SO ORDERED.

SIGNED this 18 day of October, 2006.

Dale L. Somers
Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
GEORGE AUSTIN BLACK,	**CASE NO. 05-17089**
	CHAPTER 7
DEBTOR.	
PANHANDLE FEDERAL CREDIT UNION,	
PLAINTIFF,	
v.	**ADV. NO. 05-5853**
GEORGE AUSTIN BLACK,	
DEFENDANT.	

MEMORANDUM AND ORDER DENYING COMPLAINT TO DENY DISCHARGE PURSUANT TO 11 U.S.C. § 523(a)(2)(A)

The matter before the Court is a Complaint to Deny Discharge pursuant to 11 U.S.C. § 523(a)(2)(A).[1] Plaintiff, Panhandle Federal Credit Union (hereinafter "Credit Union"), appears by Eric D. Bruce, of Bruce, Bruce, and Lehman, LLC. The defendant, Debtor George Austin Black (hereinafter "Debtor"), appears by Martin J. Peck of Hyndman & Peck, LLP. There are no other appearances. The Court has jurisdiction.[2] Following trial on August 8, 2006, the Court took the matter under advisement. Having considered the evidence and the statements of counsel, the Court is now ready to rule. For the reasons stated below, the complaint is denied.

PLAINTIFF'S ALLEGATIONS.

Plaintiff, Panhandle Federal Credit Union has an undisputed claim against Debtor for the sum of $3800, together with interest and costs, for payment of a prepetition state court judgment arising from Debtor's endorsement and deposit of a counterfeit official bank check. As examined in more detail in the findings of fact, Debtor obtained the money order through an internet scam which induced him to agree to be of assistance in a getting money out of a foreign country for transfer to an individual in Nigeria. The Credit Union contends that its claim is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), which provides:

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[1] This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to 11 U.S.C. §§ 101 - 1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

[2] This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984. A motion to determine dischargeability of a particular debt is a core proceeding which this Court may hear and determine as provided in 28 U.S.C. § 157(b)(2)(I). There is no objection to venue or jurisdiction over the parties.

> (a) A discharge under section 727 . . . this title does not discharge an individual debt from any debt --
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> * * *
>
> (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;

The Debtor contends the claim is not excepted from discharge because he made no misrepresentation and his actions were not fraudulent within the meaning of § 523(a)(2)(A).

FINDINGS OF FACT.

Debtor is a high school graduate who is not knowledgeable about financial transactions. He has been employed primarily as a maintenance technician and, at the time of trial, earned approximately $10.00 per hour. He does not recall ever writing a bad check and is not sure of the meaning of bouncing a check. Before this transaction, the largest check he had presented to the Credit Union, where he banked, was probably about $800. Before the events in issue, Debtor was not aware of internet scams.

Debtor became involved in the scam through a conversation in an internet chat room he conducted using another person's computer. In the fall of 2004, he was approached on the internet by someone who wanted his help in taking payments from clients of a textile company that had recently moved. The presentation was made to sound like internet-based employment. His job would be to receive payments in the United States and send them overseas, with his compensation being 15% of the money received. There was no discussion of the amounts involved, but there was a suggestion that if it worked out Debtor could participate in more than one transaction. Debtor agreed to participate. He was asked to and did keep the address on his chat list for future contact. The initial conversation lasted

about 30 minutes. At the time of the presentation, Debtor had not heard of internet scams and was employed only part time at the rate of approximately $6.00 per hour.

About two or three days after the initial internet conversation, Debtor received a FedEx delivery containing an "official check" of Chase Manhattan Bank, Houston, Texas for $3,800. It was payable to "George Black," the Debtor, and the remitter was Chase Bank. Debtor was surprised by the large amount of the check. Debtor used the internet to request directions. He was informed that he was to keep approximately $570 and send the remainder by money order to an individual in Nigeria. This conversation also lasted about half an hour.

Debtor testified that he was baffled by the transaction but denied knowing that it was a scam. When asked whether he agreed to participate because he was dumb or because he needed the money he was to receive, he agreed that both reasons were true in part.

Debtor then drove to the Credit Union and presented the endorsed “official check” for payment. The Credit Union had no suspicion that the check was counterfeit, made the funds immediately available, and gave Debtor cash for the full amount. Debtor went to a Western Union office in a local grocery store to send $3000 to Nigeria. Western Union requested a description of the characteristics of the recipient, so Debtor got back on line and learned that the recipient of the funds was a women, about 5 feet 4 inches tall, of dark complexion. Western Union then completed the transaction for a fee of $180. Debtor then used his share of the funds to pay bills.

After completing these transactions, Debtor told a friend about what he had done. The friend advised him to talk to a lawyer because she feared that the arrangement was not legitimate and Debtor had been scammed. Debtor did contact counsel.

The "official check" was dishonored because of suspicion that it was counterfeit. By letter dated December 1, 2004, the Credit Union informed Debtor that the check had been dishonored and made demand upon the Debtor for payment. Debtor admitted endorser liability but did not pay the Credit Union. Suit was filed and a default judgment entered on March 28, 2005, for the amount of the check, interest, and process fee of $56.00. Debtor filed for relief under Chapter 7 on October 7, 2005. Credit Union filed an unsecured proof of claim and a complaint to determine dischargeability.

ANALYSIS.

The Supreme Court in *Field v. Mans* construed the terms in § 523(a)(2)(A) to incorporate the general common law of torts as stated in the Restatement (Second) of Torts (1976).[3] The Restatement § 525, addressing liability for fraudulent misrepresentation, provides:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.[4]

A misrepresentation is fraudulent if the maker has knowledge of the untrue character of his representation.[5] Establishing an exception to discharge based upon misrepresentation is often stated to

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[3] *Field v. Mans*, 516 U.S. 59, 70-72 (1995).

[4] Restatement (Second) of Torts § 525, cmt. a (1976). The Tenth Circuit BAP, following the *Field v. Mans* analysis, when considering whether alleged misrepresentations were sufficient to deny discharge of credit card debt, relied on this section of the restatement. *Chevy Chase Bank FSB v. Kukuk (In re Kukuk)*, 225 B.R. 778, 783-84 (10th Cir BAP 1998).

[5] Restatement (Second) of Torts § 526 (1976).

require the following elements: (1) The debtor made a representation; (2) at the time of the representation, the debtor knew it to be false; (3) the debtor made the representation with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor sustained the alleged loss and damage as a proximate result of the representation having been made.[6] "The discharge provisions of § 523 will be strictly construed against the creditor and liberally construed in favor of the debtor."[7] The Creditor has the burden of proof on all elements by a preponderance of the evidence.[8]

The frauds included within misrepresentations sufficient to deny discharge must "involve moral turpitude or intentional wrong; fraud implied in law, which may be established without imputation of bad faith or immorality, is insufficient."[9] Fraudulent intent need not be shown by direct evidence and may be inferred from the circumstances. "The bankruptcy court must consider whether the totality of the circumstances 'presents a picture of deceptive conduct by the debtor which indicates intent to deceive the creditor.'"[10] This is a difficult standard for creditors to satisfy. For example, the simple

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[6] See *e.g. Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996) (stating five elements but requiring that creditor's reliance be reasonable); *Field v. Mans*, at 74 (holding that creditor reliance must be justifiable); *Groetken v. Davis (In re Davis)*, 246 B.R. 646, 652 (10th Cir. BAP 2000).

[7] *In re Davis*, 246 B.R. at 652.

[8] *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

[9] 4 *Collier on Bankruptcy* ¶ 523.08[1][d] (Alan N. Resnick & Henry J. Sommer eds.-in-chief, 15th ed. rev. 2006).

[10] *In re Davis*, 246 B.R. at 652, *quoting* 3 William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d 47:16, n. 62 (1999).

presentment of an insufficient funds check[11] is insufficient to evidence a false representation. More is required, such as when "the debtor did not intend to pay the creditor when the check was issued and knew that the check would bounce."[12]

The Court's research has located one reported case where the elements of § 523(a)(2)(A) were not satisfied where the claim resulted from a scam somewhat similar to that before this Court. In *In re Maxwell*,[13] a lawyer/business man was contacted by individuals who held themselves out as government officials of Nigeria who said they were seeking business investment opportunities in the United States. They proposed to send debtor $27.5 million dollars to be deposited in an account of a corporation controlled by debtor to be disbursed in accord with instructions for various investments. Debtor was to receive 15% as compensation. Debtor retained counsel, traveled to Canada to meet with a contact, and advanced approximately $60,000 in expenses. After a year had passed and the $27.5 million was not received, Debtor refused to advance additional funds, demanded reimbursement, and sought to terminate the relationship. The Nigerians told debtor that Avis was indebted to the Nigerian government and that a check drawn on the Avis account would be used to reimburse his costs. As promised, a check payable to Debtor drawn on an Avis account with Bank of America in the amount of $234,954.84 dated March 15, 2001, was received by debtor. After deposit to debtor's attorney trust account, debtor disbursed $160,000 to himself for costs and fees earned, and transferred

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[11] *In re Davis*, 246 B.R. at 653 (holding "a debtor does not make a false representation under § 523(a)(2)(A) merely by presenting a check for payment which later bounces").

[12] *In re Davis*, 246 B.R. at 653.

[13] *Avis Rent A Car Systems, Inc. v. Maxwell (In re Maxwell)*, 334 B.R. 736 (Bankr. M.D. Fla. 2005).

the balance in accord with written directions. The check cleared Avis's account. In August 2001, Avis learned that Ultramar, a fuel supplier vendor of Avis, had not been paid and that the check intended for Ultramar had been altered to be payable to debtor. Avis delivered a replacement check to Ultramar and made demand upon debtor for return of the funds. Debtor did not return any of the funds, and Avis became an unsecured creditor in debtor's bankruptcy filed under Chapter 7 in September 2004.

Avis brought a nondischargeability complaint under § 523(a)(2)(A), which the court denied. Although the court found that the debtor "should have been more skeptical of the Nigerian Nationals"[14] and was "gullible,"[15] it held that Avis had not satisfied its burden of proof. Avis did not establish that Debtor made a misrepresentation when he negotiated the check or that debtor negotiated the check with the specific intent to deceive Avis. Nothing on the check indicated that it had been altered, and the details of the check and its delivery were consistent with what the Nigerians had told debtor. The evidence established that debtor believed that he was entitled to negotiate the check, and Avis failed to establish otherwise. Avis also failed to establish the element of reliance, offering no evidence in that regard.

In this case likewise, the Court finds that Credit Union has failed to establish the elements necessary to nondischargeability under § 523(a)(2)(A). Assuming that presentment of the check constituted an implied representation that it was properly payable,[16] the Credit Union failed to establish

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[14] *Id.*, 334 B.R. at 740.

[15] *Id.*, 334 B.R. at 741.

[16] *See In re Kukuk*, 225 B.R. at 785 (use of credit card creates an implied representation that the debtor intends to repay the debt incurred).

the second and third elements of its burden of proof. The Court finds Debtor's testimony credible. Although the Court might have questioned the veracity of the testimony that Debtor believed the transaction to be legitimate if Debtor were a sophisticated business person and a regular user of internet chat rooms, the testimony here shows that Debtor did not fit this profile. As to Debtor, the transaction was suspect only when viewed with hindsight. The fact Debtor was baffled by the transaction does not evidence intent to deceive the Credit Union. Here, as in *Maxwell*, Debtor was gullible and should have been more skeptical; but these circumstances are not sufficient to deny dischargeability. There is no evidence that Debtor made the implied representation that the official check was properly payable knowing that it was false. There is no evidence that Debtor presented the check with intent to deceive the Credit Union. The facts present a picture of deceptive conduct by the persons who conversed with Debtor using the internet, but they do not establish a picture of deceptive conduct by Debtor toward the Credit Union. The rule of commercial transactions that as between two innocent parties the person who dealt with the thief should bear the loss, is not applicable to nondischargeability complaints. Nondischargeability requires a picture of deceptive conduct by the debtor which indicates intent to deceive the creditor. That picture is not present here.[17]

For the foregoing reasons, the Court denies the Complaint to Deny Discharge pursuant to 11 U.S.C. § 523(a)(2)(A) filed by Panhandle Federal Credit Union.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A

[17] The Credit Union presented evidence regarding reliance on Debtor's implied representation that the check was good. In denying the complaint, the Court makes no finding whether this evidence was sufficient to satisfy the element of justifiable reliance.

judgment based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

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