IT IS ORDERED as set forth below:

Date: February 28, 2012

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN RE:	)	CHAPTER 7
	)	
DAMON LEE BARNER,	)	CASE NO. 08-12907-WHD
	)	
Debtor.	)	
	)	
SARA LOVE,	)	
	)	
Plaintiff	)	
	)	
-vs-	)	ADVERSARY PROCEEDING
	)	No. 09-9001
DAMON LEE BARNER,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Motion and Brief for Sanctions for Failure to Obey the Court's Order, filed by Sara Love (hereinafter the "Plaintiff") in the above-named adversary proceeding. In an earlier order, the Court sanctioned Damon Lee Barner (hereinafter the

"Defendant") by striking Defendant's answer. Now the Court must determine whether default judgment in favor of Plaintiff is appropriate. As this matter arises in connection with a complaint to determine dischargeability, it constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I); § 1334.

As mentioned above, the Court struck Defendant's answer as a sanction for his failure to obey an order with regard to discovery. Defendant, therefore, is considered to have failed to answer the allegations in the complaint, and all material facts in the Complaint are deemed admitted. FED. R. BANKR. P. 7008; FED. R. CIV. P. 8(b)(6); *see also In re Heard*, 2010 WL 3397458, at *1 (Bankr. N.D. Ga. June 2, 2010) (Diehl, J.).

In order to grant default judgment, the Court must first determine that Plaintiff's allegations of material fact serve as a sufficient basis for entry of a judgment. *Nishimatsu Construction Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). To succeed under section 523(a)(2)(A), a creditor must establish by a preponderance of the evidence that: (1) the debtor made a false representation with the purpose and intention of deceiving the creditor; (2) the creditor relied upon the debtor's representation; (3) such reliance by the creditor was justifiable; and (4) the creditor suffered a loss as a result of that reliance. *See City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277, 279-84 (11th Cir. 1995); *see also Grogan v. Garner*, 498 U.S. 279, 285-90 (1991); *Signet Bank v. Keyes*, 959 F.2d 245 (10th Cir. 1992); *Mfr. Hanover Trust Co. v. Ward (In re Ward)*, 857 F.2d 1082, 1082 (6th Cir. 1988). Further, the Eleventh Circuit has stated that:

> A bankruptcy court may look to the totality of the circumstances, including the recklessness of a debtor's behavior, to infer whether a debtor submitted a statement with intent to deceive. "Reckless disregard for the truth or falsity

> of a statement combined with the sheer magnitude of the resultant misrepresentation may combine to produce the inferrence [sic] of intent [to deceive."

Equitable Bank v. Miller (In re Miller), 39 F.3d 301, 305 (11th Cir. 1994) (citations omitted).

As to the existence of a false representation, "fraud may consist of silence, concealment or intentional non-disclosure of a material fact, as well as affirmative misrepresentation of a material fact." *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474 (11th Cir. 1985)). Plaintiff has alleged that Defendant represented that he owned Home Depot stock while knowing that he did not own such stock. The Promissory Note, which is signed by Defendant and attached to the Complaint, corroborates the allegation in the Complaint, as it states that the stock will serve as collateral for the loan made by Plaintiff to Defendant.

The Complaint also alleged that Defendant made the false representation with the intent to deceive Plaintiff into loaning him money. This fact has been deemed admitted. Further, the Court can infer Defendant's intent from the circumstantial evidence of the case. It is also deemed admitted that Defendant knowingly signed a promissory note in which the loan is clearly intended to be secured by certain stock that he did not in fact own. This fact is sufficient to support the conclusion that he made the statement with the intent to deceive Plaintiff.

"To constitute justifiable reliance, '[t]he plaintiff's conduct must not be so utterly unreasonable, in the light of the information apparent to him, that the law may properly say that his loss is his own responsibility.'" *Vann*, 67 F.3d at 283 (citing W. Page Keeton, *Prosser & Keeton on Torts* § 108, at 749 (5th Ed. 1984)). Further, "justifiable reliance is a subjective standard measured by the individual creditor's own capacity, knowledge, and information which may be fairly charged against it from facts within its observation. *In re Kim*, 2005 WL 6488240, at *3 (Bankr. N.D. Ga. Sept. 29, 2005) (Murphy, J.) (citing *Vann*, 67 F.3d at 277). Justifiable reliance is a less stringent standard than reasonable reliance. *Id.*

The facts of the Complaint further establish that Plaintiff did in fact rely on the false representation. The Complaint alleges that Plaintiff would not have loaned the money to Defendant if she had known that Defendant did not own stock that could be used as collateral. Such reliance was justifiable under the circumstances of this case. Plaintiff is an individual, rather than a sophisticated institution, and there are no facts to suggest that she had any reason to doubt Defendant's representation.

Finally, the facts of the Complaint establish that Plaintiff suffered harm as a result of Defendant's false representation. Plaintiff would not have lent money to Defendant if she had known that he did not own the Home Depot stock. Rather than holding a loan secured by 3,000 shares of stock in a publicly traded corporation, Plaintiff was left with an unsecured debt with no source for repayment. Accordingly, Plaintiff has suffered the loss of her investment and her investment opportunity.

Thus, the Complaint establishes that the debt owed by Defendant to Plaintiff arises as a result of Defendant's false representation, as required by section 523(a)(2)(A). Entry of a default judgment following the striking of Defendant's answer is appropriate.

Plaintiff's claim includes the balance due on the promissory note ($53,361.45), unpaid interest due under the note ($16,672.66), attorney's fees provided for in the note ($5,777.42), and attorney's fees awarded previously by this Court ($2,310) against Defendant. Accordingly, the total debt of $78,121.53, is declared to be nondischargeable, pursuant to section 523(a)(2)(A) of the Bankruptcy Code.

The Court will enter a judgment contemporaneously herewith.

END OF DOCUMENT