The relief described hereinbelow is SO ORDERED.

SIGNED this 3rd day of May, 2016.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

Tanner Ray Thill **Case No. 15-21670-13**
Amanda Sue Thill,

Debtors.

First National Bank of Omaha,
Plaintiff,

v. **Adv. No. 15-6108**

Tanner Ray Thill,
Defendant.

Order Granting in Part and Denying in Part
Defendant's Motion to Dismiss

This matter is before the Court on Defendant Tanner Thill's motion to dismiss[1] the adversary complaint filed against him by Plaintiff First National Bank of Omaha. The adversary

[1] Doc. 6.

complaint seeks the denial of discharge of up to $5424.27 in credit card charges under 11 U.S.C. §§ 523(a)(2)(A) and (a)(2)(C),[2] which excepts from an individual's Chapter 13 discharge debts "for money . . . obtained by . . . false pretenses, a false representation, or actual fraud" and creates a presumption of nondischargeability for "consumer debts . . . aggregating more than $[650] for luxury goods or services incurred by an individual debtor on or within 90 days" of filing a bankruptcy petition. Defendant has moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6),[3] arguing that the allegations made fail to support § 523(a)(2) claims.

The Court finds that Plaintiff's complaint states a legally cognizable claim under § 523(a)(2)(A), but that Plaintiff has not properly stated a claim under § 523(a)(2)(C). The Court therefore grants in part and denies in part Defendant's motion to dismiss.

I. Background and Findings of Fact

The following allegations are made in Plaintiff's complaint, or are found by combing the attachment incorporated thereto.[4] Defendant opened a credit account with Plaintiff on February 20, 2015. When Defendant accepted and opened the credit card, he agreed to abide by the terms of the account agreement, and represented that he had the intention to repay the debt pursuant to the account agreement terms. Each time Defendant incurred charges on the account, he

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[2] All future statutory references are to title 11 of the United States Code, unless otherwise specified.

[3] Rule 12(b) is made applicable to bankruptcy through Federal Rule of Bankruptcy Procedure 7012(b).

[4] *See Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (stating the "bedrock principle" that the allegations in the complaint must be accepted as true when assessing a motion to dismiss).

represented that he agreed to abide by the account agreement's terms.

Over a month passed before Defendant used his new credit card for the first time. No charges were made on the credit card until March 31, 2015, at which time Defendant charged $1821.21 to "Mustangs Unlimited." About a week later, on April 8 and 9, Defendant charged another $219.90 to this same entity. A few days after that, on April 13, Defendant charged $457.50 to "Kuiken Auction." Throughout the month of April, Defendant used the credit card every day or every other day, sometimes a couple of times a day. He paid bills (e.g., $125.63 on April 13 to "AT&T Bill Payment" and $91.14 on April 14 to "Dish Network") and used the card at restaurants and gas stations (e.g., $35.19 to a Mexican restaurant on April 18 and $20 at a gas station on April 20). Larger purchases were made at Wal-Mart ($79.47 on April 16, $174.84 and $193.79 on April 19), but after his initial large purchases at Mustangs Unlimited and Kuiken Auction, most other purchases ranged from a few dollars to forty dollars.

The charges made during May 2015 followed much the same pattern. There were occasional larger purchases (e.g., $205.90 charged to "Vivid Seats LTD" on May 16 and $150.82 charged to "Jim Carter Truck Parts" on May 18) but the majority of purchases made were at restaurants and gas stations. A significant pattern change occurred in June 2015, however. The credit card was used one time, on June 1 for $25 at "Short Stop 23," but it was not used the rest of the month. At that point, the balance on the card had reached $5400.99, exceeding the $5350 credit limit. The credit card was used one more time, on July 16, 2015, at Wal-Mart, for $51.03. Ultimately, between March 31 and July 16, 2015, Defendant made purchases on the credit card totaling $5424.27. It appears one payment of $100 was made on May 13, 2015.

Shortly after the conduct described above, on August 3, 2015, Defendant (and his wife, who is not a party to this adversary proceeding) filed for Chapter 13 bankruptcy protection. Plaintiff is listed as an unsecured creditor. According to Defendant's Schedule I filed with his bankruptcy petition, Defendant has been employed by Wal-Mart for thirteen years, and at the time of filing his petition he listed his position as "Order Filler." According to his Statement of Financial Affairs, Defendant may also earn income from purchasing old/vintage cars and reselling them, but it is unclear how much or when this has happened. Defendant stated his net monthly household income as $3587.93: of this, Defendant earns $2887.96 per month from his employment at Wal-Mart and his wife earns $700 per month from self-employment. According to Defendant's Schedule J filed with his bankruptcy petition, Defendant stated his monthly household expenses as $2816, leaving a net of $771.93 to make a proposed plan payment of $771 per month.[5] Based on minimum monthly payments estimated at between 2 and 3 percent of the outstanding principal balances on the unsecured debt listed in Defendant's petition (totaling $72,695), the minimum monthly payments on this debt would be between $1454 and $2181 per month. Based on Defendant's monthly income, expenses, and debt load, at the time Defendant incurred the $5424.27 in charges on the credit card, his monthly disposable income was nowhere near sufficient to pay the minimum monthly payments on his unsecured debts.

Plaintiff timely filed its adversary complaint against Defendant stating two causes of action. First, Plaintiff states a claim under § 523(a)(2)(C)(i)(I), alleging that Defendant made $1230.69 in charges in the ninety day period prior to filing his Chapter 13 petition (beginning

[5] The majority of this plan payment is presumably going toward the significant tax debt owed by Defendant and his joint-debtor wife. Per the filed proofs of claim, they owe $34,264 to the Internal Revenue Service and $5670.64 to the Kansas Department of Revenue.

May 5, 2015), and that these charges were for luxury goods or services. Plaintiff seeks a finding that the purchases exceeding the statutory limit of $650 are nondischargeable.[6] Second, Plaintiff states a claim under § 523(a)(2)(A), alleging that Plaintiff justifiably relied on Defendant's representation that he intended to repay his credit card debt under the terms of their account agreement. Plaintiff alleges the charges made were incurred at a time when Defendant was unable to meet his existing financial obligations, and that Defendant intended to deceive Plaintiff because he knew or should have known that he had no ability to repay his debt. As a result, Plaintiff seeks a finding that the total amount charged to the credit card ($5424.27) should be nondischargeable because it was obtained by false pretenses, a false representation, or actual fraud under § 523(a)(2)(A).

Defendant seeks dismissal of the adversary proceeding in its entirety under Rule 12(b)(6). He argues that Plaintiff's complaint does not allege sufficient facts to create an inference that the purchases made were of luxury goods to support the § 523(a)(2)(C) claim or to create an inference of intent to defraud to support the § 523(a)(2)(A) claim.

II. Analysis

A. Legal Standard for Assessing a Motion to Dismiss

An adversary proceeding to determine the dischargeability of particular debts is a core proceeding under 28 U.S.C. § 157(b)(2)(I), over which this Court may exercise subject matter

[6] At the time the complaint was filed, the statutory limit was $650, and under § 104(c), that limit continues to apply despite being adjusted upward to $675 on April 1, 2016. *See* § 104(c) (stating that adjustments to dollar amounts in the Code do not apply "to cases commenced before the date of such adjustments").

jurisdiction.[7]

Defendant's motion to dismiss is filed under Federal Rule of Civil Procedure 12(b)(6), which permits a motion for "failure to state a claim upon which relief can be granted." 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."[8] To survive a motion to dismiss, a complaint must present factual allegations that, when assumed to be true, "raise a right to relief above the speculative level."[9] The complaint must contain "enough facts to state a claim to relief that is plausible on its face."[10] "[T]he complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims."[11]

The plausibility standard does not require a showing of probability that a defendant has acted unlawfully, but requires more than "a sheer possibility."[12] "[M]ere 'labels and conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice; a plaintiff must offer specific factual allegations to support each claim."[13] Finally, the Court must accept the nonmoving party's factual allegations as true and may not dismiss on the ground that

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[7] 28 U.S.C. § 157(b)(1) and § 1334(b).

[8] Rule 8 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7008(a).

[9] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[10] *Id.* at 570.

[11] *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

[12] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[13] *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555).

it appears unlikely the allegations can be proven.[14]

Where, as here, a party alleges fraud, Federal Rule of Civil Procedure 9(b) requires the party to "state with particularity the circumstances constituting fraud," with general allegations only allowed for "malice, intent, knowledge, and other conditions of a person's mind."[15] To survive a motion to dismiss, the party alleging fraud must "'set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.'"[16] In other words, the alleging party must specify the "who, what, where, and when of the alleged fraud."[17]

B. Legal Sufficiency of Plaintiff's § 523(a)(2) Claims

Section 523(a)(2)(A) states: "A discharge . . . does not discharge any individual debtor from any debt– (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." Section 523(a)(2)(C)(i)(I) then offers creditors an avenue to raise a presumption of fraud in the § 523(a)(2)(A) context. That subsection states: "[F]or purposes of subparagraph (A)– (I) consumer debts owed to a single creditor and aggregating more than $[650] for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under

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[14] *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

[15] Rule 9 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7009.

[16] *Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991).

[17] *Plastic Packaging Corp. v. Sun Chem. Corp.*, 136 F. Supp. 2d 1201, 1203 (D. Kan. 2001).

this title are presumed to be nondischargeable[.]" In summary, a creditor can argue a debt is nondischargeable either directly under § 523(a)(2)(A), in which case the creditor bears the burden of establishing false pretenses, a false representation, or actual fraud, or through § 523(a)(2)(C)(i)(I), which raises a rebuttable presumption of nondischargeability once the creditor shows that the elements of the luxury goods subsection are met.[18]

This Court takes each of Plaintiff's claims under § 523(a)(2) separately. First, the luxury goods claim: to state a claim under § 523(a)(2)(C)(i)(I), a creditor must allege facts showing: "(1) a consumer debt; (2) owed to a single creditor; (3) aggregating more than $[650]; (4) for luxury goods or services; (5) incurred by an individual debtor; and (6) on or within 90 days before the filing of the petition."[19] Defendant challenges the fourth prong of this test, arguing that Plaintiff has not pleaded sufficient facts to show his purchases within 90 days of filing bankruptcy were for "luxury goods or services."

The phrase "luxury goods or services" is not defined by the Bankruptcy Code, but the Code states what it does not mean. Section 523(a)(2)(C)(ii) states that luxury goods or services do not include "goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor." No circuit courts have addressed the definition of "luxury" in this context, but several bankruptcy courts have loosely defined the term, and "have considered whether the items are extravagant, indulgent, or nonessential or alternatively whether the items purchased served any important family function and evidence some fiscal

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[18] *Discover Bank v. Hankins* (*In re Hankins*), No. 12-5114, 2012 WL 5409629, at *3 (Bankr. D. Kan. Nov. 5, 2012).

[19] *Id.*

responsibility."[20]

What is a luxury good depends on the facts of each case.[21] And although at this stage of the adversary proceeding a plaintiff need only state a plausible claim, the case law shows plaintiffs must do more than merely say: "everything purchased within 90 days of bankruptcy was a luxury item." They must state facts to support that claim. The Court in *Discovery Bank v. Hankins (In re Hankins)*,[22] held that alleging luxury purchases, but then supporting that allegation in the complaint only by reference to a credit card statement that showed the identity of the merchant, was insufficient to survive a motion to dismiss.[23] This was especially true when the identity of the merchants alleged to have sold the luxury items were "discount or low-end retailers and restaurants," as this was not enough to raise the presumption of luxury goods for nondischargeability under § 523(a)(2)(C)(i)(I).[24] The Court in *Hankins* concluded: "At the pleading stage, it was incumbent upon [the creditor] to allege the credit card charges were for luxury goods, coupled with factual allegations from which the 'luxury' characterization could be inferred. . . .[I]t has done neither and this is fatal to maintaining its presumptive nondischargeability claim."[25]

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[20] *Cong. Fed. Credit Union v. Pusateri (In re Pusateri)*, 432 B.R. 181, 202 (Bankr. W.D.N.C. 2010).

[21] *Sears Roebuck & Co. v. Faulk (In re Faulk)*, 69 B.R. 743, 751 (Bankr. N.D. Ind. 1986).

[22] No. 12-10884, 2012 WL 5409629 (Bankr. D. Kan. Nov. 5, 2012).

[23] *Id.* at *4.

[24] *Id.*; *see also In re Pusateri*, 432 B.R. at 203 (concluding that small dollar restaurant charges of approximately $12 to $30 are clearly not luxury goods or services).

[25] *In re Hankins*, 2012 WL 5409629, at *5.

In this case, like in *Hankins*, Plaintiff's complaint fails to do anything other than make a blanket charge of luxury goods. Without discrimination, Plaintiff alleges every purchase made by Defendant from May 5, 2015 to filing was for a luxury item or service. But in the complaint, Plaintiff does not even give an example, let alone any facts that this Court could view to support the claim. Instead, Plaintiff leaves it to Defendant and the Court to comb through the attached credit card statement to determine what purchases were made and the identity of the merchant. After doing so, the Court notes that most purchases are small dollar amounts at what appear to be vending machines, gas stations, and low-end restaurants. There are purchases at Walmart, but no facts alleged that what was purchased there was anything other than typical, everyday household items. And while Defendant charged a significant amount on the credit card in April 2015, he charged less in May 2015, and almost nothing in June and July 2015.[26] There is nothing in the facts alleged for the Court to see how Plaintiff's claim of luxury goods is anything but speculative.

As stated above, the plausibility standard for assessing a complaint under Rule 12(b)(6) does not require a showing of probability that a defendant has acted unlawfully, but it requires more than "a sheer possibility."[27] Yes, it is possible that a charge for $51.03 at Wal-Mart on July 16 was for luxury items, but there are no facts showing that it is probable. It is just as possible

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[26] In his first month of using the credit card, Debtor charged $3627.97, and the remaining approximately $2300 was charged on his card over the next three months. While some of the items charged by Defendant in that first month may have been for luxury items, specifically those at Mustangs Unlimited for $1821.21 and $219.90, and $457.50 to Kuiken Auction, these purchases are outside the relevant window for the presumption to arise under § 523(a)(2)(C)(i)(I), and are therefore irrelevant to the "luxury goods" discussion. *See Chase Bank v. Hampson (In re Hampson)*, 429 B.R. 360, 362–63 (Bankr. N.D. Ga. 2009) (concluding that cash advances obtained outside the presumption period "are irrelevant.").

[27] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

that the $51.03 was spent on "goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor."[28]

Finding Plaintiff is not entitled to a presumption of nondischargeability in this case under § 523(a)(2)(C)(i)(I), the Court next assesses whether Plaintiff has stated a viable claim under § 523(a)(2)(A). Under § 523(a)(2)(A), a creditor may state a claim by alleging facts that meet 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 intent to deceive the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor sustained damage as a proximate result of the debtor making the representation."[29] Defendant argues Plaintiff has not alleged facts that could satisfy the third factor to create an inference of intent to defraud.

The Tenth Circuit BAP has addressed credit card use in the context of § 523(a)(2)(A) in *Chevy Chase Bank FSB v. Kukuk (In re Kukuk)*.[30] The BAP held 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

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[28] § 523(a)(2)(C)(ii). The only items in the relevant time period with names that lend themselves to a guess for this Court that they are entertainment purchases are: "Redbox DVD Rental" on 5/29/2015 for $6.53, "Netflix" on 5/23/2016 for $11.99, two charges at "AMC Studio KC" on 5/17/2015 for $10 and $20.88, "Aramark Kauffman Stadium" on 5/17/2015 for $21.50, "Vivid Seats Ltd." on 5/16/2015 for $205.90, and "AMC Studio KC" on 5/10/2015 for $32.72. Even if Plaintiff had alleged some facts by which the Court could know anything at all about these purchases—and it did not—the purchases total only $309.52, far below the monetary limit established in § 523(a)(2)(C)(i)(I).

[29] *See Barenberg v. Burton (In re Burton)*, No. CO-10-022, 2010 WL 3422584, at *4 (10th Cir. BAP Aug. 31, 2010).

[30] 225 B.R. 778 (10th Cir. BAP 1998).

regarding the debtor's ability to repay the debt."[31] Because of this, the ultimate question is whether the implied representation regarding a debtor's intent to repay is fraudulent.[32] The BAP stated:

> This issue requires a determination as to whether the debtor subjectively intended to repay the debt when he or she made the implied representation that in fact he or she intended to do so, i.e., when the credit card was used to incur the debt subject to discharge. An implied representation of intent to repay will be fraudulent 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.[33]

According to the BAP, the "debtor's intent cannot be inferred solely by the fact that the debtor does not repay the credit card used and seeks bankruptcy protection. Rather, since a debtor will rarely admit a lack of intention to repay, such intent must be inferred by the totality of the circumstances of the case at hand."[34]

A nonexclusive, totality of the circumstances list of factors was provided by the *Kukuk* court to assist in this analysis. Those factors are:

> (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 employed;
> (9) the debtor's employment prospects;
> (10) the debtor's financial sophistication;

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[31] *Id.* at 785.

[32] *Id.* at 785–86.

[33] *Id.* at 786.

[34] *Id.* (internal citations omitted).

(11) whether there was a sudden change in the debtor's buying habits; and
(12) whether the purchases were made for luxuries or necessities.[35]

The BAP emphasized that no one factor should be determinative, and that an inability to pay the debt incurred or make minimum monthly payments thereon should not, standing alone, be dispositive.[36]

In this case, there are several allegations that could support factors for finding Defendant's alleged fraudulent intent. Plaintiff alleges that the credit card was opened and then maxed out within months of Defendant filing bankruptcy. In addition, Plaintiff alleges a significant number of charges in a short time period: between his first purchase on March 31, 2015, and his last purchase on July 16, 2015—a period of 108 days, Debtor made 111 purchases. Most of these purchases were made in the first two months of using the account, with some days having multiple charges. Many charges—in fact, most charges—were small: Defendant regularly charged items at vending machines, gas stations, and low-end restaurants. But there are several large purchases as well, at the beginning of his use of the credit account. For example, within about a ten day time period when he first started using his card, Defendant charged $2041.11 to Mustangs Unlimited. In addition, the small charges certainly added up, as Defendant ultimately exceeded his credit limit on the account.

Although Defendant has been gainfully employed by the same employer for thirteen years and has steady employment, he was apparently living beyond his means and had been doing so for some time. Plaintiff has alleged that Defendant's household unsecured debt limit was so high, totaling $72,695, that based on minimum monthly payments estimated at between 2

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[35] *Id.*

[36] *Id.* at 787.

and 3 percent of the outstanding principal balances, Defendant would have needed to make minimum monthly payments of between $1454 and $2181. As a result, Plaintiff alleges, based on Defendant's monthly income, expenses, and debt load, at the time Defendant incurred the $5424.27 in charges on the credit card held by Plaintiff, Defendant's monthly disposable income was nowhere near sufficient to pay the minimum monthly payments on his unsecured debts.

Admittedly, Plaintiff's complaint is not a model pleading. But the complaint alleges false representations, known by Defendant to be false. It alleges many of the *Kukuk* factors that could imply fraudulent intent. The complaint alleges justifiable reliance, and damages. And although the facts of this claim will ultimately need to be resolved via an evidentiary hearing, where the specific dynamics can be ascertained, Plaintiff's complaint states a sufficiently viable claim under § 523(a)(2)(A) to survive dismissal of that claim.

III. Conclusion

For the reasons set forth above, the Court finds that Plaintiff's complaint states a legally cognizable claim under § 523(a)(2)(A), and Defendant's motion to dismiss this claim must be denied. However, Plaintiff has failed to state claim under § 523(a)(2)(C), and Defendant's motion to dismiss that claim is granted.

It is, therefore, by the Court ordered that Defendant's motion to dismiss[37] is GRANTED in part and DENIED in part, as stated more fully herein.

IT IS SO ORDERED.

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[37] Doc. 6.

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