IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	Bankruptcy Number 01-22461
ANGELA STAPLES, SSN [redacted]-8760	Chapter 7
Debtor.	
GENERAL MOTORS ACCEPTANCE CORPORATION,	Adversary Proceeding Number 01P-2084
Plaintiff,	
v.	
ANGELA STAPLES	
Defendant.	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

General Motors Acceptance Corporation (GMAC) filed a complaint under 11 U.S.C. § 523(a)(2)(C)[1] seeking to have a deficiency debt resulting from the sale of a vehicle declared non-dischargeable. GMAC claims that Angela Staples (the Debtor) obtained property and an extension of credit by use of one or more false statements or pretenses in connection with a

[1] Future references are to Title 11 of the United States Code unless otherwise noted.

consumer debt for a luxury consumer good valued at more than $1,075[2] within 60 days before the filing of the petition. The Debtor acknowledges that she obtained a vehicle and an extension of credit in connection with a consumer debt for personalty valued at more than $1,075 within 60 days before the filing of the petition, but argues that GMAC has not established its debt, that the vehicle was not a luxury good, and that otherwise the debt does not fall within the parameters of §523(a). Further, the Debtor seeks attorney fees and litigation costs against GMAC under various theories.

The matter was tried and thereafter taken under advisement.[3] The court has now reviewed the evidence, judged the credibility of the witnesses, and has made an independent review of applicable case law. Now, being fully informed, the court hereby makes and enters the following

FINDINGS OF FACT

1. On May 24, 2000, the Debtor's 1992 Toyota Camry was totaled in an automobile accident. Even though the car was considered a total loss for insurance purposes, it was still operational and used by the Debtor until January 2001.

2. In January 2001, the Debtor sold the Toyota to her brother. Her brother was going to assume the remaining payments on the car and repair it. In February the sale of the Toyota fell through when the Debtor's brother failed to make the required payments or repair the car.

3. As of January 9, 2001, the Debtor had been working primarily as a licensed realtor

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[2] This case, though not the adversary proceeding, was commenced prior to April 1, 2001, when the dollar amount in § 523(a)(2)(c) changed to $1,150.

[3] The Defendant's oral motion for judgment on partial findings pursuant to Fed. R. Bankr. P. 7052 was also taken under advisement.

for Wardley Better Homes and Gardens Realty (Wardley), and occasionally working as a waitress to supplement her income. During 2000, the Debtor had worked as an assistant to another agent, but beginning in 2001 she anticipated closing her own sales at larger commissions.

4. The Debtor's job as a realtor required her to travel to Park City, Utah, where the snow makes driving conditions difficult.

5. The Debtor received an advertising flyer indicating that realtors purchasing GMAC vehicles would receive favorable financing terms because GMAC had recently acquired Wardley.

6. The Debtor had three real estate closings scheduled: one for January 12, 2001, another for February 28, 2001, and a third in March, 2001. Through no fault of the Debtor, all three closings subsequently fell through.

7. On January 9, 2001, prior to the three scheduled real estate closings but while they were pending, the Debtor went to Riverton Motors in Sandy, Utah (Riverton) to look at vehicles. It was her intent at the time to merely ascertain what kind of favorable financing terms were available, and not to purchase a vehicle.

8. The Debtor was shown a 2000 GMC Jimmy SLE 4x4, 4-door sport utility vehicle (Jimmy) by the sales personnel at Riverton.

9. Riverton primarily sells new cars and only markets the GMC Jimmy as a used car.

10. The Debtor only looked at a couple of cars on Riverton's lot and only test drove the Jimmy.

11. The Jimmy had 21,736 mile on the odometer and was marketed to the Debtor, by Riverton, as a used vehicle.

12. The Jimmy came with a tape and cd player, cruise control, power windows, air

conditioning, anti lock brakes, 4 wheel drive and aluminum wheels. The Debtor did not have the opportunity to select or refuse any of these features; she only had the choice between taking the Jimmy with the features present or selecting another car.

13. On January 9, 2001, the Debtor purchased the Jimmy from Riverton.

14. The Jimmy has an average fuel economy and is generally a reliable car but is expensive to repair due to the 4 wheel drive.

15. The Jimmy came with the balance of a 3 year or 36,000 mile factory warranty.

16. The Debtor was presented with a Buyer's Guide by Riverton personnel which listed some major defects that may occur in used motor vehicles.

17. When the Debtor purchased the Jimmy, she also purchased theft protection, Utah State Olympic license plates and a GMPP extended warranty covering an additional 36 months or 75,000 miles .

18. The Debtor has never purchased a new vehicle and the Jimmy was the newest used car she has purchased.

19. The Jimmy SLE is toward the top of the line of Jimmy's but is not the most luxurious model available.

20. GMAC's expert witness testified that the purchase of the Jimmy was a luxury purchase because 80% of the cars on Riverton's lot were listed below the Jimmy's selling price and the Debtor could have purchase a less expensive car.

21. The Debtor's expert witness testified that the Jimmy is not considered a luxury car in the automobile retail finance industry because it is listed in the National Automobile Dealer's Association (NADA) book as a class two car; only class four cars are really considered luxury;

and the Jimmy was designed and marketed for middle class consumers.

22. The Debtor testified that she purchased the Jimmy because, a) she wished to purchase a used car because used cars depreciate less; b) the milage per gallon sticker listed an average fuel economy which was better than prior vehicles she owned; c) she wanted a four wheel drive car to drive during the winters; d) she perceived SUV's as relatively safe cars, (e) the Jimmy still had a portion of the factory warranty and she believed maintenance costs would be low, and (f) the Jimmy had four doors and the Debtor's daughter was required to be in a child restraint seat in the back seat.

23. The Debtor signed a variety of documents related to the purchase of the Jimmy.

24. On January 9, 2001, the Debtor signed a a GMAC Financial Services Credit Sale/Lease Application (Application) which was filled out by Riverton's salesman.

25. The Application lists the Debtor's annual income as $65,000 and indicates that she had been employed with Wardley as a realtor for 17 months.

26. At the time the Debtor signed the Application, she was, in fact, only earning $16,500 annually and had only been employed with Wardley for 15 months.

27. The Debtor disclosed to the salesman that the $65,000 income amount was wrong. However, the Riverton salesman told the Debtor that the discrepancy did not matter and that the Application would not be used for credit purposes.

28. On January 9, 2001, the Debtor also signed a Motor Vehicle Contract of Sale (Sales Contract) listing the cash purchase price of the Jimmy at $18,895. The total purchase price, with credit for a $2,000 down payment, and taxes, fees and other add-ons, totaled $20,038.17.

29. On January 9, 2001, the Debtor also signed a promissory note (Promissory Note),

with Riverton Motors, for the $2,000 down payment. Although there is some evidence the Promissory Note was initially to be due within two days, the executed Promissory Note indicates it was due on January 12, 2001 (coincidentally, the date of the first scheduled real estate closing).

30. The testimony related to the circumstances of the execution of the Promissory Note is contradictory. The Debtor testified she informed Riverton Motors that she did not have the money for a $2,000 down payment until after her real estate closing occurred, and that she would have to come back another day. However, the Debtor stated the sales personnel suggested the $2,000 Promissory Note as a solution to her lack of cash for a down payment.

31. Riverton's personnel testified that the Debtor alleged she left her checkbook at home and would pay the $2,000 Promissory Note later.

32. The court finds the Debtor's testimony related to the reason the Promissory Note was created to be more credible.

33. The Sales Contract recites a $2,000 down payment as having been paid, although the Promissory Note had not yet been satisfied.

34. The Debtor did not have the Jimmy on her insurance policy with Allied Insurance even though the contract says she had arranged insurance for the vehicle.

35. The Sales Contract was conditioned on Riverton arranging financing for the Debtor. The contract was not conditioned on any other terms.

36. The Debtor did not read the Sales Contract but did testify that she expected to be bound by its terms.

37. On January 9, 2001, the Debtor also signed a Conditional Sale Contract, GMAC Flexible Finance Plan, (Financing Plan), financing the $20,038.17 purchase price. Riverton is

listed on the Financing Plan as the creditor. The Financing Plan also lists the Debtor as having paid the $2,000 down payment.

38. The terms of the Financing Plan were for interest to accrue on the purchase price at 11.75%, with monthly payment of $389.14 for 72 months (6 years), totaling $30,018.08.

39. The Financing Plan lists the primary use of the vehicle as personal. The Debtor used the vehicle primarily to transport herself, her daughter and for use in her job as a realtor.

40. There is no credible evidence that the Sales Contract, the Financing Plan or the Promissory Note were conditioned on the Debtor being able to close an upcoming real estate sale.

41. GMAC relied on a combination of the Debtor's income, her time employed at Wardley, both as stated on her Application, and her credit report in their decision to extend the $20,038.17 in credit to finance the Jimmy. The Debtor's income was not available on the internet or contained within the credit report obtained by GMAC.

42. Riverton subsequently assigned the Sales Contract to GMAC.

43. When the $2,000 Promissory Note became due on January 12, 2001, it was not paid by the Debtor.

44. The Debtor testified she attempted to return the Jimmy. Riverton Motors personnel would not accept return of the Jimmy because the loan by GMAC had already funded.

45. Throughout January, 2001, Riverton attempted to collect on the $2,000 Promissory Note. The Debtor repeatedly asked for extensions.

46. The Debtor testified that at the time she purchased the Jimmy, the amount of her debts exceed her total net worth.

47. The purchase price of the Jimmy exceeded the Debtor's year 2000 income.

48. The Debtor did not anticipate or contemplate filing for bankruptcy protection at the time she purchased the Jimmy. Instead, she anticipated increased prosperity as a result of her scheduled real estate closings. It was only after the real estate closings fell through and Riverton and GMAC were pressing for collection of their debts that she sought information related to bankruptcy protection.

49. The Debtor filed a Chapter 7 petition on February 26, 2001, less than 60 days after the purchase of the automobile. The Debtor's Schedule I lists her gross annual income as $5,371,91 for 1999 and $19,880.30 for 2000.

50. As of the date of petition, the Debtor has failed to pay any money on either the Promissory Note owed to Riverton or the loan with GMAC.

51. Debtor voluntarily returned the vehicle to Riverton on April 18, 2001.

52. The vehicle was returned with no physical damage or damage to the engine. The miles on the odometer read 28,137 on the date surrendered, or 6,401 more miles than when purchased.

53. GMAC resold the Jimmy at auction on July 27, 2001, some 32 days after the date the Debtor surrendered the vehicle.

54. The Jimmy sold for $14,400. There was a $20,322.71 balance on the account. GMAC incurred $580.50 in costs related to the repossession and reselling of the Jimmy, and GMAC also received $1,763.57 as a reduction against their sales tax obligation on the Jimmy. GMAC was left with a total deficiency of $4,739.64 on the Jimmy contract.

55. Currently, the Debtor is driving a 1982 Buick she purchased for $750 at a local

auction.

56. The Debtor testified that she has suffered substantial health problems which she attributed to the stress of the transaction related to the Jimmy, and this litigation.

57. The Debtor has incurred $21,116.23 in attorney fees and costs defending this adversary proceeding.

CONCLUSIONS OF LAW

A. Jurisdiction and Standard of Proof

This adversary proceeding arises under § 523(a)(2)(C). *Personette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764, 771 (10th Cir. BAP 1997) (a proceeding "arises under" a bankruptcy case if it asserts a cause of action created by the Code.) Jurisdiction is proper over this adversary proceeding under 28 U.S.C. § 1334. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(I). Venue is determined to be proper pursuant to 28 U.S.C. § 1409(a). GMAC is required to prove its case by a "preponderance of the evidence." *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

The provisions for discharge of debt under §§ 727, 1141, 1228, and 1328(b) are subject to exceptions under § 523(a). In determining the dischargeability of a debt, the Tenth Circuit requires courts to recognize that "exceptions to discharge are to be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor's favor." *Bellco First Credit Union v. Kasper (In re Kasper)*, 125 F.3d 1358, 1361 (10th Cir. 1997).

B. Section 523(a)(2)(C)

Section 523(a)(2)(C) is a relatively new addition to the list of factors by which courts may determine debts non-dischargeable. In 1984 Congress amended § 523(a)(2) to deal with the

developing problem of "loading up" credit cards.

> 523 is amended and expanded to address a type of unconscionable or fraudulent debtor conduct not heretofore considered by the code – that of loading up. In many instances, a debtor will go on a credit buying spree in contemplation of bankruptcy. The new subsection [(a)(2)(C)] creates a rebuttable presumption that any debt incurred by the debtor within [60] days before the filing of the petition has been incurred under the circumstances that would make the debt non-dischargeable. Only that portion of a debt which was incurred within the [60]-day time period is subject to this presumption. The burden is on the debtor to demonstrate that the debt was not incurred in contemplation of discharge in Bankruptcy and thus a fraudulent debt. As the language makes clear, debts incurred for expenses reasonably necessary for support of the debtor and the debtor's dependents are not covered by the presumption.

S. Rep. No.98-95, 98th Cong, 1st Sess. 58 (1985); *See also Hernandez v. Sears, Roebuck and Co. (In re Hernandez)*, 208 B.R. 872, 880 (Bankr.W.D.Tx. 1997).

Under § 523(a)(2)(C), Congress eased the heavy burden of a creditor to prove actual fraud under § 523(a)(2) when a debtor incurs debt through loading up credit cards or taking cash advances on the eve of bankruptcy. *Bank On Columbus, N.A. v Schad (In re Kountry Korner Store)*, 221 B.R. 265, 271 (Bankr.N.D.Okla. 1998); *see also Novus Services, Inc. v. Cron (In re Cron)*, 241 B.R. 1, 7 (Bankr.S.D.Ia. 1999). When attempting to prove the elements of § 523(a)(2)(C), the creditor is not required to prove any subjective elements of fraud as required under § 523(a)(2)(A); rather, it merely has to show the debtor meets the statutory elements of § 523(a)(2)(C). *Id.* Once the creditor has met the burden of proving the elements of § 523(a)(2)(C), then the presumption is that the debtor incurred the debt without the intention to repay the obligation. *AT & T Universal Card Service Corp., v. Acker (In re Acker)*, 207 B.R. 12, 16 (Bankr.M.D.Fla. 1997).

The presumption of fraud under § 523(a)(2)(C) is rebuttable. *Cron*, 241 B.R. at 7. Courts are split on exactly what burden is shifted to the debtor to rebut the § 523(a)(2)(C) presumption.

Following a more literal reading of the statute and its legislative history, a majority of courts have shifted the burden of proof to the debtor and required a demonstration that the debt was not incurred on the eve of bankruptcy with an intent to have the debt discharged.[4] Other courts have limited the nature and extent of the presumption to only shifting the initial burden of production.[5] This court will follow the majority of courts and adopts the more literal reading of the § 523(a)(2)(C). Thus, the burden of proof shifts to the debtor to demonstrate that the debt was not incurred in contemplation of bankruptcy with an intent to have the debt discharged.

Under § 523(a)(2)(C) a creditor must show that the debt incurred is a "consumer debts owed to a single creditor and aggregating more than $1,075 for luxury goods or services incurred by an individual debtor on or within 60 days before the order of relief under this title."[6] For GMAC to succeed in having the debt presumed to be non-dischargeable, it must establish all elements by a preponderance of the evidence. Both sides have stipulated that this trial relates to a consumer debt, owed to a single creditor (although the Debtor disputes that GMAC has proven that a debt exists), aggregating more than $1,075, incurred by an individual debtor within 60 days prior to obtaining relief under Bankruptcy. The only remaining issue is whether the Debtor's purchase of the Jimmy was a purchase of "luxury goods or services."

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[4] *Novus Services, Inc. v. Cron (In re Cron)*, 241 B.R. 1, 8 (Bankr.S.D.Ia. 1999) (holding the presumption transforms the burden into one proving the debt is dischargeable and places that burden squarely on the shoulders of the debtor); *AT&T Universal Card Serv. v. Ellingsworth (In re Ellingsworth)*, 212 B.R. 326, 339-40 (Bankr.W.D.Mo. 1988) (legislative history suggests burden rests with debtor to prove dischargeability, not with creditor); *Sears Roebuck and Co. v. Hernandez (In re Hernandez)*, 208 B.R. 872, 881 n. 17 (Bankr.W.D.Tex. 1997) (noting that burden rests with creditor under § 523(a)(2)(A) claim, but shifts under § 523(a)(2)(C)); *AT & T Universal Card Service Corp., v. Acker (In re Acker)*, 207 B.R. 12, 16-17 (Bankr.M.D.Fla. 1997) (holding that burden shifts to debtor to overcome the presumption that the money was obtained by false pretenses).

[5] *Bank One Columbus v. Fulginiti (In re Fulginiti)*, 201 B.R. 730, 733-34 (Bankr.E.D.Pa. 1996) (the presumption only shifts the initial burden of production and only with respects to the element of intent).

[6] See footnote 2 related to the dollar amount recited in the statute.

1. Meaning of "Luxury Goods or Services"

The issue of what is a luxury good or service is one of first impression for this court. Because § 523(a)(2)(C) does not define luxury goods, only excluding "goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor," there is no standard determination of what is a luxury good. Generally, courts have looked at the purchase in the totality of the circumstances surrounding the purchase.[7] If the purchase evidences fiscal irresponsibility, an intent by the debtor to load up on debt on the eve of bankruptcy, or if the purchase is indulgent, extravagant or excessive, courts generally consider the item a luxury good. However, if the purchase serves some family function or is for the support of the debtor or the debtor's family, it is not consider a luxury purchase. Only four courts have dealt with the issue of an automobile being a luxury good and they have reached

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[7] *See, e.g., Acker*, 207 B.R. at 17-18 (holding that credit card debt was dischargeable because it was unlikely that hardware store purchases were for luxuries, clothes purchases were for support of debtor, and creditor failed to show evidence that hotel charge and cable television charge were in fact luxury items); *Notre Dame Federal Credit Union v. Tondreau, (In re Tondreau)*, 117 B.R. 397, 401 n.3 (Bankr.N.D.Ind 1989), (recognizing that several of the items purchased by debtor, candy, cigarette lighter, greeting card, cigarettes, and four pairs of dress shoes in five days, would qualify as luxury items but, when considered in the context of all the purchases made, were ultimately non-dischargeable under §523(a)(6)); *Montgomery Ward and Co., Inc. v. Blackburn (In re Blackburn)*, 68 B.R. 870, 874 (Bankr.N.D.Ind.1987) (recognizing that luxury was inherently relative because what amounts to excessive comfort necessarily depends on the debtor's particular situation); *Hernandez*, 208 B.R. at 880-81 (determining that drapes, curtains, rugs, basketballs, speaker phones, jewelry, toasters, and lawn mowers were luxury items because under the circumstances of each particular case, the purchases or transactions were extravagant, indulgent, or nonessential); *Bank One Layfayette, N.A. v. Larisey (In re Larisey)*, 185 B.R. 877, 880-81 (Bankr.M.D.Fla1995) (holding that purchase of carpet and air conditioning were dischargeable when items served a significant family function and where the transactions did not evidence fiscal irresponsibility); *American Express Travel Related Services Co., Inc. v. Tabar (In re Tabar)*, 220 B.R. 701, (Bankr.M.D.Fla.1 998) (holding that $16,000 in purchases for antiques, Persian rugs, art, floor coverings were luxury items, court looked at the circumstances surrounding the purchase to determine if they served any significant family function or evidenced some fiscal irresponsibility); *Carroll v. Vernon (In re Vernon)*, 192 B.R. 165, 170 (Bankr.N.D.Ill.1996) (Credit card purchases for legal services were for family support and were not a luxury service given the circumstances of the case).

varying conclusions.[8]

2. Application of a Luxury Good Standard

This court finds, after careful consideration of the expert witnesses testimony and all of the other evidence in the case, that under § 523(a)(2)(C) the Jimmy is not a "luxury good."[9] First, the purchase of the Jimmy was not excessive or indulgent. GMAC has argued that because the Jimmy came with power windows, antilock brakes, 4-wheel drive, air conditioning, and automatic transmission, and 80% of the cars on Riverton's lot were less expensive, it was a luxury good *per se*. However, when placed in the totality of the purchase, the factors do not equate to a luxury good. The Debtor did not purchase a new car where she had the option to add

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[8] See *First Security Bank of Idaho v. Davis (In re Davis)*, 56 B.R. 120, 121-22 (Bankr.D.Mnt. 1985) (examining the price paid, whether the debtors owned and used other cars, the nature of the use of the automobile, and the Montana Statutes exempting one automobile, the court held that the purchase of an 1984 Plymouth Voyager Van was not a luxury good because it was used for family necessities and was approached with some fiscal responsibility); *GMAC v. McDonald (In re McDonald)*, 129 B.R. 279, 282-83 (Bankr.M.D.Fla. 1991) (holding that purchase of 1990 Chevy Lumina was not a luxury good when the circumstances surrounding the purchase did not evidence any fiscal irresponsibility and was purchased for reliable transportation); *Lorain County Bank v. Triplett (In re Triplett)*, 139 B.R. 687, 690-91(Bankr.N.D.Ohio 1992) (purchase of a 1989 Chevy Beretta was a luxury item because debtors owned four other cars and Ohio law exempted only one car); *Nissan Motor Acceptance Corp. v. Ferrell (In re Ferrell)*, 213 B.R. 680, 688 (Bankr.N.D.Ohio 1996) (recognizing that 1991 Saab 9000 is an expensive car that could, in appropriate circumstances be considered a luxury item, it was not per se a luxury good and purchase here was not a luxury good given the amount of the debt incurred to obtain the car and that this was the family's only car).

[9] This court has some concern about applying section § 523(a)(2)(C) to the purchase of an automobile. The original intent of Congress in implementing § 523(a)(2)(C) was to prevent loading up on credit card debt and to provide credit card companies an easier method of establishing non-dischargeability. "Excessive debts incurred within a short period prior to the filing of the petition present a special problem: that of "loading up" in contemplation of bankruptcy. A debtor planning [to] file a petition with the bankruptcy court has a strong economic incentive to incur dischargeable debts for either consumable goods or exempt property." S. Rep. No.98-95, 98th Cong, 1st Sess. 58 (1985). The circumstances are very different surrounding purchases made with a credit card and the purchase of an automobile. While debt incurred by credit cards is largely unsecured and the creditor has limited protections under the bankruptcy code, the debt incurred with the purchase of an automobile is usually secured by the automobile, giving the creditor substantially more protection in bankruptcy. The necessity for the financier of a car loan to have the elements of fraud under subsection (A) eased and presumed under subsection (C) are not as apparent as they are for a credit card vendor. Not only is there less likely to be a concern of loading up of automobiles on the eve of bankruptcy there is also less of a concern that this class of creditor will not be provided adequate protection under the bankruptcy code. However, because this issue is not before this court, a determination of whether § 523(a)(2)(C) is applicable to this type of purchase will not be made.

extras; instead, she purchased a used car where she had to take the car as a whole or leave it. There is no evidence that the Debtor had the ability to pick and choose the options the Jimmy came with. Equally uncompelling is GMAC's expert testimony that because 80% of the cars on Riverton's lot were less expensive than the Jimmy, the Debtor's purchase of the Jimmy was *per se* a luxury purchase. While the Debtor did have a choice in cars, she testified that she had specific reasons in selecting the Jimmy. She wanted a used car to avoid the depreciation found in new cars. She wanted four wheel drive to help her during the winter. Whether four wheel drive is in fact more efficient or safer during the winter than two wheel drive is of less importance than the Debtor's reasonable belief that it was. She perceived the Jimmy as a relatively safe car, and believed that maintenance costs would be lower because of the remaining and purchased warranty.

The Jimmy was, however, relatively expensive in the context of the Debtor's income at the time of the transaction. However, the Debtor financed the transaction over six years which served to reduce her monthly payments. She also had three real estate closing scheduled which would add to her income. Although it may not have been prudent to enter into the transaction until the Debtor had cash-in-hand from the real estate closings, the statute does not require that the Debtor exercise wisdom in this financial transaction. That the Debtor succumbed to Riverton's sales persons persuasion that she purchase the Jimmy prior to the real estate closing is more reflective of the effectiveness of Riverton's sales force, than indicative of the Debtor's intent to load up and then file bankruptcy. The court concludes that GMAC's contention that this purchase was indulgent, extravagant or excessive, under the facts of this case, has not been proven.

GMAC also argues that the Debtors purchase of a GMPP extended warranty plan and theft insurance further demonstrate the Debtor's attempt to load up on the debt. However, the purchase of these extra's seems to support rather than refute a claim of fiscal irresponsibility. Riverton presented the Debtor with a list of major defects that may occur in a used vehicle. It is hardly surprising that faced with this list, the Debtor would decide to purchase an extended warranty.

GMAC has also failed to disprove that the Jimmy was not reasonably necessary for the support of the Debtor or the Debtor's dependent. The Debtor testified that she used the car to transport her and her daughter, and she used it for business purposes. The Debtor did still own a Toyota Camry at the time she purchased the Jimmy and she had been driving it for the six months prior to January, 2001. However, she testified that it had been in an accident in the middle of 2000, and that even though operational, was not road worthy. Additionally, the Debtor testified that she had sold her Toyota to her brother who would assume the payments and repair the Toyota. It wasn't until February that she learned that her brother could not fulfill those promised. Given these circumstances, GMAC has failed to establish that the Jimmy was not reasonably acquired for the support of the Debtor or the Debtor's dependant. For these reasons, the court concludes that the Jimmy was not a luxury good as contemplated under § 523(a)(2)(C).

3. Rebuttal of § 523(a)(2)(C) Presumption

Even if this court were able to find that the Jimmy represented a luxury good, GMAC's § 523(a)(2)(C) claim would still fail because the Debtor has successfully rebutted the presumption that "the debt was incurred in contemplation of discharge in Bankruptcy and thus a fraudulent debt." S. Rep. No.98-95, 98th Cong, 1st Sess. 58 (1985). The Debtor testified that at

the time of the purchase, she reasonably believed that she would be earning commission from three real estate closings, one on January 12, 2001, another on February 28, 2001, and one in March, 2001, which would allow her make the down payment and the monthly payments. Through no fault of her own, all three transactions fell through after the purchase of the Jimmy. It is reasonable that the Debtor would have expected the transactions to close and that she believed she would have the money to pay the loan on the Jimmy. In two of the transactions, real estate contracts had been signed and earnest money had changed hand, but in both transactions, forces outside the Debtor's control caused the transactions to fail. While the Debtor's decision to purchase the Jimmy prior to the January closing was not very prudent and may have been overly optimistic, there is no evidence that she did not, at the time of purchase, intend to repay the loan.

Under § 523(a)(2)(C), GMAC has failed to meet the requisite standards for presuming that the debt incurred by the Debtor was incurred, on the eve of bankruptcy, with no intention to repay the loan. Even if GMAC had met the requisite elements, the Debtor has successfully rebutted the presumption that the debt incurred with the purchase of the Jimmy was incurred on the eve of bankruptcy in contemplation of discharge and thus is not presumed to be incurred fraudulently.

C. Section 523(a)(2)(A)

Once the debtor has successfully rebutted the presumption of fraud under § 523(a)(2)(C), the creditor may still establish actual fraud under § 523(a)(2)(A).[10] Section 523(a)(2)(A) provides that a debt is non-dischargeable to the extent money or property is obtained by false

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[10] *See Larisey*, 185 B.R. at 881; *Chase Manhattan Bank v. Sparks (In re Sparks)*, 154 B.R. 766, 768 (Bankr.N.D.Ala. 1993); *FCC National Bank v. Orecchio (In re Orecchio)*, 109 B.R. 285, 290 (Bankr.S.D.Ohio 1989).

pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. The Supreme Court has determined that the terms within § 523(a)(2)(A) should be interpreted according to the common understanding of those terms at the time the statute was enacted. *Field v. Mans*, 516 U.S. 59, 70 (1995). To define false representation, the Court turned to the definition of fraudulent misrepresentation found in the *Restatement (Second) of Torts* ("Restatement").

> 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 by him by his justifiable reliance upon the misrepresentation.

RESTATEMENT (SECOND) OF TORTS § 525 (1976). In order to qualify as a fraudulent misrepresentation, the representation must be supported by scienter, an inherent element in a § 523(a)(2)(A) action. *Skull Valley Band of Goshute Indians v. Chivers (In re Chivers)*, 275 B.R. 606, 620 (Bankr.D.Utah 2002). Comment b to Section 530(1) of the Restatement states:

> To be actionable the statement of the maker's own intention must be fraudulent, which is to say that he must in fact not have the intention stated. If he does not have it, he must of course be taken to know that he does not have it. If the statement is honestly made and the intention in fact exists, one who acts in justifiable reliance upon it cannot maintain an action of deceit if the maker for any reason changes his mind and fails or refuses to carry his expressed intention into effect. If the receipt wishes to have legal assurance that the intention honestly entertained will be carried out, he must see that it is expressed in the form of an enforceable contract, and his action must be on the contract.

RESTATEMENT (SECOND) OF TORTS, cmt. b (1976). In order to establish a claim subject to this exception from discharge as set out by the 10th Circuit and the Supreme Court, GMAC must prove: (1) the debtor made a false representation; (2) with the intent to deceive the creditor; (3) the creditor relied on the false representation; (3) the creditor's reliance was justifiable; and (5) the false representation resulted in damages to the creditor. *Fowler Bros. V. Young (In re*

Young), 91 F.3d 1367, 1373 (10th Cir. 1996); *Chivers*, 275 B.R. at 619; *Grogan*, 498 U.S. at 287.

1. False Representation

Section 526 of the Restatement states that:

> A misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.[11]

RESTATEMENT (SECOND) OF TORTS § 526 (1976).

It is undisputed that on the Application, the Debtor's gross annual income from all sources was listed as $65,000 and the Debtor's time employed with Wardley was 17 months. In reality, the Debtor's gross annual income was only $16,500 and the time she was employed with Wardley was only 15 months. It is also undisputed that the Debtor knew that her income was incorrect when she signed the Application. There is doubt, however, as to whether this was an intentional misrepresentation on the part of the Debtor. The Debtor's undisputed testimony was that she told the Riverton sales representative that she was only making $16,500, he wrote down on the Application that the Debtor was making $65,000, she corrected the sales representative and he, in turn, left the $65,000 in place telling the Debtor that it was alright to leave it. Regardless, when the Debtor signed the Application, she adopted the representation of her

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[11] In addition, a misrepresentation may be fraudulent if the maker knows the representation to be capable of two interpretations, one of which he knows to be false and the other true if made: (a) with the intention that it be understood in the sense in which it is false, or (b) without any belief or expectation as to how it will be understood, or (c) with reckless indifference as to how it will be understood. RESTATEMENT (SECOND) OF TORTS § 527 (1976). A representation that states the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation. *Id.* at § 529. Finally, a representation is fraudulent that expresses the maker's own intention to do or not to do a particular thing if he does not have that intention. *Id.* at § 530.

income as her own representation.[12] There is also doubt as how the Debtor could come to the conclusion that she was only making $16,500 per year. The Debtor's Schedule I lists her gross annual income as $5,371.91 for 1999 and $19,880.30 for 2000. There is doubt as to how the Debtor could have arrived at $16,500 when her income in past years were no where near that number. The Debtor signed the Application, knowing her income was incorrectly stated and she adopted that statement when she signed the Application. There was no testimony regarding the time the Debtor was employed with Wardley, however, this court does not find the difference in the time the Debtor was actually employed and the time she stated she was employed as material.

2. Inducement

The second element required under § 523(a)(2)(A) is that the debtor made a misrepresentation to induce the creditor into extending credit. Section 531 of the Restatement provides:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transactions in which he intends or has reason to expect their conduct to be influenced.

RESTATEMENT (SECOND) OF TORTS § 531 (1976); *Merchants Nat'l Bank v. Moen (In re Moen)*, 238 B.R. 785, 792-93 (8th Cir. BAP 1999).

Furthermore, Comment c to § 531 provides that:

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[12] *See Enterprise Nat. Bank of Atlanta v. Jones (In re Jones)*, 197 B.R. 949, 959-60 (Bankr.M.D.Ga. 1996) (finding that false financial statement prepared by third party was debtor's own when debtor adopted contents of statement); *Insouth Bank v. Michael (In re Michael)*, 265 B.R. 593, 598 (Bankr.W.D.Tenn. 2001) (the fact that the creditor, not the debtor, filled out the financial statement is irrelevant when the debtor adopts or signs the statement after having read statement); *First Inter. Bank v. Kerbaugh (In re Kerbaugh)*, 162 B.R. 255, 261-62 (Bankr.D.N.D. 1993) (although debtors had not filled in all of the information on loan application and third party later completed sections, debtors adopted statement as their own when the signed application).

> A result is intended if the actor either acts with the desire to cause it or acts believing that there is a substantial certainty that the result will follow from his conduct. Thus one who believes that another is substantially certain to act in a particular manner as a result of a misrepresentation intends that result, although he does not act for the purpose of causing it and does not desire to do so.

RESTATEMENT (SECOND) OF TORTS § 531, cmt. c (1976) (internal citation omitted).

While the Debtor's income was misrepresented and she adopted that representation when she signed here Application, her unrefuted testimony was that she did not do so to induce Riverton or GMAC to act. The Debtor's testimony was that she pointed out the discrepancy in her income on the Application to the Riverton salesperson. She was told that it was alright and that the Application would not be used to obtain credit. The Debtor's testimony was not refuted by GMAC. Therefore, the court is unable to conclude that the Debtor represented her income to induce GMAC to extend credit when Riverton was aware of the error in her income. Because GMAC has failed to establish the requiset element of intent, this court need not consider the remaining three elements of fraud.[13]

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[13] Regarding the third element, that a creditor must establish is that it relied on the debtors misrepresentation, GMAC testified that it relied on the information provided in her application in determining whether to extend the Debtor credit. GMAC also testified that the information provided by the Debtor regarding her current income and the time she was employed at Wardley were crucial in their decision in financing the Jimmy.

The fourth element the creditor must show under a § 523(a)(2)(A) claim is that their reliance on the Debtor's fraudulent misrepresentation was justifiable. *Field*, 516 U.S. at 70. "Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct in all cases." *Id.* A creditor may justifiably rely on misrepresentation even when he could have ascertained its falsity by conducting an investigation, regardless if the investigation could have been made without "[a]ny considerable trouble or expense." RESTATEMENT (SECOND) OF TORTS § 540 cmt. a (1976). Not only did GMAC justifiably rely on Debtor's misrepresentation regarding here income, it had no real means by which to ascertain its falsity. GMAC testified that there is really no means by which they could verify any Debtor's income. Information regarding a Debtor's income is not readily available on the internet, nor is it information contained in credit reports that GMAC obtains when there is an application for credit. GMAC also testified that while it could have called the Debtor's employer, employers are generally unwilling to release salary information regarding employees. GMAC had no real means to ascertain the veracity of the Debtor's misrepresentation that she was earning $65,000 when in fact she was only earning $16,500. The court concludes that GMAC justifiably relied on Debtor's misrepresentation.

The final element that the creditor must established was that it was harmed by the Debtor's misrepresentation. The Debtor's misrepresentation resulted in GMAC extending her $20,038.17 in credit to finance her purchase. No payments were made on the loan. The Jimmy was later sold at public auction resulting in a

D. Attorney's Fees and Costs

The Debtor seeks attorney fees and costs under two theories. First, under §523(d) and second, under Fed. R. Bankr. P. 9011.

1. Fees and Costs Under § 523(d).

Section 523(d) of the Bankruptcy Code provides that:

> If a creditor requests a determination of dischargeability of a consumer debt under section (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and reasonable attorney's fees for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

In order to be awarded attorney's fees under § 523(d), the Debtor must show that "the creditor filed a dischargeability action under § 523(a)(2), the debt sought to be discharged was a consumer debt and the debt was discharged." *Household Bank, N.A. v. Sales*, 228 B.R. 748, 751-52 (10th Cir. BAP 1999). If the Debtor is able to establish these elements, the "burden shifts to the creditor to show that its position was substantially justified or, if not, that special circumstances would make an award unjust." *Id.*; *see also* S.Rep. No. 65, 98th Cong,. 1st Sess. 58, 59 (1983) (it is far easier for the creditor to demonstrate the reasonableness of its action than it is for the debtor to marshal the facts to prove the creditor was unreasonable); *America First Credit Union v. Shaw (In re Shaw)*, 114 B.R. 291, 295 (Bankr.D.Utah 1990). "If, in the bankruptcy court's discretion, it finds that the position of the creditor was not substantially justified and that there are no special circumstances that would make the award unjust, it is required . . . to award fees and costs to the debtor under § 523(d)." *Sales*, 228 B.R. at 752. The

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$4,739.64 deficiency.

parties have stipulated that this is a consumer debt. GMAC filed a dischargeability action under § 523(a)(2) and the debt will subsequently be discharged. The burden now shifts to the GMAC to show that it was substantially justified in bringing its action or that there are special circumstances that would make an award of fees unjust.

The Tenth Circuit has stated that when interpreting § 523(d), the fee shifting provision under the Equal Access to Justice Act ("EAJA") should be looked to for guidance. *Burns v. Citizens National Bank (In re Burns)*, 894 F.2d 361, 362 n. 2 (10th Cir. 1990). Interpreting the EAJA, the Supreme Court has defined "substantially justified" as this:

> We are of the view, therefore, that as between the two commonly used connotations of the word substantially, the one most naturally conveyed by the phrase before us here in not the "justified to a high degree," but rather "justified in substance or in the main" – that is, justified to a degree that could satisfy a reasonable person.

Pierce v. Underwood, 487 U.S. 552, 565-66 (1988) (citations omitted); *see also Sales*, 228 B.R. at 753 n 2.

The Debtor argues that GMAC was not substantially justified because it did insufficient research into the cause of action, and because of the various motions filed and delay tactics GMAC employed. Regardless of the various motions and possible delay tactics, GMAC was substantially justified in bringing a dischargeability action against the Debtor. This court believes that a reasonable person would be satisfied that GMAC presented reasonable grounds on which to file a nondischargeability action. The debt in question was a consumer debt, incurred by a single Debtor, owed to a single creditor, aggregating more than $1,075, and incurred 60 days prior to obtaining relief in bankruptcy. While this court does not believe that the Jimmy was the purchase of a luxury good, GMAC has reasonable legal grounds upon which to argue

that it was. Additionally, while the Debtor's unrefuted testimony was that she told Riverton that her income was stated incorrectly on her Application, her income was grossly misstated, although possibly due to the salesperson mis-hearing the Debtor's oral statement. If this court struggles with the veracity of the Debtor, then it is reasonable to expect that GMAC would also. A reasonable person would find that GMAC was substantially justified in bringing a non-dischargeability claim.

2. Sanctions Under Fed. R. Bankr. P. 9011.

Sanctions under Fed. R. Bankr. P. 9011 will not be awarded to the Debtor. The Debtor complains about the lack of timely production of documents or compliance with the scheduling order, and other irritations that have required the Debtor to incur fees. Allegations have been made from both sides regarding alleged discovery abuses. However, the court has observed this litigation shift from the resolution of the facts and legal issues, to a forum to explore the personal animus between counsel. The court will neither provide a forum for such activities, nor construe such activity to fall within the reach of Fed. R. Bankr. P. 9011. The Debtor has not proved that papers filed in this cases were filed for an improper purpose, such as to harass or cause unnecessary delay or to needlessly increase the costs of litigation, and sanctions are denied.

CONCLUSION

GMAC failed to demonstrate that the Jimmy was a luxury good or that the Jimmy was not necessary for the support of the Debtor or her dependant. Its claim for non-dischargeability under § 523(a)(2)(C) fails.

GMAC has failed to meet the requisite elements of fraud under § 523(a)(2)(A). It has failed to show the Debtor's representation regarding her income was made to induce GMAC to

extend credit to her.

The Debtor is entitled to have her debt owed to GMAC discharged.

The Debtor is not entitled to any attorney's fees or costs associated with this action under § 523(d). GMAC was substantially justified in bringing a non-dischargeability action. Furthermore, Fed. R. Bankr. P. 9011 sanctions are denied.

DATED this 3 day of September, 2002.

JUDITH A. BOULDEN
United States Bankruptcy Judge

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Certificate of Mailing

I hereby certify that on the 4th day of September, 2001, I deposited the forgoing Findings of Fact and Conclusions of Law in the United States mail, postage prepaid, to the following:

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