**IT IS ORDERED as set forth below:**

**Date: August 1, 2014**

Mary Grace Diehl

**Mary Grace Diehl**
**U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ROME DIVISION**

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| IN RE: | : | Chapter 13 |
| **RAFAEL ORTIZ and GABRIELA ORTIZ,** | : | Case Number: 13-43620-MGD |
| Debtors. | : | Judge Diehl |
| **GEORGIA UNITED CREDIT UNION, f/k/a GEORGIA FEDERAL CREDIT UNION,** | : | |
| Plaintiff, | : | |
| v. | : | Adversary Proceeding No: 14-4014 |
| **RAFAEL ORTIZ,** | : | |
| Defendant. | : | |

**ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT**

This case involves a credit union's attempt to deem a credit card debt owed to it nondischargeable pursuant to either 11 U.S.C. §§ 523(a)(2)(A) or (a)(6) or by relying on the statutory

presumption of § 523(a)(2)(C)(i)(I). The Defendant defaulted, and the credit card company moved for default judgment. An award of judgment to Plaintiff – even with Defendant's default – is not warranted because the complaint's factual assertions fail to allege the necessary elements to establish nondischargeability of the debt under any of the identified subsections of § 523.

Defendant filed a Chapter 7 petition on December 30, 2013. (Case No. 13-43620). That case was converted to one under Chapter 13 on April 10, 2014. (Docket No. 25, Case No. 13-43620). Plaintiff commenced this adversary proceeding before conversion, on March 31, 2014, seeking a determination that the credit card debt owed to Plaintiff was nondischargeable. 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. 4). 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 on May 23, 2014. Plaintiff's Motion for Default Judgment is before the Court. (Docket No. 6).

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, 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

Defendant had a charge account with Plaintiff. (Complaint, ¶ 6). Between August 16, 2008 and August 21, 2013, Defendant incurred charges and made payments on the account. (Complaint,¶ 9). On or before August 26, 2013, Defendant accrued charges in the amount of $6,108.13. This amount was paid in full on August 30, 2013. (Complaint, ¶ 10). After this date and through the October, 2013 billing period, Defendant maintained an account balance of eight cents. (Complaint, ¶ 11). Between November 20, 2013 and December 11, 2013, Defendant incurred charges totalling $4,137.90. This amount remained outstanding on the account as of Defendant's petition date,

December 30, 2013. (Complaint, ¶ 12).

The parties entered into a credit card agreement, and the terms of the agreement included that Defendant would repay all charges incurred by Defendant in using the account. (Complaint, ¶ 8). The Complaint states that at the time the charges were incurred "Defendant was insolvent and had no intention to repay the Plaintiff . . . ." (Complaint, ¶ 13). Further, "Defendant knew that he was insolvent and without the ability to repay the Plaintiff at the time the charges were incurred . . . ." (Complaint, ¶ 16). Plaintiff adds that Defendant's bankruptcy Schedules I and J show a negative net income. (Complaint, ¶ 16). The Complaint also states that "Defendant obtained credit extended from Plaintiff by false pretenses, false representation and/or actual fraud." (Complaint, ¶ 31).

In Count I, seeking nondischargeability pursuant to § 523(a)(2)(A), Plaintiff adds that Defendant made the purchases with "intent to deceive Plaintiff as to his ability to make payments . . . ." and that "[b]ased on Defendant's prior representations to pay, Plaintiff advanced Defendant credit . . . ." (Complaint, ¶¶ 18-9). Plaintiff asserts that it reasonably relied on Defendant's agreement to pay. (Complaint, ¶ 19).

In Count II, seeking nondischargeability pursuant to § 523(a)(2)(C)(i)(I), Plaintiff additional asserts that "[n]umerous purchases by Debtor appear to have been for luxury items and were not consumer goods reasonably necessary for the support or maintenance of the Debtor. The charges to the Account in the amount of $3,852.08, plus accrued interest, were for a consumer debt owed to a single creditor for more than $650 and were incurred by the Defendant within forty-one days before the order of relief. Accordingly, the purchases are presumed to be non-dischargeable." (Complaint, ¶ 23). Plaintiff does not identify which of the $4,137.90 comprise the $3,852.08 in charges to which Plaintiff refers. Plaintiff does, however, attach to the Complaint a credit card statement listing all

of the charges resulting in the $4,137.90 balance. These charges appear to be for food, clothing, pharmacy items, insurance, retail items, and utilities, among others.

Count III, which asserts nondischargeability under § 523(a)(6) states that Plaintiff acted with an "objective, substantial certainty of injury to Plaintiff" and that Defendant acted without justification or excuse. (Complaint, ¶ 24). Thus, it is alleged that the debt is for a willful and malicious injury within the meaning of the statute.

Plaintiff asserts that it suffered damages in the amount of $4,137.90 plus contractual interest and seeks a determination that such amount is nondischargeable. The Complaint also seeks an award for attorney's fees.

## II. DISCUSSION

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 complaint does not warrant an award of judgment in its favor.

### A. Section 523(a)(2)(C)(i)(I)

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). Section 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 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 complaint, however, does not address 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). No facts plead in the Complaint satisfy Plaintiff's burden to show that these items were luxury goods, and the credit card statements likewise do not illustrate that the purchases were for luxury goods.

**B. Section 523(a)(2)(A)**

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 Complaint do not sufficiently allege Defendant's intent to deceive or defraud Plaintiff. The Complaint merely recites some elements of fraud and

misrepresentation without plausible supporting facts.

The facts in the Complaint that relate to Debtor's financial status, including Debtor's negative net income shown on Schedules I and J as well as Debtor's prior payments on the account, before the charges in question were incurred, also fail to establish the requisite intent by 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). 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.").

### C. Section 523(a)(6)

Section 523(a)(6) excepts from discharge an individual's debts incurred by "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). A debt covered by this subsection is not a debt excepted from a Chapter 13 discharge. Therefore, it is not necessary for the Court to determine whether the debt qualifies as a § 523(a)(6) because regardless of this determination, the debt is dischargeable.

## III. CONCLUSION

Taking the well plead facts in the 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 nondischargeable under § 523(a)(2)(A). Debts falling under § 523(a)(6) are dischargeable in

a Chapter 13 case.

Accordingly, it is

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

The Clerk is directed to serve a copy of this Order upon the Plaintiff, Plaintiff's counsel, Defendant, the Chapter 13 Trustee, and the parties on the attached Distribution List.

**END OF DOCUMENT**

Distribution List

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