UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

MICHAEL D. JACKSON **CASE NO. 04-53512**
Debtor

CITIBANK (SOUTH DAKOTA), N.A.
Plaintiff
v. **ADV. PROC. NO. 04-05138**

MICHAEL D. JACKSON
Defendant

OPINION

The matter before the court is the Motion for Summary Judgment filed by the Plaintiff, Citibank (South Dakota), N.A. ("Citibank"). Having considered the pleadings and supporting documentation, with no opposition having been filed to the motion, the court concludes that the motion should be granted.

I. FACTUAL BACKGROUND

On August 3, 2004, Michael D. Jackson filed a petition for relief under Chapter 7 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Mississippi.

Citibank filed a complaint against the debtor on November 2, 2004 to determine dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(2)(A).[1]

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[1] **11 U.S.C. § 523(a)(2)(A) provides that a discharge under 727 does not discharge an individual debtor form any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false**

On May 16, 2005, an order was entered granting the plaintiff's motion to have matters deemed admitted due to the defendant-debtor's failure to respond to requests for admissions.[2] The following requests for admissions have been deemed admitted:

Request No. 1: Please admit that you have two (2) credit cards with Citibank, namely the Citi Platinum Select Card ("Platinum Card") and the AT&T Universal Card ("Universal Card").

Request No. 2: Please admit that on or about August 3, 2004, the date of the filing of your petition herein, you were indebted to Citibank for charges made to the Platinum Card in the amount of $2,508.27.

Request No. 3: Please admit that on or about August 3, 2004, the date of the filing of your petition, you were indebted to Citibank for charges made to the Universal Card in the amount of $2,685.42.

Request No. 4: Please admit that from April 21, 2004 to May 9, 2004, while using the Platinum Card, you obtained cash advances at the Grand Casino in Biloxi, Mississippi, for the purpose of gambling; made numerous purchases and/or other charges for luxury items; and incurred multiple charges under the floor limit.

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pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

[2] A letter from Michael D. Jackson was received by the clerk's office on May 17, 2005, that contained responses to the requests for admissions. This was after the time period for responding to the requests for admissions had expired. No motion was filed requesting withdrawal or amendment of admissions.

Request No. 5: **Please admit that you obtained $1,500.00 cash through a balance transfer check written off the Platinum Card on or about April 27, 2004, and made payable to yourself.**

Request No. 6: **Please admit that the charges made from April 21, 2004 to May 9, 2004, on your Platinum Card account were made within one hundred twenty (120) days prior to filing bankruptcy.**

Request No. 7: **Please admit that you only made one $60.00 payment on the Platinum Card account during the questionable time period and through the date you filed bankruptcy.**

Request No. 8: **Please admit that from April 19, 2004 to April 27, 2004, while using the Universal Card, you obtained cash advances at the Grand Casino in Biloxi, Mississippi, for the purpose of gambling; made numerous purchases and/or other charges for luxury items; and incurred multiple charges under the floor limit.**

Request No. 9: **Please admit that you obtained $1,750.00 cash through a balance transfer written off the Universal Card on or about April 27, 2004, and made payable to yourself.**

Request No. 10: **Please admit that the charges made from April 19, 2004 to April 27, 2004, on your Universal Card account were made within one hundred twenty (120) days prior to filing bankruptcy.**

Request No. 11: **Please admit that you only made one $60.00 payment on the Universal Card account during the questionable time period and through the**

date you filed bankruptcy.

Request No. 12: Please admit that you understood your obligation to repay Citibank for each charge made to your Platinum Card account.

Request No. 13: Please admit you understood your obligation to repay Citibank for each charge to your Universal Card account.

Request No. 14: Please admit you had knowledge of your inability to repay the charges on both accounts at the time they were incurred.

Request No. 15: Please admit you had knowledge of your poor financial condition at the time of the charges to your accounts with Citibank.

Request No. 16: Please admit that you did not have the good faith intent to repay the charges incurred by you for purchases made on your Platinum Card account between April 21, 2004 to May 9, 2004.

Request No. 17: Please admit that you did not have the good faith intent to repay the charges incurred by you for purchases made on your Universal Card account between April 19, 2004 to April 27, 2004.

Request No. 18: Please admit that your indebtedness to Citibank is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

Request No. 19: Please admit that you knowingly and willingly consigned yourself into further debt by moving into an apartment/house at a time when you already knew you were having financial problems.

Request No. 20: Please admit that you did not have any change in job status or income during the questionable time period up to the date of filing your

bankruptcy.

Citibank filed its motion for summary judgment requesting a determination that the debt is nondischargeable based upon undisputed material facts and applicable law. Citibank claims that the matters set forth in the requests for admissions are admitted and conclusively established and that the debt should be rendered nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Citibank requests judgment in the principal amount of $4,803.47 plus attorney fees in the amount of $1,601.16 plus costs of court of at least $150.00 for a total judgment of $6,554.63. No response to the motion for summary judgment was filed.

II. CONCLUSIONS OF LAW

The court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. § 1334 and § 157. The matter before the court is a core proceeding under 28 U.S.C. § 157.

Citibank has requested summary judgment pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure. As stated by the Fifth Circuit:

> **The Supreme Court has held that "summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)(quoting Fed.R.Civ.P. 56)).**

***Audibert v. Lowe's Home Centers, Inc.,* 2005 WL 2850978, at 2 (5th Cir. 2005). In reviewing requests for summary judgment, it is appropriate for the court to consider deemed admissions. *See, DirecTV, Inc. v. Brasswell,* 2004 WL 1562964**

(N.D. Tex. 2004)(deemed admissions are competent summary judgment evidence); *E Trade Consumer Finance Corporation v. Needles,* 2005 WL 2674930 (N.D. Ind. 2005)(even default admissions can serve as the factual predicate for summary judgment); *GTE Directories Corp. v. McCartney,* 11 Fed. Appx. 735 (9th Cir. 2001)(because there was no proper motion to withdraw before the court, the court did not err when it relied on deemed admissions to grant motion for summary judgment); *Ocasio v. Las Vegas Metropolitan Police Department,* 10 Fed. Appx. 471 (9th Cir. 2001)(district court properly deemed matters admitted pursuant to Rule 36(a) and in the absence of any disputed issues of material fact properly granted summary judgment).

On May 16, 2005, the court ordered that Citibank's First Set of Requests for Admissions were deemed admitted by Defendant Michael D. Jackson. Although Jackson filed a response to the plaintiff's requests for admissions, the response was not timely and there was no motion requesting withdrawal or amendment of the admissions as required under Federal Rule of Civil Procedure 36(b), made applicable by Federal Rule of Bankruptcy Procedure 7036. *See, Raiser v. Utah County,* 409 F. 3d 1243 (10th Cir. 2005)(once a matter is admitted it is conclusively established unless the court on motion permits withdrawal or amendment of the admission); *GTE Directories Corp. v. McCartney,* 11 Fed. Appx. 735 (9th Cir. 2001)(Rule 36(b) provides the exclusive remedy for withdrawal or amendment of admissions and provides that a court may do so on motion); *Carney v. IRS,* 258 F. 3d 415 (5th Cir. 2001)(the proper course to avoid consequences of failing to timely

respond to Rule 36 requests for admission is to move the court to amend or withdraw the default admissions in accordance with the standard outlined in Rule 36(b)).

Citibank has requested that the debt be excepted from discharge under 11 U.S.C. § 523(a)(2)(A). That section provides that:

> **11 USC § 523. Exceptions to discharge.**
>
> **(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –**
>
> > **(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;**

11 U.S.C. § 523 (a)(2)(A). In *General Electric Capital Corporation v. Acosta (In re Acosta),* 406 F. 3d 367 (5th Cir. 2005), the court stated:

> **Section 523(a)(2)(A) of the Bankruptcy Code provides that a debt will not be discharged in bankruptcy if it is "for money, property, services, or an extension, renewal, or refinancing of credit," to the extent that it was "obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). A creditor must prove its claim of nondischargeability by a preponderance of the evidence. *In re Mercer,* 246 F.3d 391, 403 (5th Cir.2001). For a debt to be nondischargeable under section 523(a)(2)(A), the creditor must show (1) that the debtor made a representation; (2) that the debtor knew the representation was false; (3) that the representation was made with the intent to deceive the creditor; (4) that the creditor actually and justifiably relied on the representation; and (5) that the creditor sustained a loss as a proximate result of its reliance. *Id.***

***Id.* at 372.**

In the case of *Fleet Credit Card Services, L.P. v. Kendrick (In re Kendrick),*

314 B.R. 468 (Bankr. N.D. Ga. 2004), the court considered deemed admissions in a nondischargeability action involving credit card charges:

> **Plaintiff alleges that the charges and cash advances totaling $7,402.25 were incurred by Debtor without the intent to pay the balance at the time they were made . . . In support of its motion for summary judgment, Plaintiff relies on its requests for admission to which Debtor did not respond. Request number 4 states as follows:**
>
> > **At the time which you obtained the $7,402.25 in merchandise charges and cash advances between April 15, 2003 and June 8, 2003 shown in Exhibit A, you did not intend to repay the charges.**
>
> **Debtor's failure to respond to this request means it is deemed admitted. Fed. R. Civ. P. 36(a) (applicable under Fed. R. Bankr.P. 7036(a)). Any matter admitted under Rule 36 is "conclusively established" unless the court on motion permits withdrawal or amendment of the admission. For the same reasons, Debtor has admitted the amount of the debt. (Requests 1, 2).**

Id. **at 472-73. The court concludes that the deemed admissions, including that Jackson did not have the good faith intent to repay the charges incurred, are sufficient to satisfy the requirements under § 523(a)(2)(A) and to entitle Citibank to judgment as a matter of law.**

The court notes, however, particularly in light of the fact that the debtor did file an answer to the complaint as well as a response to the admissions, although late, that some courts have declined to have matters deemed admitted. In the case of *Citibank (S.D.), N.A. v. Savage (In re Savage)*, 303 B.R. 766 (Bankr. D.Md. 2003), the court declined to deem as admitted unanswered requests for admissions:

> **A party's failure to respond to a request for admissions under**

> **Federal Rule of Civil Procedure 36 may result in a material fact being deemed admitted and subject the party to an adverse grant of summary judgment. *See Carney v. I.R.S. (In re Carney),* 258 F. 3d 415, 417-18 (5th Cir. 2001); *Gardner v. Borden, Inc.,* 110 F.R.D. 696, 697 (S.D.W.Va. 1986): *Freed v. Plastic Packaging Materials, Inc.,* 66 F.R.D. 550, 552 (E.D.Pa. 1975). However, in the case of *U.S. v. Turk,*139 F.R.D. 615, 24 Fed. R. Serv. 3d 540 (D.Md. 1991), District Judge Hebert F. Murray held that the court was not bound to deem as admitted unanswered requests for admissions by a *pro se* defendant, where to do so would be contrary to the interests of justice and unduly prejudice the defendant's rights. Judge Murray was properly "reluctant to grant summary judgment against a *pro se* defendant based solely upon his failure to comply with the discovery requirements of the Federal Rules of Civil Procedure." 139 F.R.D. At 618. In *Turk*, as in the instant suit, the defendant's lack of response was not frivolous, but rather the uninformed omission of a *pro se* defendant in a case in which the plaintiff was on notice of the defendant's position on the issue by reason of his answer. This is not to suggest that procedural rules do not apply to *pro se* defendants, but rather that "to conclusively find the facts central to this litigation against the defendant without giving him an opportunity to be heard would not further the interests of justice." *Id.* Federal Rule of Civil Procedure 36 was not intended to be used as a technical weapon to defeat the rights of *pro se* litigants to have their cases fairly judged on the merits.**

Id. **at 772-73. In *Raiser v. Utah County,* 409 F. 3d 1243 (10th Cir. 2005), the district court's decision in refusing to allow a pro se debtor to amend admissions was reversed where the admissions were the sole basis for the motion for summary judgment and where any prejudice to the opposing party was insufficient to foreclose withdrawal or amendment of the admissions.**

These cases, however, may be factually distinguished. In the case before the court, there was an order previously entered that deemed the requests admitted, and there has been no motion filed to amend admissions for the court's consideration. Moreover, the Fifth Circuit has indicated a strict compliance with

Rule 36. In *Carney v. Internal Revenue Service (In re Carney),* 258 F. 3d 415 (5th Cir. 2001), that:

> **This Circuit has stressed that a deemed admission can only be withdrawn or amended by motion in accordance with Rule 36(b). *American Auto.,* 930 F. 2d at 1120. In order to allow withdrawal of a deemed admission, Rule 36(b) requires that a trial court find that withdrawal or amendment: 1) would serve the presentation of the case on its merits, but 2) would not prejudice the party that obtained the admissions in its presentation of the case. *American Auto.,* 930 F. 2d at 1119 (citations omitted); Fed.R.Civ.P. 36(b). Even when these two factors are established, a district court still has discretion to deny a request for leave to withdraw or amend an admission.**
>
> **. . .**
>
> **Federal Rule of Civil Procedure 56(c) specifies that "admissions on file" can be an appropriate basis for granting summary judgment. Fed.R.Civil Proc. 56(c). Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record. *Dukes v. South Carolina Ins. Co.,* 770 F.2d 545, 548-49 (5th Cir. 1985); *Kasuboski,* 834 F. 2d at 1350. *See also American Auto.,* 930 F. 2d at 1119 (default admissions cannot be overcome by conflicting trial testimony). Instead, the proper course for a litigant that wishes to avoid the consequences of failing to timely respond to Rule 36 requests for admission is to move the court to amend or withdraw the default admissions in accordance with the standard outlined in Rule 36(b).**
>
> **Carney did not avail himself of the procedural mechanism for attempting to avoid the effect of his default. Consequently, application of this Court's precedent applying the plain language of Rule 36 compels us to conclude, on the record before us, that the validity of the tax deficiencies stated in the IRS's proof of claim has been conclusively established . . . Carney's failure to move the bankruptcy court to withdraw his admissions prior to or concurrently with the IRS's motion for summary judgment simply compels affirmance of the grant of summary judgment. Like the Seventh Circuit,**

> **We recognize the potential harshness of this result. The failure to respond to admissions can effectively deprive a party of the opportunity to contest the merits of a case. This result, however, is necessary to insure the orderly disposition of cases; parties to a lawsuit must comply with the rules of procedure. In addition, the harshness is tempered by the availability of the motion to withdraw admissions, a procedure which [Carney] did not employ.**
>
> ***Kasuboski,* 834 F. 2d 1345.**

***Carney,* at 419-21. *See also, E Trade Consumer Finance Corporation v. Needles,* 2005 WL 2674930 (N.D.Ind. 2005)(recognizing status as pro se defendants but noting requirement to follow the Federal Rules of Civil Procedure).**

Although the debtor's responsive pleading on file indicates that he did dispute issues and the matter may have proceeded to trial on the merits had the response been timely filed, the court is bound by Rule 36 and by the order deeming the requests admitted, and in the absence of any motion requesting withdrawal or amendment of the admissions, must find as a procedural matter that there are no genuine issues of material fact. In light of the foregoing, the court must conclude that Citibank's motion for summary judgment should be granted based upon the deemed admissions.

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 29th day of November, 2005.

/s/ Edward R. Gaines_____
EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

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