

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
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WILLIAM F. ROSS, \*  
\*  
Debtor. \* CASE NUMBER 05-40081  
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MBNA AMERICA BANK, N.A., \*  
\* ADVERSARY NUMBER 05-4080  
\*  
Plaintiff, \*  
\*  
vs. \*  
\*  
WILLIAM F. ROSS, \*  
\* THE HONORABLE KAY WOODS  
\*  
Defendant. \*  
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M E M O R A N D U M O P I N I O N  
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This cause is before the Court on a bench trial conducted on April 13, 2006. Christian Hobbis was present as an officer of Plaintiff MBNA America Bank, N.A.<sup>1</sup> ("Plaintiff"). Plaintiff was represented by Attorney Geoffrey Albrecht. Neither Debtor/Defendant William F. Ross ("Debtor") nor his attorney Charles Swartz, Esq. appeared at trial.

Plaintiff initiated this adversary proceeding to determine if credit card debt owed by Debtor to Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).<sup>2</sup>

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<sup>1</sup>After this adversary proceeding was commenced, MBNA America Bank, N.A. was acquired by Bank of America.

<sup>2</sup>Plaintiff's complaint generically refers to 11 U.S.C. § 523(a)(2). Section 523(a)(2) of the Bankruptcy Code contains subsections A, B and C. Subsection B is inapplicable because Debtor did not use a statement in writing as required by 11 U.S.C. § 523(a)(2)(B). Subsection C is inapplicable because the charges

This Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

#### I. PROCEDURAL HISTORY

On January 10, 2005 (the "Petition Date"), Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Subsequently, on April 11, 2005, Plaintiff initiated this adversary proceeding seeking a determination whether certain credit card debt incurred by Debtor and owed to Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Debtor filed Answer on May 6, 2005 (the "Answer"). In the Answer Debtor claims the cash advances were taken out by his estranged wife and the accumulated debt was charged by both Debtor and estranged wife. (Answer at ¶¶ 6, 9-12, 17.)

The Court conducted a telephonic status conference on January 30, 2006. At that time, Debtor's counsel represented that he had not been in contact with his client for four (4) months and that Debtor had either failed or refused to return his phone calls and respond to his letters. Furthermore, during the telephonic conference, Plaintiff informed the Court that Debtor has failed to respond to discovery requests forwarded to Debtor's counsel on

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and cash advances, incurred between July 23, 2004 through July 28, 2004, were not made within 60 days before the petition date as required by 11 U.S.C. § 523(a)(2)(C).

June 3, 2005. Included in Plaintiff's discovery was Plaintiff's First Request for Admission to Defendant. The Court instructed Debtor's counsel to answer all outstanding discovery within two weeks (*i.e.*, by February 13, 2006) or the requests for admission would be deemed admitted and Debtor would be prohibited from using any documents at trial that should have been produced to the Plaintiff. FED. R. BANKR. P. 7036 and FED. R. CIV. P. 36.

Subsequently, on February 21, 2006, the Court conducted a final pretrial hearing, at which Debtor and Debtor's counsel failed to appear. At the hearing, Plaintiff informed the Court that it had not received any answers to its discovery requests. Because Debtor failed to answer the discovery requests by February 13, 2006, the Court held that all the requests for admission were deemed admitted. *Id.*

On February 23, 2006, the Court issued the Trial Order, which scheduled the trial for April 3, 2006, required exhibits to be filed with the Court on or before March 28, 2006 and provided a dispositive motion date of March 7, 2006.

Plaintiff filed a motion for summary judgment on March 9, 2006. Debtor failed to respond to the motion or oppose summary judgment. Plaintiff's Motion for Summary Judgment did not contain any legal analysis, but rested entirely on the admissions in Plaintiff's First Request for Admission to Defendant to establish that Plaintiff was entitled to summary judgment. The Court denied Plaintiff's Motion for Summary Judgment because the admissions failed to establish that there was no genuine issue of material fact regarding each element

of Plaintiff's cause of action. Specifically, Plaintiff failed to request Debtor to make any admission concerning Debtor's fraudulent intent as required by *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993).

On March 31, 2006, the Court issued an order continuing the trial until April 13, 2006. On April 5, 2006, Plaintiff filed its exhibit and witness list, but failed to provide the Court with a copy of the exhibits. On April 13, 2006, the Court conducted the trial.

## II. FACTS

Since Debtor failed to appear at the trial, the facts of this case are entirely derived from (i) Debtor's admissions, as set forth in Plaintiff's First Request for Admission to Defendant, (ii) the testimony of Plaintiff's representative, Christian Hobbis, and (iii) exhibits presented at trial.<sup>3</sup> Mr. Albrecht, at the Court's request, limited Mr. Hobbis' testimony to facts that were not deemed admitted. Mr. Albrecht solicited testimony to prove Debtor's fraudulent intent.

The following facts are not in dispute since they were deemed admitted by Debtor. Plaintiff's First Request for Admission to Defendant are set forth below.

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<sup>3</sup>The Trial Order required exhibits to be filed with the Court on or before March 28, 2006; however, Plaintiff failed to file its proposed exhibits with the Court. The Court permitted Plaintiff to utilize the exhibits at trial, but Plaintiff never moved for admission of the exhibits. Nevertheless, because Debtor failed to appear at trial and, therefore, failed to object to the admission of any exhibit, the Court will treat the exhibits as if they were admitted.

1. Admit that you applied for and received a credit card with Plaintiff under Account XXXXXX1516 (the "Account").<sup>4</sup>
2. Admit that you received a copy of the terms and conditions for the Account.
3. Admit that collectively, you and any party or parties that you authorized incurred all of the charges on the Account.
4. Admit that you are indebted to Plaintiff for all of the charges on the Account.
5. Admit that you do not hold any defense, counter-claim, or set-off to your indebtedness for any of the charges on the Account.
6. Admit that you received the monthly account statements which reflect the charges incurred on the Account.
7. Admit that you did not notify Plaintiff of any dispute or objection to the charges at any time prior to filing your bankruptcy petition.
8. Admit that you received the goods, services, or consumer items that were purchased through the charges on the Account.
9. Admit that at the time the charges were incurred, you did not have the financial ability to repay them as required under the terms of the account [sic] agreement.
10. Admit that Plaintiff relied on your representations that you had the financial ability and intent to repay the charges as required under the terms of the Account agreement.
11. Admit that at the time the charges were incurred, you did not have the financial ability to repay them and remit current payments on all of your other unsecured debt and living expenses.
12. Admit that at all times during the period that the charges were incurred on the Account, you knew and understood that you had insufficient income and financial resources to remit payments to Plaintiff and your various

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<sup>4</sup>Due to fraudulent activity on the Account, Plaintiff changed Debtor's account number numerous times. The last account number issued to Debtor ends in 1516.

credit accounts and pay your other living and household expenses.

13. Admit that by accepting and using the cash advances and/or convenience checks received from Plaintiff, you agreed to be bound by the terms and conditions under which the credit card was issued.

14. Admit that the balance on the Account as of 01/10/2005 was \$8,974.62.

Plaintiff further relied on the testimony of Mr. Hobbis. Mr. Hobbis has been employed by Plaintiff for nine (9) years and currently works as a personal banking officer in charge of Plaintiff's arbitration and litigation department. Mr. Hobbis' duties include: (i) managing a team of analysts that review accounts and correspondence for arbitration, (ii) managing a relationship with Plaintiff's arbitration counsel, and (iii) serving as an expert witness in all Plaintiff's judicial and arbitration proceedings.

Mr. Hobbis testified about Debtor's Account history with Plaintiff. Specifically, he testified about and explained the trial exhibits. Based on the testimony of Mr. Hobbis, following is a summary of Debtor's Account history with Plaintiff:

May 16, 2004 - Plaintiff sent a letter to Debtor stating that (i) there were several cash advances on the Account that were inconsistent with Debtor's normal transaction pattern and (ii) any further charges might be referred to Plaintiff for approval or declined until the recent charges were verified.<sup>5</sup> (Plaintiff Ex. 4.)

May 28, 2004 - ATM transaction with Cortland Savings Bank in the amount of \$601.50.<sup>6</sup> (Plaintiff Ex. 5.)

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<sup>5</sup>In the Answer, Debtor claims his estranged wife took these cash advances.

<sup>6</sup>See *supra* n.6.

June 1, 2004 - ATM transaction with Farmers National Bank in the amount of \$401.50.<sup>7</sup> (*Id.*)

June 1, 2004 - Debtor requested a credit line increase from \$7,800.00 to \$15,000.00 on the basis his estranged wife had used all the available credit on the Account. Plaintiff denied Debtor's request for the credit line increase.<sup>8</sup> (Plaintiff Ex. 3.)

June 1, 2004 - Plaintiff sent Debtor a letter notifying him of the denial of Debtor's request for a credit line increase. (Plaintiff Exs. 3, 4.)

June 22, 2004 - Plaintiff received a \$7,500.00 payment that paid off the balance on the Account.<sup>9</sup> (Plaintiff Exs. 1, 5.)

July 13, 2004 - Transaction with Rite Aid in the amount of \$14.41. (Plaintiff Ex. 5.)

July 14, 2004 - Debtor contacted Plaintiff to remove Debtor's estranged wife from the Account. (Plaintiff Ex. 3.)

July 21, 2004 - Debtor took a direct deposit transfer in the amount of \$5,000.00 from Plaintiff.<sup>10</sup> (Plaintiff Ex. 2.)

July 24, 2004 - Transaction with Budget Inn in the amount of \$239.09. (*Id.*)

July 25, 2004 - Transactions with Cedar Point totaling \$85.37. (*Id.*)

July 26, 2004 - Transaction with Chiccarino's in the amount of \$71.15. (*Id.*)

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<sup>7</sup>See *supra* n.6.

<sup>8</sup>Plaintiff denied Debtor's request for a credit line increase because Plaintiff believed Debtor had sufficient credit available. (Plaintiff Ex. 3.) At the time of the request, Debtor was unemployed and had unemployment income of \$28,000.00. (*Id.*)

<sup>9</sup>Plaintiff's Exhibit 1 states the date as June 22, 2004, whereas Plaintiff's Exhibit 5 states the date as June 21, 2004. Plaintiff was unable to determine who made the \$7,500.00 payment.

<sup>10</sup>Plaintiff's Exhibit 3 lists the direct deposit purchase date as July 23, 2004.

July 27, 2004 - Transaction with Sprint in the amount of \$273.00. (*Id.*)

July 28, 2004 - Transactions with Sherwin Williams totaling \$156.49. Transactions with Home Depot totaling \$1,187.98. Transaction with Handyman Supply of Niles in the amount of \$83.53. Transaction with Sears Roebuck in the amount of \$334.27. (*Id.*)

July 29, 2004 - Transaction with Radisson Hotels in the amount of \$403.82. (*Id.*)<sup>11</sup>

August 23, 2004 - Debtor received a credit on the Account from Home Depot in the amount of \$80.90. (*Id.*)

September 20, 2004 - Debtor requested a new pin number to access his Account through the ATM. (Plaintiff Ex. 1.)

After the billing closing date of August 12, 2004, Debtor did not contact or attempt to pay Plaintiff for charges on the Account. As of the Petition Date, Debtor's balance with Plaintiff was \$8,974.62. (Plaintiff Ex. 5.) After the Petition Date, the only contact Debtor made with Plaintiff was to inform Plaintiff that he had filed a bankruptcy petition.

### III. DISCUSSION

The issue before the Court is whether Plaintiff has established all of the necessary elements of its cause of action. The statutory basis for Plaintiff's Complaint Objecting to Dischargeability of Indebtedness (11 U.S.C. § 523) rests entirely on the discharge exception in 11 U.S.C. § 523(a)(2)(A).<sup>12</sup> Section 523(a)(2) states in pertinent part:

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<sup>11</sup>This is the last transaction in the billing period closing on August 12, 2004. Debtor charged \$7,895.21 in this period, which exceeded the Account limit.

<sup>12</sup>See *supra* at n.2.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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.

It is well established that in order to except debt from discharge under § 523(a)(2)(A), a creditor must prove that: (1) the debtor obtained money through a material misrepresentation that, at the time the representation was made, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) the reliance was the proximate cause of the loss. *In re McLaren*, 3 F.3d at 961. The creditor must prove each of the aforementioned elements by a preponderance of the evidence. *Rembert v. AT&T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). Furthermore, exceptions to discharge are to be strictly construed against the creditor. *Id.*

The Court will first focus on elements (1) and (2) of the *McLaren* test. These elements require proof of fraudulent intent, which is measured by a subjective standard. *Id.* Therefore, Plaintiff must prove that Debtor made representations to Plaintiff with fraudulent intent.

In *In re Rembert* the Sixth Circuit Court of Appeals distinguished, at length, a debtor's ability to pay compared to his intent to defraud. Because *In re Rembert* deals with a situation that closely resembles the instant facts, this Court sets forth that analysis, in full, herein, as follows:

The use of a credit card represents either an actual or implied intent to repay the debt incurred. See, e.g., *Chevy Chase Bank, FSB v. Briese (In re Briese)*, 196 B.R. 440, 449-50 (Bankr. W.D. Wis. 1996); *Chase Manhattan Bank v. Murphy (In re Murphy)*, 190 B.R. 327, 332 (Bankr. N.D. Ill. 1995); *The GM Card v. Cox (In re Cox)*, 182 B.R. 626, 628 (Bankr. D. Mass. 1995). Subject to more debate, however, is the issue of whether the debtor's representation includes a representation that she has an **ability** to repay the debt. Compare *Anastas v. American Savings Bank (In re Anastas)*, 94 F.3d 1280, 1287 (9th Cir. 1996) (the representation made by the card holder in a credit card transaction is not that he has an ability to repay the debt), and *AT&T Universal Card Serv. Corp. v. Feld (In re Feld)*, 203 B.R. 360, 367 (Bankr. E.D. Pa. 1996) ("We therefore reject those cases that measure a debtor's intention to repay by her ability to pay."), with *Mercantile Bank v. Hoyle (In re Hoyle)*, 183 B.R. 635, 638 (Bankr. D. Kan. 1995) (debtor implied that he had ability to repay when he took out cash advances) and *Bank One Columbus, N.A. v. McDonald (In re McDonald)*, 177 B.R. 212, 216 (Bankr. E.D. Pa. 1994) (the act of using a credit card carries the implied representation that the debtor has the ability to repay the debt).

We believe that "the representation made by the cardholder in a credit card transaction is not that he has an ability to repay the debt; it is that he has an intention to repay." *Anastas*, 94 F.3d at 1287. To measure a debtor's intention to repay by her ability to do so, without more, would be contrary to one of the main reasons consumers use credit cards: because they often lack the ability to pay in full at the time they desire credit. See *Feld*, 203 B.R. at 368 (citing *Briese*, 196 B.R. at 448). Further, the language of § 523(a)(2)(A) expressly prohibits using a "statement respecting the debtor's or an insider's financial condition" as a basis for fraud. As noted by the Ninth Circuit, the focus should not be on whether the debtor was hopelessly insolvent at the time he made the credit card charges. A person on the verge of bankruptcy may have been

brought to that point by a series of unwise financial choices, such as spending beyond his means, and if ability to repay were the focus of the fraud inquiry, too often would there be an unfounded judgment of non-dischargeability of credit card debt. Rather, the express focus must be solely on whether the debtor maliciously and in bad faith incurred credit card debt with the intention of petitioning for bankruptcy and avoiding the debt. A finding that a debt is non-dischargeable under 523(a)(2)(A) requires a showing of actual or positive fraud, not merely fraud implied by law. . . . While we recognize that a view to the debtor's overall financial condition is a necessary part of inferring whether or not the debtor incurred the debt maliciously and in bad faith, . . . the hopeless state of a debtor's financial condition should never become a substitute for an actual finding of bad faith.

*Anastas*, 94 F.3d at 1285-86 (citations omitted). Thus, we hold that the proper inquiry to determine a debtor's fraudulent intent is whether the debtor subjectively intended to repay the debt.

We are not unsympathetic to Appellants' claim that a subjective analysis of a debtor's fraudulent intent is extremely difficult to establish. Clearly, debtors have an incentive to make self-serving statements and will rarely admit an intent not to repay. In particular, compulsive gamblers often will have a subjective (albeit often baseless) intent to repay their gambling debts with their "expected" winnings, which is fueled by the very nature of their addictions. Thus, a debtor's intention -- or lack thereof -- must be ascertained by the totality of the circumstances. See *Feld*, 203 B.R. at 367.

Some courts have adopted a nonexclusive list of twelve factors to consider when determining whether a debtor intended to repay the debt. (FN 3 omitted) See, e.g., *Ellingsworth v. AT&T Universal Card Serv. (In re Ellingsworth)*, 212 B.R. 326, 334-35 (Bankr. W.D. Mo. 1997). Although we believe that "factor-counting" is inappropriate when applying a subjective standard, see *Murphy*, 190 B.R. at 334, the enumerated factors could help to determine the debtor's state of mind when she represented her intention to repay. "What courts need to do is determine whether all the evidence leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent. This determination will require a review of the circumstances of the case at hand, but not a comparison with circumstances (a/k/a/ 'factors') of other cases." *Id.*

*In re Rembert*, 141 F.3d at 281-82. (Emphasis in original). Although the Sixth Circuit dismissed "factor-counting" as inappropriate, the Court set forth twelve factors to consider in determining whether a debtor intended to repay the debt.

These factors are: (1) the length of time between the charges made and the filing of bankruptcy; (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were 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 are made; (6) whether the charges were above the credit limit of the account; (7) whether the debtor made multiple charges on the same day; (8) whether or not the debtor was employed; (9) the debtor's prospects for employment; (10) financial sophistication of the debtor; (11) whether there was a sudden change in the debtor's buying habits; and (12) whether the purchases were made for luxuries or necessities. See *Citibank South Dakota, N.A. v. Dougherty (In re Dougherty)*, 84 B.R. 653, 657 (9th Cir. B.A.P. 1988) (citing *Sears Roebuck and Co. v. Faulk (In re Faulk)*, 69 B.R. 743, 757 (Bankr. N.D. Ind. 1986)), abrogated on other grounds, *Grogan v. Garner*, 498 U.S. 279, 112 L. Ed. 2d 755, 111 S. Ct. 654 (1991). It should be noted that even the Ninth Circuit, which decided *Dougherty*, has recognized that the twelve-factor test has "been criticized because it does not consider all the common law elements of fraud, particularly misrepresentation and reliance." *Citibank (South Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1088 (9th Cir. 1996) (citing *The GM Card v. Cox (In re Cox)*, 182 B.R. 626, 637 (Bankr. D. Mass. 1995)).

*Id.*, at 282, n.3.

Turning to the present case, Plaintiff must prove that Debtor possessed fraudulent intent to deceive Plaintiff. The admissions establish that Debtor did not have the financial ability to pay the credit card debt at the time the charges were incurred. (See Admission Nos. 9, 11 and 12.) However, the admissions failed to demonstrate Debtor's subjective intent to defraud Plaintiff at

the time the charges were incurred.<sup>13</sup> To determine if Debtor possessed fraudulent intent, the Court turns to the testimony of Mr. Hobbis to examine the totality of the circumstances.<sup>14</sup> *Id.*, 141 F.3d at 281-82.

First, the Court will analyze Debtor's financial situation. At the time the transactions occurred, Debtor was unemployed and had a total household income of \$28,000.00. Debtor was previously employed as an Army sandblaster and had an annual household income of \$35,000.00. Therefore, the Court can find that Debtor anticipated that his future income would be in the range of \$28,000.00 - \$35,000.00 and that Debtor was not expecting to receive a significant increase from new employment.

Second, the Court will analyze the transactions on the Account after June 22, 2004; *i.e.* the date the Account was paid in full. Debtor purchased a \$5,000.00 direct deposit from Plaintiff, which was an unusual transaction for Debtor. Then, in a six (6) day period, Debtor charged: \$85.37 at an amusement park; \$642.91 at hotels; \$71.15 at a restaurant; \$273.00 at Sprint; \$334.27 at Sears and \$1,428.00 at home improvement stores. All of these charges appear to be luxury (*i.e.*, unnecessary) items that someone unemployed and trying to live within a budget could not afford

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<sup>13</sup>Plaintiff's failure to establish Debtor's fraudulent intent, as required by the *McLaren* test, through the admissions was the reason the Court denied Plaintiff's Motion for Summary Judgment. Hence, the only reason this matter went to trial was for Plaintiff to attempt to prove Debtor's fraudulent intent.

<sup>14</sup>Even though the Sixth Circuit has not adopted the "factor-counting" test, the factors can be used to analyze the totality of the circumstances. The only restriction set forth in *In re Rembert* is that the Court cannot conduct a case by case comparison to determine the totality of the circumstances. *In re Rembert*, 141 F.3d at 281-82.

and would not make. In total, Debtor charged \$7,834.70 to the Account in a very short period; these charges placed the Account over the approved credit limit.

Next, the Court will analyze the timing of the charges. Debtor claims his estranged wife made all of the cash advances against the Account. (Answer at ¶¶ 6, 9-12, 17.) However, the charges in question occurred after July 24, 2004; *i.e.* the date Debtor removed his estranged wife as a person authorized to charge on the Account. At the time Debtor removed his estranged wife from the Account, the Account balance was \$14.41. Therefore, Debtor was the only person who had access to the Account at the time the \$5,000.00 direct deposit was made and \$2,834.70 in luxury items were charged. Consequently, there is no dispute that Debtor made the charges.<sup>15</sup> Debtor's proposition that his estranged wife made the charges, when he was the only person who had access to the Account, demonstrates that Debtor is attempting to deceive the Court and Plaintiff.

Fourth, the Court will analyze Debtor's attempt to make payments on the Account. After incurring the new charges (subsequent to reducing the Account Balance to zero), Debtor made no payments on the Account. Indeed, the only "payment" activity was a credit to the Account in the amount of \$80.90, as a result of a return of merchandise to Home Depot. Mr. Hobbis testified that Plaintiff tried to contact Debtor regarding the overdue balance on the Account, but was unable to reach him. Furthermore, Debtor refused

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<sup>15</sup>Additionally, Debtor has admitted, in response to Request for Admission No. 3, that either he or parties he authorized incurred all of the charges on the Account. (Request for Admission, ¶ 3.)

to return Plaintiff's phone calls. Mr. Hobbis further testified that the only contact Debtor made with Plaintiff, after the charges were made, was to request a pin to access the Account at an ATM<sup>16</sup> and to inform Plaintiff he petitioned for bankruptcy. Simply put, Debtor did not make any attempt to pay the Account debt.

Finally, the Court will analyze the Account history. The information provided to the Court represents that the Account, prior to this dispute, was never delinquent or over the limit. Plaintiff's exhibits further represent that the Account was paid in full on a regular basis. Consequently, Debtor's conduct in (i) taking out a \$5,000.00 direct deposit, (ii) running up approximately \$3,000.00 in charges in a six (6) day period, (iii) charging the Account over the approved credit limit, and (iv) failing to make any attempt to pay on the Account was out of the ordinary for Debtor. Furthermore, Mr. Hobbis testified that the ATM and direct deposit transactions were so abnormal for this Account that Plaintiff contacted Debtor about these charges. Additionally, during this period, Debtor requested Plaintiff to double his available credit line even though Debtor was unemployed. All of these deviations from the normal Account activity make the Court wary regarding Debtor's intent to repay when he incurred the charges.

For the foregoing reasons, the Court finds that the totality of the circumstances demonstrate that Debtor had an intent to defraud Plaintiff. Having found that the Debtor had the

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<sup>16</sup>At the time Debtor requested a pin to access the ATM, the Account was over the limit and overdue.

intent to deceive Plaintiff, the Court will focus on the *McLaren* test.

First, Debtor represented to Plaintiff he was going to pay Plaintiff for the charged items and the direct deposit. (Request for Admission, ¶¶ 1, 2, 13.) The evidence demonstrates that Debtor did not intend to pay Plaintiff at the time the charges were made; consequently, Debtor obtained money and goods through material misrepresentations that he would pay Plaintiff for the credit used. (Request for Admission, ¶ 8.) Second, Debtor intended to defraud Plaintiff. See *supra* pp. 11-14. Third, the Plaintiff extended credit to Debtor in reliance on Debtor's promise to pay for the items charged. (Request for Admission, ¶ 10.) Fourth, Plaintiff's reliance on Debtor's promise that he had the ability and intent to pay for the charges - hence the extension of credit - was the cause of Plaintiff's losses. As a result, Plaintiff satisfies the *McLaren* test, which exempts credit card debt from discharge under section 523(a)(2)(A).

#### IV. CONCLUSION

Plaintiff proved by a preponderance of the evidence that Debtor's credit card debt with Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). During the time period in question, Debtor, as the only authorized cardholder on the Account, ran up and exceeded the entire approved line of credit in a nine (9) day period. Debtor's charges consisted of luxury items and a direct deposit that was abnormal for the Account. Debtor made no attempt to repay the charges and refused to return Plaintiff's calls

regarding the charges. These facts establish that Debtor possessed the appropriate fraudulent intent required by the *McLaren* test. Wherefore, Plaintiff's debt, in the amount of \$8,974.62 - which constitutes the pre-petition principal balance of \$7,440.00 plus interest and penalties through the Petition Date - is nondischargeable.

An appropriate order will enter.

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
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WILLIAM F. ROSS, \*  
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Debtor. \* CASE NUMBER 05-40081  
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MBNA AMERICA BANK, N.A., \*  
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WILLIAM F. ROSS, \*  
\* THE HONORABLE KAY WOODS  
Defendant. \*  
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O R D E R  
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For the reasons set forth in this Court's Memorandum Opinion entered this date, pursuant to 11 U.S.C. § 523(a)(2)(A), the debt in the amount of \$8,974.62 owed by Debtor William F. Ross to Plaintiff MBNA America Bank, N.A., is not discharged.

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE