The relief described hereinbelow is SO ORDERED.

SIGNED this 7th day of May, 2014.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

TRAVIS JACKSON MANUEL and
ERIN MARIE MANUEL,
Debtors.

Case No. 13-21628
Chapter 13

FIRST NATIONAL BANK OF OMAHA,
Plaintiff,

v.

Adv. No. 13-6091

ERIN MANUEL,
Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Now on this 24th day of April, 2014, this matter comes before the Court on a motion filed by Defendant Erin Manuel ("Debtor") seeking dismissal of the adversary complaint filed against

her by Plaintiff First National Bank of Omaha ("Creditor").[1] In its adversary complaint, Creditor seeks denial of discharge of a debt on a line of credit extended to Debtor. Specifically, Creditor alleges that the line of credit was procured through fraud, false pretenses, or misrepresentation and that 11 U.S.C. § 523(a)(2)(A)[2] merits denial of discharge of the debt. Alternatively, Creditor advocates denial of discharge under § 523(a)(2)(c), alleging that the Court should deny discharge to the extent that the debt was incurred for "luxury goods or services." Debtor responded to the adversary complaint with a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). Debtor's motion does not challenge the sufficiency of the complaint, but rather alleges Creditor should be precluded under the doctrine of *res judicata* from seeking denial of discharge at this point in the litigation, because Creditor failed to do so at any time during the plan confirmation process. For the reasons explained below, the Court finds that preclusion is improper and denies Defendant's motion to dismiss.

I. Background

Debtors Travis and Erin Manuel filed a chapter 13 petition in June 2013.[3] On their Schedule F, they listed a $2,091 unsecured nonpriority debt owed to Creditor. The Court confirmed Debtor's Chapter 13 Plan without objection on August 23, 2013,[4] and Creditor filed

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[1] Doc. 6.

[2] All future statutory references are to the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101 - 1532, unless otherwise specifically noted. All references to Rules, without more, are to the Federal Rules of Bankruptcy Procedure.

[3] *In re Manuel*, Bankr. D. Kan. ECF 13-21628, 1.

[4] *Id.*, 16.

an adversary proceeding roughly one month later, naming only Erin Manuel as a defendant.[5] Creditor's complaint seeks an adjudication of nondischargeability of the entire $2,091 debt pursuant to § 523(a)(2)(A) and, alternatively, § 523(a)(2)(c). For § 523(a)(2)(A), Creditor argues that Debtor never intended to pay back her debt, and Creditor cites the short time between the extension of credit and the bankruptcy filing to support this argument. For § 523(a)(2)(c), Creditor argues Debtor made charges that should be deemed nondischargeable as luxury goods or services, including charges for "Mokan Steaks" and "Passion Parties."

In response, Debtor filed a motion to dismiss the adversary complaint based on Creditor's failure to object to plan confirmation despite Creditor's receipt of timely notice of the plan and confirmation order. Debtor suggests that this failure precludes Creditor from bringing a dischargeability complaint. Debtor relies on § 1327(a) and cases interpreting it--these authorities set out the general rule that the confirmation order is binding on all involved parties.[6]

II. Analysis

A. Standard for Motion to Dismiss

Rule 12(b)(6) provides a vehicle for a party to challenge the legal sufficiency of a claim. The requirements for a legally sufficient claim stem from Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[7] In analyzing a

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[5] Doc. 1.

[6] Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 229.1, at ¶ 77, Sec. Rev. Oct. 8, 2010, www.Ch13online.com.

[7] FED. R. CIV. P. 12(b)(6) is made applicable in adversary proceedings by FED. R. BANKR. P. 7012(b); FED. R. CIV. P. 8(a) applies under FED. R. BANKR. P. 7008.

12(b)(6) motion, a court accepts as true all factual allegations and views them in the light most favorable to the nonmoving party--here, the Creditor.[8] The court may not weigh evidence or assess credibility, but must rather assess the *legal* sufficiency of the complaint.[9] The motion should be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[10] Mere possibility or conceivability of relief is insufficient; instead, the prayer for relief must be "plausible on its face."[11]

B. Applicability of § 523(a)(2) in Non-Hardship Cases

Debtor briefly argues that § 523(a)(2) only applies to debtors seeking a chapter 13 hardship discharge under § 1328(b), which would not apply in this case. This argument fails. Section 1328(a)(2) applies to non-hardship discharge and states that "any debt of the kind specified in [§ 523(a)(2)]" is excepted from discharge.[12] Here, § 523(a)(2) may serve as a basis for excepting debt from discharge in a full payment chapter 13 non-hardship discharge[13].

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[8] *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991) (citations omitted).

[9] *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (citations omitted) (emphasis added) (quoting *Miller v. Glanz*, 948 F.2d at 1565).

[10] *Sutton v. Utah State Sch. For Deaf & Blind* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

[11] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[12] The exception to discharge of certain debts under § 523(a)(2) is incorporated by reference into § 1328(a)(2). Interestingly, the prefatory language "does not discharge" in § 523(a) is not incorporated. *United Student Aid Funds, Inc., v. Espinosa*, 559 U.S. 260, 275 n.11 (2010).

[13] *See* 8 COLLIER ON BANKRUPTCY ¶ 1328.02[3] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.) (noting that "section 1328(a)(2) now excepts from a *full-compliance* discharge debts that are specified in [§ 523(a)(2)]") (emphasis added); *Vu v. Ankoanda (In re Ankoanda)*, 495 B.R. 599, 604 (Bankr. N.D. Ga. 2013) (finding that plaintiff's claims, brought under § 523(a)(2) and (4), are applicable in the chapter 13 context). "Full payment" does not mean full payment of all of the debtor's debts; it only

C. Claim Preclusion

Debtor argues that Creditor's failure to object to confirmation should preclude it from arguing nondischargeability under the doctrine of res judicata. Res judicata, also known as claim preclusion, prevents a party from re-litigating a claim that was previously decided on the merits based on issues that were actually raised or could have been raised in the prior action.[14] The first question before this Court, then, is whether a nondischargeability claim, which may only be raised in an adversary proceeding,[15] must be raised in the plan confirmation proceeding. The answer is no.

The effect of confirmation of a Chapter 13 plan is clear:

> § 1327. Effect of confirmation.
> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

The pertinent § 1328(a) full payment discharge exceptions that apply to tax debts are:

> § 1328. Discharge
> (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, . . . **the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--**
> . . . .
> **(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B),**

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requires the debtor to satisfy the terms of the confirmed plan by making all the payments required. A full compliance discharge is a more accurate description since a debtor has other obligations under the Code, Rules and her plan than just to make all the payments.

[14] *See, e.g.*, *Wilkes v. Wyoming Dept. of Emp't Div. of Labor Standards*, 314 F.3d 501, 503–04 (10th Cir. 2002).

[15] *See* FED. R. BANKR. P. 7001(6) (requiring an adversary proceeding to determine the dischargeability of debt).

(1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a). . . . (Emphasis added.)

The Tenth Circuit has squarely addressed this question;[16] in *In re Mersmann*, the Tenth Circuit held that "if an issue must be raised through an adversary proceeding it will not have a preclusive effect unless it is actually litigated."[17] Although the Supreme Court arguably abrogated portions of *In re Mersmann* in *United Student Aid Funds, Inc. v. Espinosa*,[18] *Espinosa* addressed only whether a bankruptcy court's failure to require an adversary proceeding to discharge student loan debt rendered the court's judgment void under Fed. R. Civ. P. 60(b)(4). In *Espinosa*, the Court decided that it was not proper to vacate an order of plan confirmation where the bankruptcy court had not followed the Bankruptcy Rules and had instead permitted a debtor to discharge her student loans absent the required adversary proceeding and a finding of undue hardship. The Court determined that the confirmation was a legal error, but that the error could not be remedied through Fed. R. Civ. P. 60(b)(4).

In *Espinosa*, Justice Thomas makes an interesting observation as to the incorporation by reference of certain § 523(a) exceptions to a full compliance Chapter 13 discharge:

> [T]he "does not discharge" language in § 523(a) is inapplicable to this case. . . . [Debtor] sought a discharge under § 1328(a), which provides that, upon completion of a Chapter 13 plan, a bankruptcy court "shall grant the debtor a discharge of all debts provided for by the plan . . ., except any debt . . . of the kind specified in . . . paragraph . . . (5), (8), or (9) of section 523(a)." Section 1328(a) thus incorporates by reference *paragraph (8)* of § 523(a), including that paragraph's self-executing requirement for an undue hardship determination, but

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[16] *Educ. Credit Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033 (10th Cir. 2007).

[17] *Id.* at 1050.

[18] 559 U.S. 260 (2010).

does not incorporate the "does not discharge" text of § 523(a) itself.[19]

Hence, § 1328(a)(2) incorporates certain discharge exceptions under § 523(a)(2), but does not incorporate the prefatory language "does not discharge" set out in § 523(a). Therefore, we must look to the language of § 1328(a)(2) to resolve the matter before this Court.

The broader chapter 13 discharge functions as a dual incentive for debtors to file a Chapter 13 bankruptcy to seek repayment of some or all of their debts and to make all payments due under a Chapter 13 plan.[20] We look to the incorporated subsections of § 523(a) without reference to whether a claim has been or has not been allowed. In *Espinosa*, the debtor's confirmed plan provided for the discharge of post-petition interest on a student loan. This proposed discharge was contingent upon payment of the student loan creditor's claim as it existed on the bankruptcy petition date. In *Espinosa*, the confirmed chapter 13 plan specifically dealt with the discharge of student loan debts under § 523(a)(8); here, the Debtor's Plan does not specifically address the Plaintiff's debt. Without this language, the § 523(a)(2) exception still applies and excepts from discharge Plaintiff's debts that fall within this exception to discharge.

Even if dischargeability could have been raised during the confirmation proceeding, *res judicata* only applies to a final judgment. Although plan confirmation is generally considered a final judgment,[21] the plan confirmation in this case was not a final judgment with respect to

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[19] *Espinosa*, 559 U.S. at 275 n.11 (italics added in original).

[20] 8 COLLIER ON BANKRUPTCY ¶ 1328.02[2][b], at 1328-10 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2013).

[21] *Espinosa*, 559 U.S. at 269 (noting that the bankruptcy court's order confirming the debtor's proposed chapter 13 plan constituted a final judgment).

§ 523(a)(2) dischargeability. The Court provided in its notice that creditors had 60 days from the date initially scheduled for the § 341 meeting to file an adversary proceeding seeking the exception from discharge of certain debts. Until that date passed, creditors could attack the merits of discharge as to those debts. Because the confirmation lacked finality with respect to § 523(a)(2) dischargeability, preclusion is improper.

Beyond the *res judicata* concerns, holding that Creditor is precluded from filing the adversary complaint notwithstanding the fact that it complied with the 60-day deadline would be unfair to Creditor and would interfere with the Court's ability to manage case deadlines in the future. Bankruptcy Rule 4007 governs debt dischargeability proceedings, including the adversary proceedings required to challenge dischargeability under Bankruptcy Rule 7001(6). Bankruptcy Rule 4007(c) requires that a complaint to determine debt dischargeability under § 523(c) be filed no later than 60 days after the first date set for the § 341 meeting of creditors. Section 523(c) includes debts that are not dischargeable under § 523(a)(2). Further, because the Code requires that the confirmation hearing be held within 45 days of the meeting of the creditors,[22] the Bankruptcy Rules and Code presume that adversary proceedings may not be commenced until after the first setting of the confirmation hearing. To preclude such adversary proceedings filed after confirmation, as Debtor suggests, would create an intractable conflict between the Bankruptcy Rules and the Code and would prevent this Court from managing its cases in accordance with the Bankruptcy Rules and the Code. Debtor does not cite any cases where a court found preclusion proper when a creditor challenged dischargeability within the

[22] 11 U.S.C.§ 1324.

60-day window, and this Court has found none. Thus, the Court will not give the confirmation order preclusive effect in these dischargeability proceedings.

Debtor relies on the broad language of § 1327(a) concerning confirmation: "The provisions of a confirmed plan bind the debtor and each creditor . . . whether or not such creditor has objected to, has accepted, or has rejected the plan." However, the language of § 1327(a) cannot be read to preclude the normal operation of the adversary proceeding process to determine the dischargeability of certain debts.

III. Conclusion

Because the Court will not give the confirmation order preclusive effect in these dischargeability proceedings, Creditor's claim is not barred by res judicata.

It is, therefore, by the Court ordered that Defendant/Debtor Erin Manuel's Motion to Dismiss is DENIED. To the extent not inconsistent with this order, the findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52 were stated orally and recorded in open court and constitute the complete grounds for the Court's action.

IT IS SO ORDERED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS