonable attorney's fees, the creditor is on notice that loss of his claim could result in his being assessed those fees and costs.'"[31] The bankruptcy court in *Davis v. Melcher (In re Melcher)* explained its position as follows:

> It is usually obvious whether a debt is a consumer debt, such as to put the creditor on notice that fees may be recoverable under § 523(d). Permitting such a creditor to escape § 523(d) on the technicality that a § 523(d) request for fees was not pled would confer a windfall on the creditor. Moreover, a court examines whether a creditor's conduct throughout the entire proceeding, not just the filing of the complaint, was "substantially justified." Accordingly, a request for fees under § 523(d) may not be warranted until only after an answer was filed. The court thus determines that failure to plead a request for fees in the answer ought not be fatal.

This Court agrees with the reasoning of the *Bernhardy* and *Melcher* cases.[32] A debtor may not know that a request for costs and attorney fees is appropriate at the time an answer is due to a complaint or at the time a pretrial order is entered. Alternatively, it is crystal clear to a creditor from the time it files a complaint under § 523(a)(2)(A) that it is at risk of suffering an award of costs and fees under § 523(d). The better course of action is to permit a request for costs and attorney's fees as long as that request is timely made. In this case, Debtor requested attorney's fees under § 523(d)

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[31] *Davis v. Melcher (In re Melcher)*, 322 B.R. 1, 5 (Bankr. D.D.C. 2005) (quoting *In re Sidore*, 41 B.R. at 209).

[32] The Tenth Circuit has not addressed the conflict between § 523(d) and Rule 7008(b). The Ninth Circuit, in *First Card v. Hunt (In re Hunt)*, 238 F.3d 1098, 1101 (9th Cir. 2001), acknowledged a split in authority when applying § 523(d), but concluded it need not directly address the issue, because it found, in fact, that an award of costs and fees had been incorporated into the pretrial order.

in her answer, and then renewed her request at trial. NFM has had adequate notice that § 523(d) was at issue in this matter.

And this case is probably the poster child for why Congress included a mandatory provision for attorney fees and costs in this kind of case, if a creditor cannot show its position was substantially justified.[33] Creditors have the opportunity to question debtors, under oath, immediately after they file bankruptcy in 11 U.S.C. § 341 meetings to conduct essentially informal discovery and ask questions about the underlying account. NFM's complaint, filed after it could have done that preliminary discovery at that meeting, specifically alleged that the "majority of the merchandise purchased on the account was purchased specifically for her business, BPM Studios, Inc." No such evidence was received at trial.[34]

Even after receiving sworn interrogatory answers that clearly demonstrated that the vast majority of items purchased were not likely for use in her business, on an account opened a full two years before Debtor opened her business, NFM pressed on through a trial. And at trial, NFM was unable or failed to present a single piece of evidence, or call a single witness, even remotely suggesting any fraudulent intent by Debtor. Most debtors would likely have capitulated and settled prior to trial, by

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[33] *See Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1167–68 (6th Cir. 1985) (stating that "Congress enacted section 523(d) out of concern that creditors were using the threat of litigation to induce consumer debtors to settle for reduced sums, even though the debtors were in many cases entitled to a discharge").

[34] If Debtor so testified at the § 341 meeting, for example, it is possible NFM would have been substantially justified in filing this action if it also had any evidence she intended to defraud NFM.

agreeing to pay some reduced amount, as in this judge's experience, most debtors do not have the funds to hire counsel to take such a case through trial. This Debtor, instead, chose to fight. This imbalance of power and ability to fund litigation is exactly what § 523(d) was meant to remedy.

As a result, absent an agreement with NFM resolving the matter of Debtor's costs and attorney's fees, which agreement this Court encourages, Debtor should file a motion seeking costs and attorney's fees by September 17, 2013, including an itemization of all costs and fees requested. Debtor's motion should satisfy the statutory basis for costs and fees, and Debtor should meet her burden therein to show that she is entitled to such an award.[35] NFM is then ordered to file a response to Debtor's motion by October 1, 2013. Any reply by Debtor shall be filed by October 11, 2013.

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[35] A debtor requesting attorney's fees under § 523(d) must first show that a request for determination of dischargeability was made of a consumer debt, and that the consumer debt was subsequently discharged. *Am. Gen. Fin. of Utah v. Stauffer (In re Stauffer)*, Case No. UT-07-045, 2008 WL 2247088, at *3 (10th Cir. BAP 2008). The burden then shifts to the creditor to show that its position was substantially justified. *Id.*; *see also Taylor v. Hazboun (In re Hazboun)*, Case No. UT-04-033, 2004 WL 3008941, at *3–4 (10th Cir. BAP 2004) (discussing standards for § 523(d) requests); *Household Bank, N.A. v. Sales (In re Sales)*, 228 B.R. 748, 752–54 (10th Cir. BAP 1999) (same). Regarding substantial justification, the Tenth Circuit BAP has stated:

> [T]o determine whether substantial justification exists for bringing a complaint for purposes of § 523(d), a court should consider whether the plaintiff has shown a reasonable basis for the facts asserted; a reasonable basis in the law for the legal theory proposed; and support for the legal theory by the facts alleged. Bankruptcy courts in this circuit also have noted: The determination of substantial justification is largely one of fact which requires proof of elements such as what the party did prior to making the complaint to investigate and substantiate the allegations, and what proof it has to establish the elements essential for it to prevail.

Adamar of New Jersey, Inc. v. Innerbichler (In re Innerbichler), Case No. NM-12-032, 2013 WL 659078, at *7 (10th Cir. BAP 2013) (internal quotations and citations omitted).

It is so ordered.

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