IT IS ORDERED as set forth below:

Date: January 6, 2014

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	Chapter 7
Arthur Gerald Pelchat, Sr. and Dorothy Ann Pelchat,	:	Case Number: 11-76869-MGD
Debtors.	:	Judge Diehl
FIA Card Services, N.A. (f.k.a. MBNA America, Bank, N.A.),	:	
Plaintiff,	:	
v.	:	Adversary Proceeding No: 11-5698
Arthur Gerald Pelchat, Sr.,	:	
Defendant.	:	

ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

Plaintiff commenced this adversary proceeding on December 12, 2011, seeking a determination that the debt owed to Plaintiff was nondischargeable pursuant to 11 U.S.C. §

523(a)(2). A summons was issued commanding Defendant to file and serve an answer to the complaint. According to the certificate of service, it appears service was proper under Rule 7004(b) of the Federal Rules of Bankruptcy Procedure. (Docket No. 3). Rule 7012 of the Federal Rules of Bankruptcy Procedure requires a defendant to "serve an answer within 30 days after the issuance of the summons." Defendant did not file a response or otherwise make an appearance within the 30-day period, and, upon Plaintiff's request, entry of default was made March 15, 2012. Plaintiff filed a Motion for Default Judgment on May 11, 2012. (Docket No. 6). The Court entered an Order ("Prior Order") denying Plaintiff's Motion for Default Judgment on July 13, 2012, because the complaint's factual assertions failed to allege the necessary elements to invoke the non-dischargeability presumption under 523(a)(2)(c) and because Plaintiff did not sufficiently plead facts that established non-dischargeability of the debt without the benefit of the presumption. (Docket No. 7).

Plaintiff filed an Amended Complaint on July 27, 2012. (Docket No. 9). The Amended Complaint was dismissed on May 7, 2013, pursuant to B.L.R. 7041-1(a)(3), subject to a twenty-one day period for Plaintiff to file an objection to the dismissal. (Docket No. 10). On May 28, 2013, Plaintiff filed a Notice of Objection to Dismissal. (Docket No. 12). On October 4, 2013, Plaintiff filed a second Request for Entry of Default, and entry of default was made on October 8, 2013. (Docket No. 13). Plaintiff then filed the Motion for Default Judgment ("Motion") that is now before the Court. (Docket No. 14).

In default, the complaint's factual allegations – except those relating to the amount of damages – are deemed admitted. FED. R. BANKR. P. 7008 (applying FED. R. CIV. P. 8(b)(6)). Yet, "a defendant's default does not in itself warrant the court in entering default judgment. There must be a sufficient basis in the pleadings for the judgment entered." *Nishimatsu Constr. Co., Ltd. v.*

Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975). A default only admits well-pled allegations of fact and does not admit conclusions of law. *Id*. "[F]acts which are not established by the pleadings ..., or claims which are not well-pleaded, are not binding and cannot support the [default] judgment." *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir.1988).

In assessing whether the complaint sufficiently alleges a factual basis to award judgment, recent Supreme Court analysis explains that a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). While our pleading rules do not require "detailed factual allegations," a pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 557). Instead, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. at 570. Therefore, the Court will assess Plaintiff's Motion by considering the well plead factual allegations as true without regard to "naked assertion[s] devoid of further factual enhancement" and legal conclusions based upon a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 129 S. Ct. at 1949; *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555.

I. FACTS

The Prior Order denying Plaintiff's first Motion for Default Judgment recited the relevant facts plead in the original complaint. The Amended Complaint did not change any of those facts but did add some new facts. This Order incorporates the facts as stated in the Prior Order, and the Court will now address only the few new facts added to the Amended Complaint. The Amended

Complaint adds some detail about the nature of the charges made by Plaintiff. It states that Defendant charged $2,103 to Tuff Shed, which sells outbuildings, thirteen days before filing, $375.59 for clothing at Red Woman fourteen days before filing, $140.08 to Foot Smart sixteen days before filing, and $192.95 to Zij ZiJA Drinkiifein the day before filing. (Amended Complaint, ¶ 8). These charges, Plaintiff asserts, were luxuries and not necessities. (Amended Complaint, ¶ 9). Defendant also took out $400 in cash advances within a month of filing. (Amended Complaint, ¶ 10). Defendant made no payments after August 24, 2011, which was prior to the time when Defendant incurred the majority of these charges. (Amended Complaint, ¶ 13). Defendant made regular payments prior to incurring the charges at issue. This showed, Plaintiff asserts, "Defendant's representation to abide by the terms and conditions of the credit card agreement. These terms and conditions include repayment of the charges made." (Amended Complaint, ¶ 30). Lastly, Plaintiff states that the Court could infer that Defendant never intended to pay the charges because "Defendant's income was so low that the prospects to repay did not exist." (Amended Complaint, ¶ 34).

II. DISCUSSION

As the Amended Complaint is very similar to the original Complaint, the discussion of the applicable law largely tracks the Prior Order. Entry of default judgment is governed by Federal Rule of Bankruptcy Procedure 7055, which applies Federal Rule of Civil Procedure 55. The Court has discretion to enter a default judgment. Rule 55 provides that the court *may* enter judgment by default (emphasis added). Here, Plaintiff's Amended Complaint does not warrant an award of judgment in its favor.

A creditor has the burden of proving by a preponderance of the evidence that a debt is

nondischargeable under § 523(a)(2)(A). *See Grogan v. Garner*, 498 U.S. 279, 291 (1991). Plaintiff seeks to summarily use § 523(a)(2)(C) as the basis for a non-dischargeability finding. Yet, § 523(a)(2)(C) does not create a separate class of nondischargeable debts; it merely creates a presumption of nondischargeability for purposes of § 523(a)(2)(A) for certain debts. It is the creditor's initial burden to establish that the presumption applies. *E.g.*, *In re Manning*, 280 B.R. 171, 179 (Bankr. S.D. Ohio 2002).

The non-dischargeability presumption that Plaintiff seeks to invoke is applicable to "consumer debts owed to a single creditor and aggregating more than $600 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title . . ." 11 U.S.C. § 523(a)(2)(C)(i)(I). The Amended Complaint pleads facts that the debt is a consumer debt and that the debt was incurred during the 90-day period preceding Debtor's filing of Chapter 7. The Amended Complaint, however, does not plead facts addressing all the statutory requirements that allow a creditor to invoke the presumption, including that the debt was incurred for luxury goods or services, as defined by § 523(a)(2)(C)(ii)(II).[1] That Section provides that "luxury goods" does not include goods "reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor." There is nothing inherent in the nature of the charges as described in the Amended Complaint and recited above, which shows that the purchased goods were not reasonably necessary for Defendant's support or maintenance. Plaintiff has thus not plead sufficient facts to show that the purchases were luxury goods.

[1] Plaintiff attaches a credit card statement to its Motion. The Court makes no ruling of whether Defendant admits the substance of the card statements when they are later presented with the default judgment Motion. The Amended Complaint does not plead facts that satisfy the requisite element of luxury goods or services.

The facts asserted by Plaintiff fail to trigger § 523(a)(2)(C)'s presumption, and, further, Plaintiff's § 523(a)(2)(A) claim, on its own, fails to allege sufficient facts to entitle Plaintiff to judgment. The requisite elements of a § 523(a)(2)(A) claim are the traditional elements of common law fraud:

> 1. The debtor made a false representation with the purpose and intent of deceiving the creditor;
> 2. The defendant/debtor knew the representations were false at the time they were made;
> 3. The creditor relied upon such representations;
> 4. The creditor's reliance was justified; and
> 5. The creditor sustained a loss as a result of such representation.

SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998); *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996); *Grogan v. Garner*, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755(1991). The well plead facts in the Amended Complaint do not sufficiently allege Defendant's intent to deceive or defraud Plaintiff. The statements in the Amended Complaint regarding a credit card kiting scheme are not adequately supported by factual enhancements. The Amended Complaint merely recites some elements of fraud and misrepresentation without plausible supporting facts. Plaintiff's assertion that Defendant's regular payments prior to incurring the charges amounted to Defendant's representation that he would repay the charges is not sufficient to show a knowing false representation.

The facts in the Amended Complaint that relate to Debtor's financial status, including gross income, value of assets, and budgets based on Debtor's bankruptcy schedules also fail to establish the requisite intent of Debtor to deceive. "[S]ubjective intent is not established solely by the fact that an insolvent debtor used a credit card and did not have the ability to pay the debt." *In re Alam*, 314 B.R. 834, 838 (Bankr. N.D. Ga. 2004). Thus, the Court cannot infer, as Plaintiff suggests, that

Defendant never intended to pay the charges because of insufficient income at the time. Further, any implied representation fraud theory that Plaintiff relies upon fails as a matter of law in the Eleventh Circuit. *In re Alam*, 314 B.R. at 838 ("[R]egardless of whether a claim of nondischargeability alleges false pretenses, false representation, or actual fraud, . . . an implied representation can never serve as the basis for the claim.").

Taking the well plead facts in the Amended Complaint as true, Plaintiff has not alleged the statutory elements to avail itself of the presumption of non-dischargeability in § 523(a)(2)(C). Consequently, the presumption of nondischargeability of the debt under § 523(a)(2)(C) is inapplicable to whether Plaintiff is entitled to default judgment. Further, Plaintiff fails to plead sufficient facts to deem this debt non-dischargeable under § 523(a)(2)(A). Accordingly, it is

ORDERED that Plaintiff's Motion for Default Judgment is hereby **DENIED.**

It is **FURTHER ORDERED** that Plaintiff has to and including **February 10, 2014** to file a dispositive motion or pretrial order. If no action is taken, this adversary proceeding shall stand as **DISMISSED** without further notice.

The Clerk is directed to serve a copy of this Order upon the parties on the attached distribution list.

END OF DOCUMENT

Distribution List

FIA Card Services, N.A.
(f.k.a. MBNA America Bank, N.A.)
C/O WEINSTEIN & RILEY PS

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