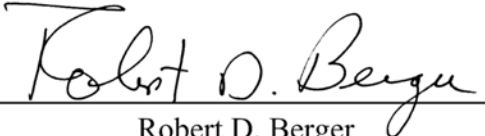


**The relief described hereinbelow is SO ORDERED.**

**SIGNED this 22nd day of December, 2017.**



  
Robert D. Berger  
United States Bankruptcy Judge

---

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

In re:

**MICHAEL E. DAVIDSSON and  
BILLIE J. DAVIDSSON,**

Case No. 16-20832  
Chapter 7

Debtors.

---

**FIRST NATIONAL BANK OF OMAHA,**

Adv. No. 16-06072

Plaintiff,

v.

**MICHAEL E. DAVIDSSON,**

Defendant.

---

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This is an adversary proceeding (1) to determine the dischargeability of a \$1,910.41 credit card debt under 11 U.S.C. § 523(a)(2)(A)<sup>1</sup> and (2) for costs and attorney's fees under 11 U.S.C. § 523(d).<sup>2</sup> The Court held a hearing on December 15, 2017 and is now prepared to make findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. The Court will enter a separate judgment as required by Fed. R. Bankr. P. 8058 and Fed. R. Civ. P. 58.

### **FINDINGS OF FACT**

Defendant Michael Davidsson, an assistant professor of economics at Pittsburg State University, opened a credit card issued by AMAC, Inc., an affiliate of Plaintiff First National Bank of Omaha, on January 15, 2016. He had several other credit cards at the time, and was current on both the monthly payments for those credit cards and the payments on his other outstanding loans. Defendant applied for the card at issue here (the "AMAC Card") because he hoped to transfer higher-interest credit card balances onto it, and was disappointed to learn that the credit limit on the AMAC Card would be only \$1,500.

Defendant made no charges on the AMAC Card until March 1, 2016. Between March 1, 2016 and March 13, 2016, he made the following charges:

<b>Date</b>	<b>Vendor (Payee)</b>	<b>Amount</b>	<b>Description of purchase or payment</b>	<b>Purpose of Transaction</b>
March 1, 2016	Sam's Club	\$68.87	Household goods	Purchase of needed household supplies

---

<sup>1</sup> Compl. ¶¶ 19-33, ECF No. 1. By order dated February 13, 2017, ECF No. 31, the Court granted Defendant's motion for summary judgment on Plaintiff's claim under 11 U.S.C. § 523(a)(2)(C)(i)(I).

<sup>2</sup> Answer ¶¶ 8-9, ECF No. 6.

March 1, 2016	Molle MC of Pittsburg	\$45.08	Oil change	Oil change for motor vehicle
March 6, 2016	Snak Atak	\$10.02	Food	Purchase of meal for defendant
March 7, 2016	Broadway Lumber	\$396.80	Lumber	Purchase of supplies to build a utility shed
March 11, 2016	Applebee's	\$41.94	Food	Purchase of meal for defendant
March 13, 2016	Faces Saloon	\$13.25	Beverages	Purchase of beverages for defendant
	<b>TOTAL</b>	<b>\$575.96</b>		

On March 20, 2016, Defendant made a \$200.00 payment on the AMAC Card. On March 23, 2016, he made the following charge:

<b>Date</b>	<b>Vendor (Payee)</b>	<b>Amount</b>	<b>Description of purchase or payment</b>	<b>Purpose of Transaction</b>
March 23, 2016	Lanasjodur isl.namsmanna	\$1489.76	Payment to Icelandic government	Semi-annual student loan payment <sup>3</sup>
	Foreign Transaction Fee	\$44.69		
	<b>TOTAL</b>	<b>\$1534.45</b>		

Following these transactions, the balance on the AMAC Card was \$1,910.41. Defendant made no further payments or charges on the AMAC Card.

Defendant credibly testified that he intended to repay each charge at the time he made the

---

<sup>3</sup> Defendant's student loan payments are due semi-annually, in March and September. The March payment is a fixed amount; the September payment is calculated at four and a half percent of the debtor's yearly income minus the amount paid in March, such that the total amount paid per year is never more than four and a half percent of the debtor's yearly income.

charge, and that at no time between March 1, 2016 and March 23, 2016 did he intend to file for bankruptcy. Rather, during that time, Defendant consistently hoped (and applied) for a consolidation loan onto which he could transfer his outstanding credit card balances. Defendant made payments on other credit cards on March 24, 2016; April 4, 2016; April 7, 2016; April 8, 2016; April 11, 2016; April 12, 2016; and April 14, 2016.

Defendant credibly testified that he first “considered” bankruptcy, in the sense that it first came to his mind, in late March of 2016. However, he did not actually “consider” bankruptcy, in the sense of thinking about it as a step he and his wife might take, until April. He made his first call to a bankruptcy attorney on April 13, 2016, and first met with the attorney on April 21, 2016. Defendant and his wife filed their joint Chapter 7 petition on May 11, 2016.

### **CONCLUSIONS OF LAW**

Plaintiff contends that Defendant’s \$1,910.41 debt on the AMAC Card is excepted from discharge under 11 U.S.C. § 523(a)(2)(A), which provides:

(a) A discharge under section 727 . . . of this title does not discharge an 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.

A creditor seeking to except its debt from discharge under section 523(a)(2)(A) must prove, by a preponderance of the evidence, that:

- (1) the debtor made a false representation;
- (2) the debtor made the representation with the intent to deceive the creditor;
- (3) the creditor relied on the representation;

- (4) the creditor's reliance was justifiable; and
- (5) the debtor's representation caused the creditor to sustain a loss.

*In re Johnson*, 477 B.R. 156, 169 (B.A.P. 10th Cir. 2012). Section 523(a)(2)(A) is to be narrowly construed, with all doubts resolved in Plaintiff's favor. *See In re Kukuk*, 225 B.R. 778, 782 (B.A.P. 10th Cir. 1998).

In this case, the Court need not reach the issue of whether Plaintiff met the first, third, fourth, and fifth elements of the *Johnson* test because Plaintiff did not meet the second element—i.e., Plaintiff did not prove, by a preponderance of the evidence, that Defendant made a false representation with the intent to deceive Plaintiff.

“Misrepresentation . . . includes an implied representation regarding a debtor's intent to perform under a credit card agreement *when he or she uses the credit card.*” *Kukuk*, 225 B.R. at 785 (emphasis added). To determine whether a debtor intended to deceive a creditor as to his intent to repay at the time he used a credit card, the Bankruptcy Appellate Panel of the Tenth Circuit has adopted a “totality of the circumstances” test, with “the particular circumstances of the case and the demeanor and credibility of the witness playing a very large role.” *Id.* at 786; *see Johnson*, 477 B.R. at 169. In determining a debtor's intent, courts look to the following nonexhaustive list of factors:

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

*Kukuk*, 225 B.R. at 786. This test “creates a very difficult burden for credit card issuers under § 523(a)(2)(A).” *Id.* at 788.

Applying *Kukuk*'s “totality of the circumstances” test to the facts of this case, the Court holds that Plaintiff did not satisfy its burden of proof as to Defendant's intent. Although the first, fifth, sixth, and tenth factors listed in *Kukuk* may weigh in Plaintiff's favor, the second, seventh, eighth, ninth, and eleventh factors weigh in favor of Defendant. The fact that Defendant continued to make scheduled payments on his other credit cards following the charges at issue here also weighs in his favor. Moreover, after listening to Defendant's testimony and observing his demeanor, the Court found Defendant's testimony regarding his subjective intent to repay credible. All in all, a preponderance of the evidence shows that Defendant *did* intend to repay the charges to the AMAC Card at the time he made the charges. For this reason, judgment will be entered in Defendant's favor on Plaintiff's claim under 11 U.S.C. § 523(a)(2)(A). However, given the factors that weigh in Plaintiff's favor, the Court holds that Plaintiff's request to determine the dischargeability of the debt at issue here was substantially justified. *Cf. In re Pappan*, 334 B.R. 678, 683 (B.A.P. 10th Cir. 2005) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988) (“[T]he party attempting to prove substantial justification for its action must show: ‘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.’”). Therefore, judgment will be

entered in Plaintiff's favor on Defendant's counterclaim under 1 U.S.C. § 523(d).

###