SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: October 24, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

BOBBIE J. MARTIN,	**CASE NO. 13-02091-NPO**
DEBTOR.	**CHAPTER 13**
COUNTRY CREDIT, LLC	**PLAINTIFF**
VS.	**ADV. PROC. NO. 13-00090-NPO**
BOBBIE J. MARTIN	**DEFENDANT**

MEMORANDUM OPINION AND ORDER ON
AMENDED MOTION FOR ATTORNEYS[’] FEES AND COSTS

This matter came before the Court for hearing on September 21, 2016 (the “Hearing”), on the Amended Motion for Attorneys[’] Fees and Costs (the “Motion”) (Adv. Dkt. 66) filed by Bobbie J. Martin (the “Debtor”), the defendant in the above-styled adversary proceeding (the “Adversary”);[1] the Country Credit LLC’s Response to Debtor’s Amended Motion for Attorney’s Fees and Costs (the “Response”) (Adv. Dkt. 68) filed by the plaintiff, Country Credit, LLC

[1] Citations to the record are as follows: references to the docket in the Adversary will be cited as “(Adv. Dkt. ___)” and references to the record in the associated bankruptcy case, Case No. 13-02091-NPO (the “Bankruptcy Case”), will be cited as “(Bankr. Dkt. ___).”

("Country Credit"); and the Rebuttal to Country Credit LLC's Response to Debtor's Amended Motion for Attorney's Fees and Costs (the "Debtor's Rebuttal") (Adv. Dkt. 69) filed by the Debtor. At the Hearing, Tylvester O. Goss ("Goss") and Anitra L. Eubanks ("Eubanks") represented the Debtor, Stacey Moore Buchanan ("Buchanan") represented Country Credit, and Justin B. Jones appeared on behalf of Harold J. Barkley, Jr., the standing chapter 13 trustee. After fully considering the matter and being fully advised in the premises, the Court granted the Motion from the bench. This Opinion memorializes and supplements the Court's bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Notice of the Motion was proper under the circumstances.

Facts[2]

Country Credit is a lender that negotiates and approves loans based on information it receives from potential borrowers over the phone. Apparently, Country Credit accepts loan applications over the phone, reviews the information garnered from the telephone conversation, and then calls the potential borrower to tell him or her that his or her application is approved. If the loan is approved, then the potential borrower visits Country Credit at its physical store to sign certain documents related to the loan.

As it pertains to the Bankruptcy Case and the Adversary, the Debtor contacted Country Credit on September 18, 2012, to apply for a loan. Based on the information the Debtor

[2] The following, unless otherwise indicated, constitutes a reiteration of the findings of fact the Court made pursuant to Federal Rule of Bankruptcy Procedure 7052 in the Memorandum Opinion and Order on Amended Complaint to Determine the Dischargeability of Debt Pursuant to 11 U.S.C. § 523 and for Other Relief (the "Bankruptcy Court Opinion") (Adv. Dkt. 31).

provided over the telephone, Charlotte King ("C. King"), a customer service representative of Country Credit, completed an application form (the "Application") (Country Credit Trial Ex. 2)[3] and a budget form (the "Budget") (Country Credit Trial Ex. 3). Subsequently, Misty King ("M. King"), Country Credit's office manager, called the Debtor to verify that the Budget was accurate. The Debtor signed the completed Application in person at Country Credit's office in Brookhaven, Mississippi on September 19, 2012. Additionally, the Debtor signed the following documents related to the loan: (1) Disclosure Statement, Promissory Note, and Security Agreement (Country Credit Trial Ex. 1); (2) Budget; (3) Loan Application Addendum (the "Addendum") (Country Credit Trial Ex. 4); and (4) signature page (Country Credit Trial Ex. 5). The Debtor then received a loan in the principal amount of $1,869.95 (the "Loan") at an annual interest rate of 43.33 percent (43.33%). During his telephone conversations with C. King and M. King, the Debtor did not disclose that he had any dependents or child support obligations. He later testified at trial that he had six (6) children and paid child support for five (5) children. The Debtor subsequently initiated the Bankruptcy Case. Country Credit initiated the Adversary thereafter, arguing that the Loan was nondischargeable.

The underlying dispute in the Adversary relates to a loan of approximately $1,200.00[4] that the Debtor proposed to pay Country Credit in full through the Plan. The Motion arises from the Bankruptcy Court Opinion, in which the Court determined that Country Credit "failed to demonstrate that the Debtor made a misrepresentation that renders the debt owed to them nondischargeable under [11 U.S.C.] § 523(a)(2)(B)." (Bankr. Ct. Op. at 19). Country Credit

[3] References to the exhibits introduced at the trial held on May 28, 2014, will be cited as "(Country Credit Trial Ex. ___)".

[4] The principal amount of the Loan was $1,869.95, but the Debtor evidently made payments towards the Loan because the proof of claim (the "POC") (Bankr. Cl. No. 18-1) later filed by Country Credit indicated that the amount of the debt was $1,171.17.

appealed the Bankruptcy Court Opinion to the United States District Court for the Southern District of Mississippi (the "District Court"), which affirmed this Court in the Order (the "District Court Order") (Case 3:14-cv-00709-CWR-LRA). Country Credit subsequently appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed this Court and the District Court in a two-page, four (4) sentence order (the "Fifth Circuit Order") (Case No. 15-60734) entered the day after the oral argument was held at the request of Country Credit.

I. Bankruptcy Case

The Debtor filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on July 8, 2013 (the "Petition") (Bankr. Dkt. 1). He filed the 100% Chapter 13 Plan (the "Plan") (Bankr. Dkt. 2),[5] proposing to pay his unsecured creditors in full, and his Statement of Financial Affairs and Schedules (Bankr. Dkt. 4) contemporaneously with the Petition. In the Plan, the Debtor proposed to make sixty (60) monthly payments of approximately $668.91, or $155.56 per week. (Plan at 1). The Plan also indicated that the Debtor owed three (3) separate domestic support obligations: (1) $31.00 per week to Juanita White; (2) $100.00 per week to Janie Reed; and (3) $32.00 per week to Videla Brown-Joiner. (Plan at 1-2). On Schedule F-Creditors Holding Unsecured Nonpriority Claims, the Debtor indicated that he owed Country Credit $1,200.00 for "Collection." (Bankr. Dkt. 4 at 14). Country Credit filed the POC on February 14, 2014.[6]

[5] The Debtor filed an Amended Chapter 13 Plan (the "Amended Plan") (Bankr. Dkt. 80) on September 19, 2013, in which he maintained his proposal to pay his unsecured claims in full. The Amended Plan was confirmed on July 28, 2014 (Bankr. Dkt. 114). The Plan and the Amended Plan will be referred to collectively as the "Plan".

[6] Although the deadline for non-governmental entities to file a proof of claim was November 18, 2013, Country Credit filed the Motion to Allow Late-Filed Claim (Bankr. Dkt. 110) on February 14, 2014, which the Court granted on March 21, 2014 (Bankr. Dkt. 112).

II. Adversary

Country Credit filed the Complaint to Determine the Dischargeability of Debt Pursuant to 11 U.S.C. § 523 and for Other Relief (the "Complaint") (Adv. Dkt. 1)[7] on October 18, 2013. In the Complaint, Country Credit alleged that even though the Debtor indicated when he applied for the Loan that he had no domestic support obligations, in the Plan, he "scheduled three separate domestic support obligations totaling $163.00 per week." (Compl. at 3). According to Country Credit, based on "information and belief, based upon information provided by Debtor in this bankruptcy proceeding, and the testimony provided by Debtor at his meeting of creditors, Debtor has five separate domestic support obligations with an arrearage of $10,813.00." (*Id.*). Country Credit alleged that the Debtor made "material misrepresentations and/or omissions regarding his domestic support obligations upon which Country Credit reasonably relied." (*Id.* at 4). "If Debtor had fully disclosed any of his domestic support obligations, Country Credit would not have made the loan." (*Id.* at 4). It was Country Credit's contention that the Debtor intended to deceive it when he intentionally made these misrepresentations and/or failed to disclose material information in order to obtain the Loan. (*Id.*). Country Credit, therefore, asserted in the Complaint that the debt owed to Country Credit was nondischargeable under both § 523(a)(2)(A) and (B). (*Id.*).

The Debtor filed the Response to Amended Complaint to Determine the Dischargeability of Debt Pursuant to 11 U.S.C. § 523 and for Other Relief (the "Answer") (Adv. Dkt. 15) on March 5, 2014, denying the allegations in the Complaint. The Complaint and Answer came

[7] Country Credit filed a substantively identical Amended Complaint to Determine the Dischargeability of Debt Pursuant to 11 U.S.C. § 523 and for other Relief (the "Amended Complaint") (Adv. Dkt. 14) on February 10, 2014. The Complaint and the Amended Complaint will be referred to collectively as the "Complaint." Citations to the Complaint will be to Adv. Dkt. 1.

before the Court for trial on May 28, 2014 (the "Trial"). At the Trial, Buchanan and John S. Simpson ("Simpson") represented Country Credit and Goss represented the Debtor. Country Credit introduced seventeen (17) exhibits into evidence and called three (3) witnesses: (1) M. King; (2) C. King; and (3) Stephen Binning, a member of Country Credit. The Debtor introduced nine (9) exhibits into evidence and testified on his own behalf. Country Credit pursued causes of action under both 11 U.S.C. § 523(a)(2)(A) and (B)[8] at the Trial.

After the Trial, the parties obtained the Court's permission to submit post-trial briefs. The Debtor submitted the Brief of Defendant — Bobb[ie] J. Martin (the "Debtor Brief") (Adv. Dkt. 29) and Country Credit filed a brief in the form of a one-page letter (the "Country Credit Brief") (Adv. Dkt. 30) on June 18, 2014. In the Debtor Brief, the Debtor reiterated his arguments that Country Credit failed to meet its burden of proof and requested attorneys' fees under § 523(d) "if the court rules against the creditor . . . ." (Debtor Br. at 12). In the Country Credit Brief, Country Credit abandoned its claim under § 523(a)(2)(A) for the first time, stating that it "does not contend that the record establishes that the note was procured by a misrepresentation other than a statement respecting the debtor's financial condition," but maintained that it proved its § 523(a)(2)(B) claim. (Country Credit Br. at 1). The Court entered the Bankruptcy Court Opinion on July 10, 2014.

A. Bankruptcy Court Opinion

This Court was tasked with determining whether the Debtor made representations or omissions to Country Credit within the meaning of § 523(a)(2)(B)[9] that would render his

[8] Hereinafter, all code sections refer to the Bankruptcy Code in title 11 of the U.S. Code unless indicated otherwise.

[9] Although before and during the Trial Country Credit indicated that it intended to prove that the Loan was nondischargeable under § 523(a)(2)(A) and (B), Country Credit abandoned its

indebtedness to Country Credit nondischargeable. As the creditor, Country Credit had the burden of proving by a preponderance of the evidence that the debt was nondischargeable. (Bankr. Ct. Op. at 6; citations omitted). The Court further noted that "exceptions to discharge must be strictly construed against the creditor and liberally construed in favor of the debtor." (*Id.*).

Although Country Credit withdrew its § 523(a)(2)(A) claim at the end of the Trial, the Court determined that it failed to meets its burden of proof nonetheless. (*Id.* at 8). The Court determined that the Debtor did not make a misrepresentation regarding his dependents as it related to § 523(a)(2)(A) or (B) because: "(1) he had no dependents for tax purposes; (2) Country Credit did not provide a definition of "dependents" contrary to the definition used for tax purposes; and (3) the Debtor signed the Application before completing Schedule I." [10] (Bankr. Ct. Op. at 8-9). The Court also noted that Country Credit bore the burden of proving by a preponderance of the evidence that the Debtor's alleged misrepresentation was unrelated to his financial condition as required by § 523(a)(2)(A), which it failed to do. (*Id.* at 8).

The Court also determined that Country Credit failed to meet its burden to prove by a preponderance of the evidence that the Debtor made material misrepresentations under § 523(a)(2)(B) by stating in the Budget and Addendum that he did not owe child support. (*Id.* at

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argument under § 523(a)(2)(A) in the Country Credit Brief. Country Credit conceded that all of the Debtor's alleged misrepresentations "respected the debtor's financial condition." (Country Credit Br.). Because Country Credit pursued the § 523(a)(2)(A) claim at Trial, and for the sake of thoroughness, the Court included a discussion regarding County Credit's § 523(a)(2)(A) in the Bankruptcy Court Opinion. (Bankr. Ct. Op. at 6). This is now relevant because the Court concluded that Country Credit's § 523(a)(2)(A) claim lacked merit, thus indicating Country Credit was not substantially justified in pursuing the claim. (Bankr. Ct. Op. at 7-8).

[10] This was important because Country Credit argued that the Debtor contradicted himself when he listed six (6) dependents on Schedule I, but "[b]y relying on the alleged inconsistency between Schedule I and the Application, Country Credit confused the definition of a dependent in tax law as opposed to the definition in the Code." (Bankr. Ct. Op. at 7). "This statement clarifies why it was not inconsistent *per se* for the Debtor to list his children as dependents on Schedule I but not on the Application." (*Id.* at 8).

9). To prevail under § 523(a)(2)(B), Country Credit had to prove by a preponderance of the evidence each of the following elements: "(1) a statement in writing exists; (2) the writing is materially false; (3) the writing concerns the Debtor's financial condition; (4) Country Credit reasonably relied on the statement when it approved the Loan; and (5) the Debtor made or published the statement with the intent to deceive Country Credit." (*Id.*). The Court found that Country Credit met its burden to prove that a statement in writing existed, the writing was materially false, the writing concerned the Debtor's financial condition, and that it reasonably relied on the Debtor's statement when it approved the Loan. (*Id.* at 9-15). The Court, however, found that the fifth element was not satisfied because Country Credit did not meet its burden of proving that the Debtor intended to deceive Country Credit. (*Id.* at 19). The Court found that: (1) when the Debtor provided Country Credit with his most recent pay stub, which happened to be a "free check,"[11] he complied with Country Credit's request; and (2) the Debtor's confusion regarding Country Credit's use of the terms "domestic support" and "child support" interchangeably throughout the Loan documents was reasonable. (*Id.* at 15-19). The Court also concluded that the Loan documents were ambiguous, which weighed in favor of finding that the Debtor did not intend to deceive Country Credit. (*Id.* at 16-20).

Based on the foregoing, the Court held that the Loan was dischargeable, concluding that Country Credit abandoned its argument under § 523(a)(2)(A) and failed to prove that the Debtor made a misrepresentation that rendered the Loan nondischargeable under § 523(a)(2)(B). (*Id.* at 19). The Court reserved entering a final judgment until disposition of a § 523(d) motion for attorneys' fees. (*Id.*). The Court held that it would consider an award of costs and attorneys'

[11] At Trial, the Debtor testified that a "free check" is one that does not show any amount deducted for child support. (Bankr. Ct. Op. at 13). "The Debtor received a 'free check' whenever the total amount the Debtor owed for child support that month had been withheld already from previous checks that same month." (*Id.* at n.16).

fees upon proper motion filed by the Debtor under § 523(d). (*Id.*). The Debtor filed the Motion for Attorneys Fees and Costs (the "First Motion for Fees") (Adv. Dkt. 32) on July 23, 2014, but before the Court could rule, Country Credit filed the Notice of Appeal (Adv. Dkt. 34). The Court subsequently entered the Order Holding Motion for Attorneys' Fees and Costs in Abeyance Pending Appeal (the "Abeyance Order") (Adv. Dkt. 40). Accordingly, the Court never entered a final judgment.

B. District Court Affirmance

In the District Court Order, the District Court affirmed the Bankruptcy Court Opinion, finding that the Court made no clear error. Although Country Credit argued that the Bankruptcy Court's interpretation of the word "dependent" using the Tax Code was in error, the District Court agreed that the term "dependent" was ambiguous and that the Application as a whole was ambiguous. (Dist. Ct. Order at 3). State law governs a finding of whether a contract is ambiguous, and, under Mississippi law, "ambiguity is defined as a susceptibility to two reasonable interpretations." (*Id.*). Country Credit pointed out that the word "dependent" is defined by the OXFORD AMERICAN DICTIONARY & THESAURUS as "a person who relies on another, esp. for financial support," but the District Court noted that there are "several other ordinary dictionary definitions that give 'dependent' more than one reasonable interpretation." (*Id.*). According to the District Court, "[o]ne could, for example, reasonably interpret 'dependent' as 'one not able to exist or sustain oneself without the power or aid of someone else." (*Id.*). Such an interpretation "would not automatically lead to a belief that one who pays child support has a child(ren) who is not able to exist or be sustained without such support." (*Id.* at 4). Additionally, as the Bankruptcy Court found, "even dictionary definitions link taxes and dependents: WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, for instance, uses the

example 'a man taxed according to the number of [dependents] he has.'" (*Id.*). Accordingly, the District Court concluded that the Bankruptcy Court did not err in finding that the term "dependent" was ambiguous in the Loan documents. (*Id.*).

The District Court also affirmed the Court's holding that Country Credit failed to meet its burden of proving that the Debtor had the intent to deceive Country Credit when he stated that he had no dependents. (*Id.* at 5). "Having reviewed the record, the Court finds that the Bankruptcy Court did not clearly err in concluding that Martin did not intend to deceive Country Credit. Moreover, the findings were supported by substantial evidence." (*Id.* at 5). The District Court specifically affirmed the Court's following findings as to the Debtor's lack of intent to deceive: (1) the Debtor did not misrepresent that he had no dependents because they did not live with him and the information was consistent with his tax returns; (2) the check stub presented to Country Credit that did not reflect any child support deductions was in compliance with Country Credit's request for his most recent check stub; and (3) the Application was vague and ambiguous. (*Id.* at 5-6). Because courts generally deem a debt dischargeable when dischargeability is a close call, and in light of the fact that the Application was vague and confusing, the District Court found that the Court did not err in finding a lack of intent to deceive. (*Id.*). Accordingly, the District Court affirmed the Bankruptcy Court Opinion. (*Id.* at 7).

C. Fifth Circuit Affirmance

On October 21, 2015, Country Credit filed a Notice of Appeal (Adv. Dkt. 57), indicating that it was appealing the District Court Order to the Fifth Circuit. After hearing oral arguments, held at the request of Country Credit, the Fifth Circuit affirmed the District Court, *per curiam*, in the Fifth Circuit Order on June 8, 2016. In the Fifth Circuit Order, the Fifth Circuit held that after reviewing the record, studying the briefs, and entertaining oral arguments, "in the light of

our precedents, [] the bankruptcy court did not err when it determined that [the Debtor's] debt, acquired through a payday loan from [Country Credit], is dischargeable." (Fifth Circuit Order at 2).

D. Motion, Response, Debtor's Rebuttal, and Hearing

Pursuant to the Abeyance Order, the Court reserved ruling on attorneys' fees and costs pending Country Credit's appeal. Now that Country Credit has exhausted the appeals process, the issue of attorneys' fees and costs is ripe for review, and the Debtor filed the Motion seeking $45,651.72 in attorneys' fees.[12]

1. Motion

The Debtor filed the Motion on August 15, 2016, seeking attorneys' fees. In the Motion, the Debtor did not seek payment for expenses or costs. According to the Motion, the Debtor incurred $45,651.72 in attorneys' fees due to "Country Credit's decision to file this action and then to vigorously pursue this action to appeal." (Mot. at 2). This number reflects "related litigation activities such as reviewing and analyzing the dischargeability Complaint, conducting pertinent research, filing motions in response while adhering to stringent deadlines, and preparing for and attending the trial on the dischargeability complaint." (*Id.*). The Debtor argued that "Country Credit continued to force [the Debtor] to incur substantial attorneys[']] fees by electing to appeal both this Court's and the District Court's rulings to the Fifth Circuit Court of Appeals located in New Orleans, La." (*Id.*). Then, Country Credit requested an oral argument when "they were fully aware that [Debtor's] counsel would be required to travel to New Orleans and spend additional time preparing for oral arguments." (*Id.*).

[12] The Debtor did not make a claim for costs.

Citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), the Debtor argued that the attorneys' fees requested in the Motion were reasonable "in light of the time and energy spend litigating the repayment of an $1800.00 loan in a 100% Chapter 13 Bankruptcy Plan." (Mot. at 2-3). In the Motion, the Debtor conducted a thorough analysis of each of the *Johnson* factors and explained how each weighs in favor of a finding that the requested attorneys' fees were reasonable.[13] (*Id.* at 3-7). The Debtor argued that because the *Johnson* factors demonstrate his entitlement to attorneys' fees in the amount of $45,651.72, the Court should award attorneys' fees in that amount pursuant to § 523(d).

The Debtor also attached several exhibits to the Motion.[14] Goss submitted an affidavit (the "Goss Affidavit") (Mot. Ex. 1 at 1), in which he stated that his discounted hourly rate was $250.00. (Goss Aff. at 1). According to Goss, his hourly rate is reasonably based on the fact that he has practiced bankruptcy law for over twenty-five (25) years and compared to attorneys "of similar age, experience and ability in the Jackson, Mississippi area . . . ." (*Id*). Eubanks also submitted an affidavit (the "Eubanks Affidavit") (Mot. Ex. 1 at 2) stating that her hourly rate is $150.00. (Eubanks Aff. at 1). Eubanks stated that her hourly rate is reasonable based on the fact that she has practiced law for over sixteen (16)[15] years and compared to the "hourly rate for

[13] A detailed discussion of the *Johnson* factors is contained herein.

[14] Exhibits attached to the Motion will be cited as "(Mot. Ex. ___)" and exhibits entered into evidence at the Hearing will be cited as "(Debtor Hr'g Ex. ____)" or "(Country Credit Hr'g Ex. ___"). See *infra* n.3.

[15] The Eubanks Affidavit provided that Eubanks has been practicing law for sixteen (16) years, but Goss testified at the Hearing that Eubanks has actually been practicing law for thirteen (13) years. Buchanan's only objection to Debtor's Exhibit A, discussed fully herein, entered into evidence at the Hearing, was to this fact in the Eubanks Affidavit. The Court notes that Eubanks has been practicing law for thirteen (13) years rather than sixteen (16). The Mississippi Bar Lawyer Directory provides that Eubanks was admitted to practice law in Mississippi on October 7, 2003. *See* msbar.org.

attorneys of similar age, experience and ability in the Jackson, Mississippi area . . . ." (*Id*). Also attached to the Motion was the itemization of time and expenses (the "Itemization") (Mot. Ex. 1 at 4-9), which contained a detailed description of tasks completed by Goss and Eubanks and the hours spent completing each task.

The Debtor also employed attorney Terris C. Harris ("Harris") to represent him at the Fifth Circuit (in addition to Eubanks). Harris submitted an affidavit (the "Harris Affidavit") (Mot. Ex. 1 at 3), attesting to the reasonableness of his $5,000.00 flat fee. According to Harris, he charged the Debtor a flat fee of $5,000.00 instead of a standard billable hour because the amount of money at issue was less than $10,000.00. (Harris Aff. at 1). Harris provided that if he had "charged a billable rate, it would have been $250/hr, which is my discounted rate." (*Id.*). Based on his experience practicing law since 1999, and compared to the rate "for attorneys of similar age, experience and ability in the Jackson, Mississippi area," Harris believed his fee was reasonable. (*Id.*). The Debtor submitted a document titled "(Terris Harris) Time Spent on Martin Case" (the "Harris Itemization") (Adv. Dkt. 70) on September 20, 2016. According to the Harris Itemization, he spent a total of forty-eight (48) hours on the Debtor's case. (Harris Itemization at 1). Had Harris billed by the hour, his attorneys' fees would have totaled $12,000.00. (*Id*).

2. Response

Country Credit filed the Response on September 6, 2016, arguing that the Court should deny the Motion. In the Response, Country Credit argued that it should not be responsible for paying the Debtor's attorneys' and court fees because its position was substantially justified. (Resp. at 12). Country Credit contended that it was substantially justified in initiating the Adversary and "appealing the decision of this Court to both the District Court and Fifth Circuit

as this case was a 'close one.'" (*Id.*). "Congress designed section 523(d) for the award of attorney's fees where a creditor's position was not substantially justified, not where the creditor's position was reasonable under the facts and the law." (*Id.*).

In the Response, Country Credit argued that if the Court were to determine that the Debtor is entitled to attorneys' fees, "[t]he fees incurred in defending an appeal of an adversary proceeding ruling are not authorized by section 523(d) and should be made to the appellate court." (*Id.* at 10). According to Country Credit, the Court should not award attorneys' fees for Harris because the Debtor "failed to include any itemization for time expended by [Harris] related to the appeal." (*Id.* at 11).[16] Country Credit also appeared to argue that the Debtor should not receive attorneys' fees for sending two (2) attorneys to the oral argument at the Fifth Circuit, concluding that the Debtor's employment of both Eubanks and Harris at the oral argument constituted "additional billing for two lawyers' appearances before the Fifth Circuit-when only one was necessary." (*Id.* at 11).

3. Debtor's Rebuttal

The Debtor filed the Debtor's Rebuttal on September 13, 2016. In the Debtor's Rebuttal, the Debtor argued that Country Credit's position was not substantially justified, especially in regard to the appeals. (Debtor's Rebuttal at 1). According to the Debtor, "[i]n light of the minimal amount of money involved, and the vast resources that were ultimately expended to defend against a 100% Chapter 13 plan, this Court should find that Country Credit was not substantially justified in bringing this action in the first place." (*Id.* at 2). The Debtor noted that unlike the cases relied on by Country Credit in the Response, the Debtor proposed a chapter 13 plan through which he would pay all of his unsecured creditors in full. (*Id.* at 1). According to

[16] The Debtor subsequently filed the Harris Itemization, which was entered into evidence at the Hearing without objection from Country Credit, rendering this argument moot.

the Debtor, "[i]n the bankruptcy world, this is as good as it gets." (*Id.*). The Debtor argued that he was "forced to expend unnecessary energy, money, time and other resources to defend a 100% Chapter 13 bankruptcy plan that centered around the repayment of an $1800.00 loan." (*Id.*). The Debtor noted that "[a]s if [appealing to the Fifth Circuit] wasn't enough, Country Credit further requested oral argument on the matter," even though "it was fully aware that [the Debtor's] counsel would be required to travel to New Orleans and spend additional time and money preparing for oral argument." (*Id.* at 1-2).

The Debtor also argued in the Debtor's Rebuttal that he is entitled to attorneys' fees incurred in defending Country Credit's appeal to the District Court and Fifth Circuit, citing an Eastern District of Virginia Bankruptcy Court case. (*Id.* at 3). The Debtor argued that the bankruptcy court in *Morrissey v. Wiencek (In re Wiencek),* 58 B.R. 485, 487 (Bankr. E.D. Va. 1986) held that bankruptcy courts are required to award fees for appellate representation "absent an overriding expression of Congressional intent." (*Id.*).

4. Hearing

a. Debtor

At the Hearing, Goss testified on behalf of the Debtor in support of the attorneys' fees incurred throughout the course of the Adversary, including the attorneys' fees incurred by the Debtor in defending the appeal to the District Court and to the Fifth Circuit. The Debtor introduced Debtor's Exhibit A into evidence at the Hearing, without a substantive objection from Country Credit. Exhibit A included the following documents: (1) the Goss Affidavit; (2) the Eubanks Affidavit;[17] (3) the Harris Affidavit;[18] (4) the Itemization; (5) the $5,000.00 bill for

[17] *See supra* note 11.

Harris's services; (6) the Account Summary for Harris' services; and (7) the Harris Itemization. (Debtor's Hr'g Exhibit A).

i. Goss's Testimony

At the Hearing, Goss stated that in his twenty-five (25) years of practicing bankruptcy law, this is the first time he has defended an adversary in a bankruptcy case in which the debtor proposed a 100% chapter 13 bankruptcy plan. Even though County Credit would be paid in full through the Plan, it appealed the Bankruptcy Court Opinion all the way to the Fifth Circuit, causing the Debtor to incur a significant amount of attorneys' fees. According to Goss, he believed that his discounted hourly rate of $250.00 was fair and reasonable in the Adversary under § 523(d). Goss stated that he had initially billed the Debtor $300.00 per hour, but when he was preparing the Motion, he discovered that the bill totaled $66,000.00. Goss subsequently reduced his hourly rate to $250.00 to decrease the total amount of the bill. (Hr'g at 10:10:10).[19]

After the Court entered the Bankruptcy Court Opinion, which the District Court affirmed, Country Credit appealed to the Fifth Circuit. At that point, Goss testified that the Debtor retained Harris due to his experience handling appeals before the Fifth Circuit and his record of success. Goss stated that Harris has argued before the Fifth Circuit "seven (7) or eight (8) times" and has "a ninety percent (90%) success rate." (Hr'g at 10:03:52). According to Goss, he called other attorneys to inquire about representing the Debtor on appeal. One of the attorneys Goss called would have charged the Debtor a $10,000.00 retainer, and would have charged $350.00 per hour with a forty (40) to sixty (60) hour minimum. Harris agreed to a $5,000.00 flat rate fee

[18] Although Harris was not present at the Hearing, the Harris Affidavit was introduced into evidence without objection. Accordingly, the Court takes the sworn statements of Harris in the Harris Affidavit as true.

[19] The Hearing was not transcribed. Citations to testimony at the Hearing are to the timestamp of the audio recording.

before he began representing the Debtor, which Goss believed was a very reasonable fee. Harris charged a flat rate fee of $5,000.00, even though the time he spent on the appeal amounted to about $12,000.00, which is reflected in the Harris Itemization.

Goss testified that the time he spent on the Adversary far exceeded the time he actually billed. (Hr'g at 10:15:05). Goss did not charge the Debtor for at least forty (40) hours of work he performed preparing for the Fifth Circuit oral argument. (Hr'g at 10:05:30). Although Goss assisted Eubanks and Harris in preparing for the Fifth Circuit oral argument for two (2) weeks, he did not bill for his time because he believed it would be unfair to bill the Debtor for three (3) attorneys' work. (Hr'g at 10:08:55). Additionally, the Debtor was not billed for travel and other expenses. Although Goss was unable to attend the oral argument before the Fifth Circuit because he could not reschedule a matter before another judge, both Eubanks and Harris were able to attend the oral argument to represent the Debtor. Goss stated that Country Credit also had two (2) attorneys present at the Fifth Circuit oral argument, and it also had two (2) attorneys present at the Trial. The amount of time each attorney spent working on the Adversary, including the appeal, exceeded the amount each attorney billed for their legal services, according to Goss.

ii. Eubanks's Argument

Eubanks argued that the purpose of § 523(d) is to discourage creditors from bringing weak nondischargeability actions in hopes of inducing settlements from anxious debtors. (Hr'g at 10:27:10). Eubanks emphasized that the Plan was a 100% chapter 13 plan, meaning that Country Credit would have been paid in full through the Plan. (Hr'g at 10:27:45). Because

Country Credit chose to appeal a $1,200.00[20] dischargeability decision to the District Court and then to the Fifth Circuit, the Debtor and his attorneys were required to spend extensive time and energy and incur significant expenses. According to Eubanks, Country Credit was not substantially justified in bringing the nondischargeability action based on a $1,200.00 debt that the Debtor proposed to pay in full through the Plan. That Country Credit lost at all levels shows that the Adversary was not substantially justified, according to Eubanks. Like Goss, Eubanks stated that she believed the Debtor's attorneys' fees were reasonable and, in fact, the attorneys did not charge for every hour worked or for expenses.

b. Country Credit

Buchanan did not call any witnesses and did not introduce any documents into evidence at the Hearing. Buchanan argued that under § 523(d), the Debtor must prove that the debt was dischargeable, and, if successful, the burden shifts to Country Credit to prove that its position in arguing that the debt was nondischargeable was substantially justified. According to Buchanan, Country Credit's argument had a reasonable basis in both law and fact and there was a causal connection between the facts and the theory alleged. Buchanan contended that Country Credit's position was substantially justified, as evidenced by the Court referring to its decision as a "close call,"[21] and by the fact that the Court found in favor of Country Credit on four (4) out of the five (5) elements for nondischargeability. Buchanan argued that Country Credit was substantially

[20] Throughout the Hearing, the amount of the debt was inconsistently referred to as a "$1,800.00 debt." As mentioned in footnote 4, *supra,* the POC indicated that the debt totals approximately $1,200.00. Accordingly, the Court will hereinafter refer to the Loan as totaling $1,200.00.

[21] The Court did not expressly state that the issue of dischargeability of the Loan in the Adversary was a "close call;" however, the court stated that "[i]n circumstances such as these, where 'the question is a close one, courts generally determine that the debt is dischargeable.'" (Bankr. Ct. Op. at 19) (citing *Fraser v. Fraser,* 196 B.R. 371, 374 (E.D. Tex. 1996)).

justified at all stages of litigation, including in bringing the Adversary in the Bankruptcy Court, appealing the Bankruptcy Court Opinion to the District Court, and appealing the District Court Order to the Fifth Circuit.

According to Buchanan, the fact that other creditors may not have appealed the Bankruptcy Court Opinion is irrelevant to whether Country Credit was substantially justified in appealing. She argued that Country Credit was entitled to appeal to both the District Court and the Fifth Circuit, and its decision to do so was not frivolous. According to Buchanan, Country Credit believed that it was worth the time and expense to appeal. The fact that the underlying debt was only for $1,200.00 had no bearing on whether Country Credit was substantially justified in appealing, according to Buchanan, because Country Credit was entitled to appeal and request oral argument. Buchanan appeared to support her contention that Country Credit's appeal to the Fifth Circuit was substantially justified based, in part, on the fact that the Fifth Circuit granted its request for oral argument.[22]

Even if the Court grants the Motion in regard to attorneys' fees in defending the Adversary, Buchanan argued that § 523(d) does not authorize the Court to award attorneys' fees the Debtor incurred in defending the appeal. Although Buchanan acknowledged that Country Credit had two (2) attorneys attend the oral argument at the Fifth Circuit, she argued that the Debtor was not justified in also sending two (2) attorneys to the Fifth Circuit oral argument. Additionally, Buchanan contended that "Goss [] represented Mr. Martin in the Bankruptcy and proceeded to represent him with the Adversary Case before this Court then chose to continue to represent Mr. Martin in the appeals." (Hr'g at 10:32:30). Buchanan appeared to argue that because Goss, Eubanks, and Harris "chose" to represent the Debtor on appeal and Country Credit

[22] Under Federal Rule of Appellate Procedure 34(a)(2), oral argument must be allowed unless a three-judge panel decides that oral argument is unnecessary for the enumerated reasons.

did not "force" them to do so, as the Debtor contended, Country Credit should not be liable for attorneys' fees incurred on appeal.

Discussion

As Eubanks correctly stated at the Hearing, the purpose of § 523(d) "is to discourage creditors from bringing objectively weak false financial statement exception litigation in the hopes of extracting a settlement from a debtor anxious to avoid paying attorney's fees to defend the action." 4 COLLIER ON BANKRUPTCY ¶ 523.08[8] (16th ed. 2016); *see* H.R. REP. NO. 595, 95th Cong., 1st Sess. 365 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 80 (1978); *Country Credit, LLC v. Johnson (In re Johnson)*, Adv. No. 11-00084-KMS (Dkt. 19), slip op. at *2-3 (Bankr. S.D. Miss. May 15, 2012). "In the absence of section 523(d), the threat of litigation over the discharge exceptions of section 523(a)(2) and the attendant costs of litigation could induce debtors to settle for a reduced sum. Thus, creditors with marginal cases could compel at least part of their claims to be excepted from discharge or reaffirmed, despite the weakness of their cases." *Id.* To serve its purpose of discouraging creditors from taking advantage of debtors in a desperate financial situation, § 523(d) allows a debtor to receive an award of attorneys' fees and costs if the creditor loses a nondischargeability action it initiated and "the court finds that the position of the creditor was not substantially justified." *Id.* The Debtor must satisfy three (3) elements to receive an award of attorneys' fees under § 523(d): (1) the creditor requested a determination of the dischargeability of the debt under § 523(a)(2); (2) the debt is a consumer debt; and (3) the debt was discharged. *Id.* If the Debtor successfully establishes each of these elements, the burden shifts to the creditor "to prove either that its position was substantially justified or that special circumstances exist that would make an award of costs and attorney fees unjust." *Id.*

The Debtor clearly met his initial burden under § 523(d), which Buchanan conceded at the Hearing. (Hr'g at 10:18:53). Accordingly, the only issue before the Court at the Hearing was whether Country Credit proved that its position was substantially justified or that special circumstances existed so that awarding attorneys' fees to the Debtor would be unjust. "The award of attorney's fees under § 523(d) is within this Court's sound discretion." *Eric D. Fein, P.C. & Assoc. v. Young (In re Young),* 425 B.R. 811, 819 (Bankr. E.D. Tex. 2010) (citations omitted). Having found that Country Credit's position was not substantially justified and that no special circumstances existed, the Court granted the Motion from the bench. The following is a supplement to the Court's bench ruling, and a determination as to the amount of attorneys' fees to be awarded to the Debtor.

I. No Substantial Justification

The standard for the award of attorneys' fees and costs under § 523(d) is the same standard contained in the Equal Access to Justice Act (the "EAJA"). Under the EAJA, "a losing party must make a strong showing of justification for its claims." 4 COLLIER ON BANKRUPTCY ¶ 523.08[8]. "According to commentators, the substantial justification test is a reasonableness test." *Neary v. Jordan (In re Jordan),* 364 B.R. 634, 637 (Bankr. N.D. Tex. 2007). The Court is not required to find that Country Credit acted in bad faith or frivolously in order to award attorneys' fees to the Debtor under § 523(d). *In re Young,* 424 B.R. at 819. Instead, the Court is only required to determine that Country Credit "proceeded past a point where it knew, or should have known, that it could not carry its burden of proof." *Id.* (quoting *AT&T Universal Card Servs., Inc. v. Nguyen (Nguyen),* 235 B.R. 76, 91 (Bankr. N.D. Cal. 1999)).

The Supreme Court of the United States has held that "substantially justified" means that the losing party is required to show that the claim had a reasonable basis in both law and fact.

Pierce v. Underwood, 487 U.S. 552, 565 (1988). The Supreme Court also held in *Pierce* that the Court's determination of whether a position is substantially justified should be reviewed "under the abuse-of-discretion standard." *Id.* at 562-63. A determination of whether a position is substantially justified is "a multifarious and novel question, little susceptible, for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop." *Id.* at 562.

The Court will first discuss the Debtor's entitlement to attorneys' fees in the Adversary. Country Credit also argued that even if the Debtor is entitled to attorneys' fees for defending the initial § 523(a)(2) action, he is not entitled to attorneys' fees on appeal. In order to determine whether the Debtor is entitled to attorneys' fees incurred on appeal, the Court must answer the threshold question of whether § 523(d) authorizes the award of attorneys' fees incurred on appeal. If it does, the Court will determine whether the Debtor is entitled to such fees.

A. No Reasonable Basis in Fact

Although Country Credit contended that it had a reasonable basis in fact for the theory alleged because the parties stipulated to a majority of the facts, Country Credit failed to conduct a reasonable investigation to discover facts that would tend to prove that the Debtor possessed the requisite intent under § 523(a)(2)(A). In *Country Credit, LLC v. Johnson*, the bankruptcy court was tasked with determining whether the debtor was entitled to attorneys' fees after it had determined that the loan in question was dischargeable. *Country Credit, LLC v. Johnson (In re Johnson)*, Adv. No. 11-00084-KMS (Dkt. 19), slip op. (Bankr. S.D. Miss. May 15, 2012). Similar to the Adversary, Country Credit initiated an adversary proceeding against the debtor, claiming that a debt owed to it by the debtor was nondischargeable for failure to disclose an outstanding tax obligation, mortgage payment, and a payday debt. *Id.*, at *2. The bankruptcy

court found that the debt was dischargeable, and the debtor filed a motion for attorneys' fees and costs under § 523(d). *Id.* Like it asserted at the Hearing, Country Credit contended in *In re Johnson* that its position was substantially justified, arguing that it initiated an adversary proceeding after reviewing the loan application and other documents. *Id.*, at *2-3. Also like it contended at the Hearing, Country Credit argued that because it was a "close call" whether the loan was dischargeable, a trial was necessary to determine the issue. *Id.*, at *3. The bankruptcy court noted that, prior to initiating an adversary, Country Credit made no attempt to obtain loan information regarding when a home loan modification was executed or whether the debtor had an outstanding payday loan. *Id.*, at *4. Additionally, the record did not reflect that "Country Credit conducted an examination of the debtor under a Federal Rule of Bankruptcy Procedure 2004 before filing the Adversary." *Id.*

In regard to the Loan, as the Court noted in the Bankruptcy Court Opinion, the Debtor did not demonstrate an intent to deceive Country Credit when he complied with its request to provide his most recent pay stub as a part of the approval process.[23] Country Credit could and should have requested more than one (1) pay stub from the Debtor, and it would have realized that the Debtor owed child support. From the inception of the Loan, Country Credit possessed the ability to obtain additional information and acquire additional pay stubs in order to eliminate any ambiguity in the Debtor's financial condition. Instead, it conducted no reasonable inquiry or investigation, and its own lack of diligence gave rise to the issues it claims existed in the Application and other Loan documents.

Similarly, there is no evidence in the record in this case to indicate that Country Credit conducted an investigation to determine whether the Debtor actually violated § 523(a)(2)(A) or

[23] Country Credit requested the Debtor's most recent pay stub, which he provided by submitting his September 14, 2012, pay stub to Country Credit. (Bankr. Ct. Op. at 13).

(B).[24] Section 523(a)(2)(B) requires an intent to deceive; therefore, Country Credit should have conducted an investigation into the Debtor's intent before pursuing the Adversary. As the Court noted in the Bankruptcy Court Opinion, the Debtor's representation to Country Credit that he had no dependents was "consistent with the information he provided in the tax returns." (Bankr. Ct. Op. at 7). "The Debtor claimed no dependents on his tax returns in 2011 (Debtor Ex. 7) and 2012 (Debtor Ex. 5). These years, respectively, are the year before, and the year of the Application." (*Id.*). The Court held that the Debtor's tax returns complied with the Internal Revenue Code provisions allowing only the parent whom the child resides for the longest period of time to claim that child as a dependent. (*Id.*). An investigation into the Debtor's background, tax returns, and child support prior to filing the Adversary would have revealed this information;[25] however, there is no evidence that Country Credit ever requested supporting documentation.

Additionally, Country Credit should have known that it is common for individuals to define the term "dependent" in light of dependents for tax return purposes. Further, the Application was ambiguous so that the Debtor's indication that he did not owe domestic support or child support was not intentional. "Country Credit had every opportunity to ask the Debtor outright, 'Do you pay child support?' but did not. Instead, every mention of 'child support' is preceded by a qualifying term such as 'debt' or 'family financial issues.'" (Bankr. Ct. Op. at 18). The Court found that these ambiguities indicated that the Debtor lacked the intent to deceive.

[24] As discussed fully herein, Country Credit abandoned its § 523(a)(2)(A) argument after the Trial. However, it did pursue its nondischargeability action under § 523(a)(2)(B).

[25] Country Credit could have obtained this information by attending the first meeting of creditors or conducting an examination of the Debtor pursuant to Rule 2004. These are both tools that were available to Country Credit prior to filing the Adversary.

"[I]t would not have been burdensome or unduly expensive for Country Credit to have provided better-defined terms. Because Country Credit did not do so, any 'misinterpretation is at least partly attributable to underlying faults in the . . . form[s].'" (*Id.*) (citations omitted). As the District Court recognized, Country Credit engages in an "ambiguous approval process," which indicated that the Debtor's acts were not intentional. (Dist. Ct. Order at 6). Because Country Credit presented no facts to indicate that the Debtor intended to deceive it, it had no reasonable basis in fact for initiating the Adversary.

B. No Reasonable Basis for Legal Theories

Country Credit pursued causes of action under both § 523(a)(2)(A) and (B) at the Trial. It subsequently abandoned its § 523(a)(2)(A) claim after the Trial, conceding that it did not have the evidence to prove that claim. (Country Credit Br. at 1). Even if Country Credit had not abandoned its § 523(a)(2)(A) claim, however, the Court found that it had no merit. (Bankr. Ct. Op. at 6-8).

At the Hearing, Buchanan repeatedly emphasized that the Court found in Country Credit's favor on four (4) out of five (5) elements of § 523(a)(2)(B), but the fact that four (4) out of (5) elements were satisfied does not make a legal theory reasonable. In fact, if there are five (5) elements and one (1) element is clearly not satisfied, the legal theory is flawed. As Country Credit correctly noted in its Response, § 523(a)(2)(B) requires proof of five (5) *elements,* which means that unless all five (5) elements are satisfied, the debt is dischargeable. Whether the Court found that Country Credit proved four (4) elements or zero (0) is irrelevant because if any of the five (5) elements is lacking, Country Credit fails to meet its burden. The Court held in the Bankruptcy Court Opinion that Country Credit failed to prove the fifth element, intent, noting that when "in circumstances such as these, where the question is a close one, courts generally

determine that the debt is dischargeable." (Bankr. Ct. Op. at 19) (quoting *Fraser v. Fraser*, 196 B.R. 371, 374 (E.D. Tex. 1996)). Likewise, the District Court held in the District Court Order that Country Credit failed to meet the final element, agreeing with this Court that when a dischargeability determination is a close call, courts rule in favor of discharging the debt. (District Court Order at 4).

Also at the Hearing, Buchanan consistently asserted that the determination of the dischargeability of the Loan was a "close one." Counsel for Country Credit misses the essential point. As a general rule, exceptions to discharge must be strictly construed against the creditor because of the Bankruptcy Code's fresh start policy. The law is well settled that "exceptions to discharge must be strictly construed against the creditor and liberally construed in favor of the debtor." *Country Credit, LLC v. Kornegay (In re Kornegay),* Adv. No. 11-00042-KMS, 2012 WL 930818, at *3 (Bankr. S.D. Miss. Mar. 19, 2012) (citing *Lanier v. Futch (In re Futch),* Adv. No. 09-00144-NPO, 2011 WL 576071, at *16 (Bankr. S.D. Miss. Feb. 4, 2011)); *see Fezler v. Davis (In re Davis),* 194 F.3d 570, 573 (5th Cir. 1999); *Hudson v. Raggio & Raggio, Inc. (In re Hudson*), 107 F.3d 355, 356 (5th Cir. 1997); *Mammel v. Pierce (In re Pierce),* Adv. No. 10-3408, 2011 WL 2312037, at *1 (Bankr. N.D. Tex. June 10, 2011). The Fifth Circuit has held that the rationale behind reading the nondischargeability provisions narrowly "is to help preserve the Code's basic policy of giving an honest debtor a fresh start." *Jordan v. Se. Nat'l Bank (In re Jordan),* 927 F.2d 221, 224 (5th Cir. 1991) (*overruled in part by Coston v. Bank of Malvern (In re Coston),* 991 F.2d 257 (5th Cir. 1993)) (quotations omitted).

As the bankruptcy court found in *In re Young,* the Court is only required to determine that Country Credit "proceeded past a point where it knew, or should have known, that it could not carry its burden of proof." *In re Young,* 424 B.R. at 819. The Court finds that Country

Credit knew it had to satisfy five (5) elements and that the dischargeability exceptions are construed against it. Thus, it proceeded past a point where it should have known it could not carry its burden of proof.

C. Additional Evidence of Lack of Justification

In addition to finding that Country Credit did not have a reasonable basis in law or fact to the initiate the Adversary, the Court finds that the following facts indicate that Country Credit's position was not substantially justified.

1. Proportionality

The underlying debt was approximately $1,200.00. Not only was the debt for a nominal amount, but the Debtor proposed to pay Country Credit *in full* through the Plan. Notwithstanding the fact that it would be repaid in full through the Plan, Country Credit initiated the Adversary, appealed to the District Court, appealed to the Fifth Circuit, and requested oral argument at the Fifth Circuit, maximizing the amount of attorneys' fees incurred by both the Debtor and Country Credit to the fullest extent possible. While Buchanan may be correct in noting that Country Credit did have a right to appeal, that fact does not alter the reality that Country Credit's actions were disproportionate to the amount of the debt and that it forced the Debtor, an individual *in bankruptcy*, to incur $45,651.72 in attorneys' fees. Had the Debtor chosen to submit to Country Credit's pressure rather than defending the Adversary, he would have been forced to settle the Adversary, which this Court, the District Court, and the Fifth Circuit all determined failed. The fact that Country Credit pursued its claim in such a disproportionate nature raises a question of whether the Adversary was even filed in good faith. The Court has given great consideration to the rationale behind Country Credit's decision to go

to extreme lengths to have the Loan determined nondischargeable when it would have been paid in full through the Plan. This consideration is an overriding theme throughout this Opinion.

The purpose of § 523(d) was to prevent creditors, like Country Credit, from pressuring anxious debtors into settling nondischargeability actions in order to avoid paying attorneys' fees they cannot afford. As previously mentioned, many courts have recognized that § 523(d) was "enacted to discourage creditors from filing § 523(a)(2) complaints without first carefully reviewing the legal and factual bases for their fraud-based nondischargeability claims." *Stine v. Flynn (In re Stine),* 254 B.R. 244 (9th Cir. 2000); *see also Bridgewater Credit Union v. McCarthy (In re McCarthy*), 243 B.R. 203, 208 (B.A.P. 1st Cir. 2000); *Carthage Bank v. Kirkland*, 121 B.R. 496 (S.D. Miss. 1990); *FIA Card Servs., N.A. v. Conant (In re Conant),* 464 B.R. 511 (Bankr. D. Mass. 2012). "Congress was concerned that, absent the meaningful possibility that a successful defending debtor would be awarded his or her fees and costs, unscrupulous or inconsiderate creditors might file iffy actions willy-nilly, betting that their financially strapped consumer debtors would settle to avoid defense costs." *In re McCarthy,* 243 B.R. at 208. Thus, the "substantial justification standard balances legislative solicitude for the honest debtor's plight against the risk that imposing the expense of the debtor's attorney's fees and costs on the creditor may chill creditor efforts to have debts that were procured through fraud declared nondischargeable." *Id.*

Based on the facts of the Adversary and the disproportionate nature of Country Credit's actions, it appears that this is exactly the type of case § 523(d) was designed to protect debtors against. In consideration of Congress' intent to prevent abuse and the risk of chilling lending, the Court finds that this is a prime example of the type of situation Congress contemplated when it enacted § 523(d): a creditor who initiates an adversary against a debtor who proposed to repay

a $1,200.00 debt in full through a chapter 13 plan and then appeals a dischargeability decision all the way to the Fifth Circuit.

2. Abandonment of Claim

Country Credit originally argued that the Loan was nondischargeable under § 523(a)(2)(A) and (B). (Compl. at 1). In the Pre-Trial Order (Adv. Dkt. 23) submitted by the parties prior to the Trial, Country Credit continued to pursue its theory under both § 523(a)(2)(A) and (B). (PTO at 3). Thus, the Debtor's attorneys had to prepare to defend two (2) separate legal theories prior to the Trial. Country Credit continued to argue that the Loan was nondischargeable under § 523(a)(2)(A) and (B) at the Trial, requiring the Debtor to put forth evidence and testimony to defend himself against both theories. At the end of the Trial, Simpson was asked whether he believed that Country Credit had a basis to pursue nondischargeability under both § 523(a)(2)(A) and (B) based on the evidence presented at Trial. Simpson reiterated Country Credit's position that it was seeking nondischargeability under both provisions. The Court allowed the parties twenty-one (21) days in which to review the evidence and submit briefs regarding the applicability of § 523(a)(2)(A) and (B).

In the Country Credit Brief, Country Credit stated that it changed its position, concluding that it "does not contend that the record establishes that the note was procured by a misrepresentation other than a statement respecting the debtor's financial condition." (Country Credit Br. at 1). Thus, after a pre-trial order and a full trial, Country Credit acknowledged that it was not substantially justified in bringing a nondischargeability action under § 523(a)(2)(A). In the Bankruptcy Court Opinion, the Court noted that Country Credit argued before and during the Trial that the Debtor made a misrepresentation under § 523(a)(2)(A) by claiming that he had no dependents even though he had six (6) children. (Bankr. Ct. Op. at 3 n.3). Country Credit

eventually abandoned this argument after the Trial, "conceding that all of the Debtor's alleged misrepresentations 'respected the debtor's financial condition.'" (*Id.*). When Country Credit proceeded under § 523(a)(2)(A) despite its lack of substantial justification, it forced the Debtor's attorneys to incur additional fees in preparing to defend against two (2) legal theories rather than just one (1). Now, Country Credit does not want the Debtor's attorneys to be paid for that work. Although Buchanan argued that Country Credit's abandonment of one (1) legal theory after the Trial did not mean that it was not substantially justified in bringing a nondischargeability action under § 523(a)(2)(B), the Court finds this fact to be relevant to its determination that Country Credit was not substantially justified in initiating the Adversary in the first place.

II. No Special Circumstances

In addition to the "substantial justification" standard derived from the EAJA, § 523(d) added the "special circumstances" provision that allows the Court to decline to award attorneys' fees and/or costs if the award would be unjust. 4 COLLIER ON BANKRUPTCY ¶ 523.08[8]. "If the creditor has a sound case, acts in good faith, and has not been guilty of abusive practices in obtaining a false statement, the court is permitted to deny judgment for costs and attorney's fees even though the debtor may ultimately prevail at trial." *Id.*

In *Universal Card Services Corp. v. Akins (In re Akins)*, 235 B.R. 866 (Bankr. W.D. Tex. 1999), the bankruptcy court held that the creditor's position was not substantially justified and that no facts existed to establish special circumstances that would make an award of attorneys' fees unjust. The credit card company in *In re Akins* repeatedly encouraged and enticed the debtor to use her credit card, despite her reluctance to do so. *Id.* at 869-70. When the debtor filed for bankruptcy, the credit card company sued her, arguing that her credit card debt was nondischargeable. *Id.* at 871. The bankruptcy court held that the creditor's § 523 action

constituted "nothing more than persecuting an unfortunate honest debtor and blaming that debtor for [its] own casual and inadequate lending practices." *Id.* at 876 (quotations omitted).

Similarly, Country Credit is attempting to persecute the Debtor, who proposed to repay the debt in full through the Plan, and to blame him for its own lending practices, which the Court and the District Court agreed are ambiguous. The Court finds that there are no special circumstances that would make the award of attorneys' fees unjust. Country Credit offered no justification in the pleadings for a finding of special circumstances, and Buchanan offered none at the Hearing. Accordingly, the Court finds that Country Credit's position was not substantially justified and no special circumstances exist so that an award of attorneys' fees would be unjust. The Debtor is therefore entitled to reasonable attorneys' fees incurred in defending the Adversary. Next, the Court will determine whether § 523(d) entitles the Debtor to attorneys' fees incurred on appeal.

III. Appeal

After the Debtor filed the First Motion for Fees, the Court entered the Abeyance Order holding the issue in abeyance until the appellate courts' resolution of the Adversary. Under § 523(d), Country Credit must prove "that it acted reasonably at all stages of litigation." *Davidson v. Veneman,* 317 F.3d 503, 506 (5th Cir. 2003) (applying the substantial justification standard to the EAJA). In determining whether Country Credit's decision to appeal to the District Court and then to the Fifth Circuit was substantially justified, "the Court must 'view the events as they occurred rather than with the benefit of hindsight.'" *Rothe Dev. Corp. v. U.S. Dept. of Def.,* No. SA-98-CA-1011-XR, 2009 WL 2496734, at *2 (W.D. Tex. Aug. 11, 2009) (quoting *Morris Mech. Enters., Inc. v. United States,* 728 F.2d 497, 499 (Fed. Cir. 1984)). The

Court will first determine whether § 523(d) authorizes it to award attorneys' fees on appeal and, if it does, whether the Debtor has proved that he is entitled to such an award.

A. Fees Incurred on Appeal Authorized by § 523(d)

There is a split of authority regarding a debtor's entitlement to attorneys' fees and costs incurred on appeal. *See Discover Bank v. Warren (In re Warren)*, 507 B.R. 885, 896 (Bankr. D.S.C. 2014) ("Courts are divided on the issue of whether bankruptcy courts have authority under section 523(d) to award attorney fees incurred on appeal."). The Debtor cited cases holding that § 523(d) authorizes bankruptcy courts to award attorneys' fees and costs incurred on appeal while Country Credit cited cases holding the opposite, highlighting the split of authority on the issue. The award of fees and costs incurred on appeal under § 523(d) is an issue of first impression in this Court.

1. Debtor's Supporting Authority

In the Debtor's Rebuttal, the Debtor cited *Morrissey v. Wiencek (In re Wiencek)*, 58 B.R. 485 (Bankr. E.D. Va. 1986) to support his position that § 523(d) authorizes him to receive attorneys' fees incurred on appeal. In *In re Wiencek*, the bankruptcy court concluded that "absent an overriding expression of Congressional intent, the policy of the Bankruptcy Code demands that this Court read section 523(d) as mandating an award of fees for appellate representation." *Id.* at 488. The debtor in *In re Wiencek* received a discharge, and a plaintiff's attorney who had previously represented him in a personal injury matter initiated an adversary, alleging that the debt was nondischargeable under § 523(a)(2)(A) and/or (B). *Id.* at 486. The bankruptcy court found that the plaintiff's § 523(a)(2)(A) claim lacked merit and dismissed his § 523(a)(2)(B) claim because the debtor's statements did not concern his financial condition. *Id.* The bankruptcy court subsequently granted the debtor's motion for fees under § 523(d), and the

plaintiff appealed the finding of dischargeability and the award of attorneys' fees. *Id.* The district court affirmed the dischargeability ruling, which the Fourth Circuit Court of Appeals subsequently affirmed *per curiam,* but remanded the determination of attorneys' fees for the bankruptcy court to make findings as to the reasonableness of the fees. *Id.*

The bankruptcy court in *In re Wiencek* noted that "Courts have the inherent equitable power to award attorney's fees, unless forbidden by statute to do so." *Id.* at 487 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 258 (1975)). "In general, absent an authorizing statute or an agreement providing for a fee award, courts adhere to the 'American Rule' and decline to award fees unless the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* (citing *Alyeska Pipeline Serv. Co.,* 421 U.S. at 258). Against the backdrop of the United States Supreme Court's precedent, the bankruptcy court was tasked with determining whether § 523(d) authorizes bankruptcy courts to award fees charged for appellate representation. *Id.* The bankruptcy court examined the more restrictive view of § 523(d)—that § 523(d) only allows debtors to recover fees incurred as a direct result of litigating the dischargeability dispute, but it adopted the more expansive view of § 523(d)—that it "confers upon the Court the power to grant attorney's fees for representation during the entire course of a dischargeability dispute." *Id.*

The rationale behind the enactment of § 523(d) was instrumental in the bankruptcy court's allowance of attorneys' fees and costs incurred on appeal, and the bankruptcy court noted that § 523(d) was designed to protect debtors against abuse that can continue throughout the appeals process, necessitating the application of § 523(d) to appellate fees and costs. *Id.* "Pursuit of a claim through the appeals process is nearly as potent as a financial threat as the initial filing and trying of the claim. Although it may be argued that the pressure on a debtor to

settle the creditor's claim eases once the debtor has received a favorable ruling in the Bankruptcy Court, an examination of the fees on this appeal urges a different conclusion." *Id.* at 487-88. In *In re Wiencek,* the bankruptcy court concluded that in light of the intent behind § 523(d), the facts of the case warranted the allowance of appellate fees and costs. *Id.* at 488.

The bankruptcy court in *In re Wiencek* also found instructive the Bankruptcy Code's "fresh start" principle, and concluded that § 523(d) is consistent with that purpose. *Id.* "It is axiomatic that the general purpose of bankruptcy legislation is to rehabilitate the bankrupt debtor by discharging his debts and affording him a fresh financial start. Accordingly, courts must resolve any ambiguity in the Bankruptcy Code in favor of the debtor." *Id.* (citing *Wright v. Union Central Life Ins. Co.,* 311 U.S. 273, 279 (1940)). Thus, as this Court has previously noted, exceptions to this policy, "including the exceptions to discharge codified in section 523, are to be strictly construed against the objecting creditor." *Id.* The bankruptcy court therefore concluded that "it is consistent with the remedial purpose of the Code to adopt the [expansive] construction of section 523(d). Relief from fees for appellate representation is as significant an element of a debtor's fresh start as is relief from the initial costs of defense." *Id.* Accordingly, "absent an overriding expression of Congressional intent, the policy of the Bankruptcy Code demands that this Court read section 523(d) as mandating an award of fees for appellate representation." *Id.* Not only did the bankruptcy court conclude that the expansive view of § 523(d) was required by the purpose of the Bankruptcy Code, it also concluded that the narrow view proposed by Country Credit "does significant violence to the remedial purpose of the Code, for it renders section 523(d) incapable of preventing the harm with which Congress was concerned." *Id.*

2. Country Credit's Supporting Authority

Country Credit argued in the Response that § 523(d) "only expressly authorizes fees related to the litigation of the dischargeability of debt before the bankruptcy court." (Resp. at 10). Country Credit's position is that the Debtor's request for attorneys' fees incurred in defending the appeals "should be made to the appellate court." (*Id.*). In support of its position, Country Credit cited cases in which an initial determination of attorney's fees and costs had already been made. In those cases, the debtor already had been awarded fees under § 523(d), the creditor subsequently appealed, and, at the conclusion of appellate litigation, the debtor filed a second § 523(d) motion for fees incurred on appeal. In those cases, the debtors moved for attorneys' fees and costs incurred as a result of defending an appeal of the bankruptcy court's § 523(d) determination. In the Adversary, the Court held in abeyance the determination of attorneys' fees and costs, meaning that no § 523(d) determination has been made.[26]

In *Vasseli v. Wells Fargo Bank, Nat'l Ass'n (In re Vasseli)*, 5 F.3d 351, 354 (9th Cir. 1993), the Ninth Circuit Court of Appeals held that under Federal Rule of Appellate Procedure 38, "any fee request for attorney's fees incurred by a prevailing party must be made to the appellate court. Section 523(d) does not give a bankruptcy court the power to award attorney's fees incurred on appeal." The bankruptcy court awarded appellate attorneys' fees to the debtors under § 523(d), but the Bankruptcy Appellate Panel (the "BAP") reversed its decision. *Id.* The Ninth Circuit affirmed the BAP, concluding that the debtors should have applied to the district court for fees and costs incurred on appeal, not the bankruptcy court. *Id.* at 353. In *In re Vasseli*, Wells Fargo brought an adversary seeking a determination that the debt was nondischargeable,

[26] The procedural posture of the Adversary is distinguishable from those cases in which attorneys' fees incurred on appeal were not permitted. Here, the Court entered the Abeyance Order, reserving the issue of attorneys' fees under § 523(d) until resolution of the appeals. Thus, unlike in the cases cited by Country Credit, there was no appeal of a § 523(d) determination.

but the bankruptcy court granted summary judgment against it and awarded the debtors $1,000.00 in attorneys' fees. *Id.* at 352. After the debtors successfully defended Wells Fargo's appeal, the bankruptcy court awarded an additional $3,719.25 for fees incurred on appeal. *Id.* Thus, the bankruptcy court in *In re Vasseli* awarded attorneys' fees and costs in two (2) separate judgments. The Ninth Circuit, citing *In re Vasseli,* again held that the debtors should have applied to the district court for fees and costs incurred on appeal. *Cal. Emp't Dev. Dept. v. Taxel (In re Del Mission Ltd.),* 98 F.3d 1147 (9th Cir. 1996). The Ninth Circuit concluded that "[i]n accord with *Vasseli,* we . . . hold that the only authority for awarding discretionary appellate fees in bankruptcy appeals is Rule 38." *Id.* at 1154.

Also citing *In re Vasseli,* the BAP in *AT&T Universal Card Services Corp. v. Williams (In re Williams),* 224 B.R. 523, 533 (B.A.P. 2d Cir. 1998) determined that the prevailing debtor could not obtain attorneys' fees and costs incurred on appeal. In *In re Williams,* after the debtor filed for bankruptcy, AT&T sued her to declare that her credit card debt was nondischargeable under § 523(a)(2)(A). *Id.* at 526-27. The bankruptcy court found that the debt was dischargeable, AT&T did not appeal, and the bankruptcy court awarded the debtor attorneys' fees under § 523(d). *Id.* at 527. AT&T appealed the bankruptcy court's § 523(d) award of attorneys' fees. *Id.* After the appeal was litigated, the Debtor requested an award of attorneys' fees and costs incurred in defending the appeal. *Id.* at 532. The BAP held that "Code § 523(d) alone does not authorize the Bankruptcy Court to award attorneys' fees for appellate representation." *Id.* (*citing In re Vasseli,* 5 F.3d at 351; *In re Del Mission Ltd.,* 98 F.3d at 1147)). Accordingly, the debtor was not entitled to fees incurred on appeal. Like *In re Vasseli, In re Williams* involved two (2) separate awards of attorneys' fees: one for pre-appeal litigation and one for appellate litigation.

3. Section 523(d) Authorizes Award of Appellate Fees

Having considered the cases cited by the parties and others from its independent research, the Court concludes that the expansive view of fees and costs incurred on appeal is the correct standard in light of the purposes behind § 523(d) and the Bankruptcy Code. As the bankruptcy court accurately noted in *In re Wincek*, the reason § 523(d) was enacted was to discourage creditors from bringing objectively weak false financial statement exception litigation in the hopes of extracting a settlement from a debtor anxious to avoid paying attorney's fees to defend the action. Because the threat of creditors bringing weak or false claims against destitute debtors continues throughout the appeals process, the Court finds that in order to exact Congress' purpose, § 523(d) must be construed to apply to appellate fees under the facts of the Adversary.

Country Credit's pursuit of its claim all the way to the Fifth Circuit is "nearly as potent," if not as potent, "as a financial threat as the initial filing and trying of the claim. Although it may be argued that the pressure on a debtor to settle the creditor's claim eases once the debtor has received a favorable ruling in the Bankruptcy Court, an examination of the fees on this appeal urges a different conclusion." *In re Wincek*, 58 B.R. at 488. As the Court has repeatedly noted, Country Credit initiated the Adversary based on a $1,200.00 debt it would have been paid in full through the Plan. Country Credit proceeded to Trial, where it forced the Debtor to prepare for two (2) legal theories only to abandon one of the claims at the conclusion of the Trial. Not to be deterred, Country Credit appealed to the District Court and then to the Fifth Circuit, forcing the Debtor to incur a significant amount of legal fees and expenses. This is the epitome of the type of case § 523(d) was designed to protect debtors against. Declining to apply § 523(d) under the facts of the Adversary would have the opposite result of what Congress intended. It would ratify the practice of Country Credit, and lenders like it, of forcing debtors to defend meritless

adversaries and appeals. Additionally, forcing debtors to incur significant fees and expenses on appeal compromises the overriding purpose of the Bankruptcy Code: to give the "honest but unfortunate debtor" an opportunity to receive a financial fresh start. *Grogan v. Garner,* 498 U.S. 279, 287 (1991).

The Court is cognizant that other courts have held that § 523(d) does not authorize appellate fees and expenses; however, the facts of those cases are distinguishable and the Court is unable to follow those court's conclusion in light of the clear purpose of § 523(d) and the Bankruptcy Code. The debtors in all of the cases cited by Country Credit had already been awarded attorneys' fees and costs incurred in defending the initial nondischargeability claim. The bankruptcy courts in those cases did not allow the debtors to recover fees incurred as a result of defending an appeal of the initial § 523(d) determination. Here, the Court entered the Abeyance Order, holding the issue of attorneys' fees and costs in abeyance pending the appeal, meaning that, to date, the Debtor's attorneys have been paid $0 for work performed over three (3) years. Unlike in the aforementioned cases, this Court had not yet made a § 523(d) determination for Country Credit to appeal.

Country Credit argued that the attorneys' fees the Debtor incurred in defending its appeal "should be made to the appellate court." (Resp. at 10). The Court finds, however, that § 523(d) authorizes it to determine fees and costs incurred on appeal. To hold otherwise would frustrate the purpose of § 523(d) and the Bankruptcy Code. The Court will not allow Country Credit to circumvent those purposes by requiring the Debtor to return to the appellate courts to incur even more fees and costs in order to obtain the legal fees and costs to which he is entitled. Having determined that § 523(d) authorizes the award of attorneys' fees incurred on appeal, the Court will determine whether the Debtor is entitled to payment of his appellate fees.

B. Debtor Entitled to Fees Incurred on Appeal

As the Court has already determined, Country Credit was not substantially justified in initiating the Adversary. Thus, it follows that it was not substantially justified in appealing the Bankruptcy Court Opinion to the District Court and then to the Fifth Circuit. For the reasons set forth below, the Court finds that Country Credit was not substantially justified in appealing to either the District Court or the Fifth Circuit,[27] which entitles the Debtor to fees incurred on appeal. Additionally, no special circumstances exist that would make the award of attorneys' fees unjust.[28]

1. Standard of Review

That Country Credit was not substantially justified in appealing the Bankruptcy Court Opinion is evidenced by its consistent referral to this Court's and the District Court's opinions as a "close call." As Country Credit should be aware, when an issue is a "close call," deference is given to the trial court. The District Court noted in the District Court Order that in regard to contract interpretation, this Court's "findings of fact as to the intent of the parties are reviewed for clear error." (District Ct. Order at 2) (citing *McLane Foodservice Inc., v. Table Rock Restaurants, L.L.C.*, 736 F.3d 375, 377 (5th Cir. 2013)). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (*Id.*) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[27] See *infra* section I.C.1. When the Court ruled in the Debtor's favor, Country Credit appealed to the District Court and then to the Fifth Circuit. The fees incurred by both parties and the judicial resources expended to litigate a $1,200.00 debt Country Credit would have been paid in full through the Plan are extremely disproportionate.

[28] See *infra* Section II.

Because Country Credit repeatedly acknowledged that the question of the Debtor's intent was a close call, she knew that the Court did not make a clear error in finding that the debt was dischargeable. The District Court agreed, holding that the Court committed no clear error in finding that the Loan was dischargeable. In fact, in regard to the Court's finding that Country Credit failed to meet its burden to prove that the Debtor had the intent to deceive, the District Court found that the Court's "findings were supported by substantial evidence." (Dist. Ct. Order at 5). After considering the parties' appellate briefs and after hearing oral argument, the Fifth Circuit affirmed in a two-page order. In light of the precedent and knowing the standard of review, the Fifth Circuit held that "the bankruptcy court did not err when it determined that [the Debtor's] debt, acquired through a payday loan from Country Credit, L.L.C., is dischargeable." (Fifth Cir. Order at 2). Had the Fifth Circuit believed that the appeal was a close call, it would have taken more than four (4) sentences to affirm the Court and the District Court.

In sum, knowing the standard of review, Country Credit should have known that deference would be given to the Court and that the Bankruptcy Court Opinion would be affirmed. The Court does not have to determine that Country Credit acted in bad faith or frivolously to find that the Debtor is entitled to appellate attorneys' fees. It is only required to find that Country Credit proceeded past a point where it should have known that it could not carry its burden of proof. *In re Young*, 424 B.R. at 819. Knowing that the standard of review on appeal was for "clear error," when Country Credit appealed to the District Court and to the Fifth Circuit, it proceeded past a point where it should have known it would lose. Accordingly, Country Credit was not substantially justified in appealing a decision that was clearly within the Court's sound discretion.

2. Goss's and Eubanks's Ethical Duties

At the Hearing, Buchanan stated that Goss and Eubanks were not "forced" to represent the Debtor on appeal or to attend the Fifth Circuit oral argument. (Hr'g at 10:30:35). According to Buchanan, "Goss [] represented Mr. Martin in the Bankruptcy and proceeded to represent him with the Adversary case before this Court then *chose* to continue to represent Mr. Martin in the appeals." (Hr'g at 10:32:30). Obviously Country Credit would have preferred the Debtor's attorneys to stay home so that the Debtor's interests would be unrepresented at the Fifth Circuit, but such action is not permitted by the ethical obligations placed upon an attorney. Goss and Eubanks were ethically obligated to represent the Debtor on appeal based on the facts presented and, had they "chosen" not to represent the Debtor, they would have violated the Mississippi Rules of Professional Conduct. The Preamble to the Mississippi Rules of Professional Conduct states that "[a]s an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MISS. RULES OF PROF'L CONDUCT, Preamble: A Lawyer's Responsibilities. Specifically, Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." MISS. RULE OF PROF'L CONDUCT, 1.3. According to the official Comment to Rule 1.3, a lawyer is expected to "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience . . . ." MISS. RULE OF PROF'L CONDUCT, Rule 1.3 cmt. Further, unless the attorney-client relationship is terminated pursuant to Rule 1.16, "a lawyer should carry through to conclusion all matters undertaken for a client." *Id.*

Accordingly, the Court finds under the facts that Goss and Eubanks were ethically obligated to represent the Debtor throughout the entire pendency of the Adversary, including on appeal. Because the Mississippi Rules of Professional Conduct require competence, diligence, and zealous advocacy, they employed Harris, an experienced appellate attorney who

significantly reduced his rate, to assist them in representing the Debtor in the Fifth Circuit. The Court finds that by employing Harris, Goss and Eubanks were exercising their ethical obligations to represent the Debtor zealously and diligently. The Debtor's attorneys are entitled to receive payment for the work they performed.

3. Rationale behind § 523(d)

As the Supreme Court noted in *Alyeska Pipeline,* departure from the "American Rule" is warranted when the losing party acts for oppressive reasons. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 258. The Court has repeatedly mentioned throughout this Opinion that it appears Country Credit is conducting itself in a way designed to discourage debtors from availing themselves of the Bankruptcy Code. Not only did Country Credit initiate the Adversary against the Debtor, who would have paid the $1,200.00 debt in full through the Plan, it also appears to be discouraging debtors from seeking representation to defend appeals. According to Buchanan, the Debtor should be responsible for the attorneys' fees he incurred as a result of Country Credit's appeal, in part, because his attorneys chose to fulfill their ethical obligation to represent him on appeal. Ultimately, Country Credit conducted itself and litigated the Adversary and appeals in the most expensive way possible to obtain payment of $1,200.00, which it would have been paid in full through the Plan. Then, Country Credit disputed the fees it forced the Debtor to incur, requiring the Debtor to incur even more litigation fees. A debtor lacking a zealous attorney may submit to Country Credit's demands in order to avoid legal expenses, but a debtor who is able to successfully defend a nondischargeability action lacking substantial justification is entitled to attorneys' fees and costs under § 523(d). Such a ruling upholds the rationale of both § 523(d) and the fresh start policy of the Bankruptcy Code.

IV. Amount of Attorneys' Fees

Having found that the Debtor is entitled to attorneys' fees incurred in defending the initial § 523(a)(2) action and the appeals, the Court concludes that the fees claimed by the Debtor in the Motion are exceptionally reasonable. In fact, as Goss testified at the Hearing, he did not charge for at least forty (40) hours of work he performed, and reduced his hourly rate when he saw the total and believed it to be unreasonable. Additionally, Harris charged a flat rate of $5,000, even though he conducted forty-eight (48) hours of work on the Fifth Circuit appeal, which would have entitled him to a $12,000.00 fee under a reduced hourly rate of $250.00. It is clear that the Debtor's attorneys went above and beyond to ensure that their fee on all levels in the Adversary was reasonable.

According to the Motion, the Debtor incurred $45,651.72 in attorneys' fees in the Bankruptcy Court, the District Court, and the Fifth Circuit. In the First Motion for Fees, the Debtor requested attorneys' fees of $15,708.35. In the Motion, which was filed after the litigation of the appeals in the District Court and the Fifth Circuit, he claimed fees of $45,651.72, indicating that $29,943.37 was incurred during the appellate process. Country Credit made limited objections to the reasonableness of the Debtor's requested fee, arguing that the Debtor did not submit an itemization for Harris's work and that two (2) attorneys attended the Fifth Circuit oral argument. The Debtor subsequently submitted the Harris Affidavit, rendering Country Credit's argument that Harris did not submit an itemization moot. Additionally, as the Court has discussed and will discuss more fully below, the fact that two (2) attorneys attended a Fifth Circuit oral argument was reasonable and appropriate under the circumstances of the

Adversary and the time billed was also reasonable and appropriate.[29] Country Credit did not otherwise argue that the Debtor's requested fee is unreasonable; rather, its argument hinged on its position that the Debtor is not entitled to attorneys' fees incurred on appeal. (Resp. at 10). The Court has already determined that § 523(d) authorizes it to award attorneys' fees and expenses incurred on appeal under the facts of the Adversary; therefore, that argument is now moot.

Having considered the Goss Affidavit, the Eubanks Affidavit, the Itemization, the Harris Affidavit, and the Harris Itemization, the Court finds that the total fees charged by Goss, Eubanks, and Harris are reasonable, and the Debtor is entitled to payment of $45,651.72 in attorneys' fees and expenses. The "reasonableness factors," otherwise known as the "*Johnson* factors," articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), demonstrate the reasonableness of the overall fees the Debtor incurred in defending and litigating the repayment of a $1,200.00 debt he would have repaid in full through the Plan.

A. Time and Labor Required

"[H]ours claimed or spent on a case should not be the sole basis for determining a fee, [but] they are a necessary ingredient to be considered." *Johnson*, 488 F.2d at 717 (citing *Electronics Cap. Corp. v. Sheperd*, 439 F.2d 692 (5th Cir. 1971)). The bankruptcy judge "should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activity." *Id.* Of particular relevance in the Adversary is that when more than one attorney is employed, "the possibility of duplication of effort along with the

[29] Despite reiterating Country Credit's argument that it was unreasonable for the Debtor to send two (2) attorneys to the Fifth Circuit oral argument and bill for both of their times, Buchanan conceded at the Hearing that Country Credit also sent two (2) attorneys to represent it at the Fifth Circuit oral argument. (Hr'g at 10:29:58).

proper utilization of time should be scrutinized." *Id.* "The time of two or three lawyers in a courtroom . . . when one would do, may obviously be discounted." *Id.*

In consideration of the Goss Affidavit and the Eubanks Affidavit, the Court finds that the Debtor was represented by attorneys highly experienced in bankruptcy law. Goss and Eubanks were clearly competent to represent the Debtor. Goss testified that they were careful not to duplicate work, and after reviewing the Itemization, the Court finds that this contention is true. Goss and Eubanks were required to spend a significant amount of time preparing for Trial, which included preparing to defend two (2) legal theories even though Country Credit later acknowledged only one (1) had potential merit, and then defend appeals to both the District Court and the Fifth Circuit. In the Court's experience and to its knowledge, litigating an issue all the way to the Fifth Circuit required the Debtor's attorneys to reasonably expend the number of hours claimed in the Itemization. Accordingly, the Court finds that the time and labor required by Goss and Eubanks was reasonable.

The Court also finds that it was reasonable for the Debtor to employ Harris in addition to Eubanks to represent him at the Fifth Circuit. Goss was unavailable to attend the Fifth Circuit oral argument and, since he was the attorney who tried the Adversary before this Court, it was reasonable to send two (2) attorneys in his place to ensure that the Debtor was adequately represented. Thus, it was overall reasonable for two (2) attorneys to represent the Debtor on such a big stage, and Country Credit provided no evidence to indicate otherwise. In fact, it also sent two (2) attorneys to represent it at the Fifth Circuit. Accordingly, the Court finds that the time and labor expended by Harris was also reasonable.

B. Novelty and Difficulty of the Questions

The Court is well aware of the facts of the Adversary and agrees with the Debtor that the Adversary "was an extremely contentious case that involved various objections, motions, a trial and subsequent appeals." (Mot. at 4). Defending appeals in the District Court and the Fifth Circuit is not an easy task, and the Debtor's attorneys were forced to engage in a significant amount of litigation. The Court finds that litigating the Adversary was difficult and also contained issues that make the Motion reasonable.

C. Skill Requisite to Perform Legal Service Properly

"The trial judge should closely observe the attorney's work product, his preparation, and general ability before the Court." *Id.* Clearly, the Debtor's attorneys possessed the skills required to properly represent him in the Adversary. The Debtor's attorneys competently represented him throughout pre-trial litigation, at Trial, on appeal, and at the Hearing. Not only did the Debtor's attorneys provide competent representation, but they also were successful in doing so. Litigation of a nondischargeability action, in the Court's experience, requires special knowledge and skill. Additionally, successfully litigating an appeal before the District Court and the Fifth Circuit requires specialized skills. After reviewing the Goss Affidavit, the Eubanks Affidavit, and the Harris Affidavit, it is evident that each of these attorneys possessed the requisite knowledge and skill to represent the Debtor's interest, which is further evidenced by their success.

D. Preclusion of Other Employment

"This guideline involves the dual consideration of otherwise available business which is foreclosed because of . . . the fact that once the employment is undertaken the attorney is not free to use the time spent on the client's behalf for other purposes." *Johnson,* 488 F.2d at 718. As

previously mentioned, the Debtor's attorneys reasonably spent a significant amount of time litigating the Adversary. Presumably, the time and dedication the attorneys spent on the Adversary precluded them from undertaking additional representation they may have undertaken had they not been consumed by the Adversary. Because Country Credit forced the Debtor to litigate "this time consuming matter to the appellate level, all while adhering to numerous deadlines, [the Debtor's attorneys'] attention was devoted exclusively to this case and resulted in [the Debtor's attorneys] not being able to work on other cases that would have normally been worked on." (Mot. at 4-5). The Court finds that the Debtor's attorneys were likely precluded from undertaking other employment due to the time consuming nature of the Adversary, which indicates that the fees are reasonable.

E. Customary Fee

The relevant market for examining the "customary fee" factor is "ordinarily the community in which the court where the action is prosecuted sits." *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994). The Court finds that the hourly rate charged by both Goss and Eubanks was reasonable compared to the rate charged by attorneys of similar knowledge, skill, and experience practicing before the Mississippi Bankruptcy Courts. This is due, in part, to the fact that Goss, although not required to do so, reduced his fee and did not charge for at least forty (40) hours of work he performed. Harris also significantly reduced the fee he charged for representing the Debtor in the Fifth Circuit. Based on the Court's knowledge and its review of rates charged in similar cases, the Court finds that the Debtor's attorneys charged an hourly rate that was customary, or even below the market rate, and reasonable for representing a client's interest all the way to the Fifth Circuit.

F. Fixed or Contingent Fee

The fee requested in the Adversary "is based upon the time expended by [the Debtor's attorneys] at a reasonable hourly rate." (Mot. at 5). As the Court has discussed, the Debtor's attorneys charged a reasonable hourly rate for the work they performed.

G. Time Limitations Imposed by Client or Circumstances

"Priority work that delays the lawyer's other legal work is entitled to some premium." *Johnson,* 488 F.2d at 718. Bankruptcy cases, including the Adversary, are heavily driven by deadlines. The Debtor faced deadlines at the pre-trial, Trial, post-trial, and appellate levels. This precluded the Debtor's attorneys from performing legal work on other cases. As the Court noted, the Debtor's attorneys were precluded from other employment due to the time consuming and detailed nature of the Adversary. Accordingly, the time limitations imposed by the circumstances indicates that the requested fee is reasonable.

H. Amount Involved and Results Obtained

Country Credit forced the Debtor to litigate a $1,200.00 debt all the way to the Fifth Circuit. Not only was the amount of money involved in the Adversary nominal, but Country Credit would have received full repayment through the Plan. The Debtor obtained highly skilled and experienced counsel who dedicated time and energy to the Adversary, including the appeals, and were successful. The Debtor's attorneys were required to put forth maximum effort to defend the Debtor against a nondischargeability claim based on a $1,200.00 debt that would have been paid in full through the Plan. In the end, the Debtor succeeded at all levels, indicating the fee is reasonable.

I. Experience, Reputation, and Ability of Attorneys

Goss and Eubanks often appear before this Court, and the Court is cognizant of their experience, reputation, and ability, which is evidenced by their zealous and vigorous defense of the Debtor's interest. Goss testified that he has been practicing bankruptcy law for twenty-five (25) years and Eubanks has been practicing bankruptcy law for thirteen (13) years. The Goss Affidavit and the Eubanks Affidavit confirm that they were qualified to represent the Debtor's interest in the Adversary. Having reviewed the Harris Affidavit and based on Goss's testimony at the Hearing, the Court finds that Harris's experience, reputation, and ability entitled him to the fee he charged to represent the Debtor at the Fifth Circuit. Accordingly, the Court finds that Goss, Eubanks, and Harris's experience, reputation, and ability indicate that the fee is reasonable.

J. "Undesirability" of the Case

The Court would be pressed to find a more undesirable bankruptcy case than one in which a debtor faces a nondischargeability claim against it for a nominal debt he proposed to pay in full through a chapter 13 plan. Further, when such a nominal debt is appealed to the District Court and then to the Fifth Circuit, the case becomes even more undesirable. Fortunately for the Debtor, Goss, Eubanks, and Harris undertook this representation despite the undesirability of the Adversary. Nondischargeability actions in and of themselves are difficult, time consuming, and require an attorney with specialized knowledge, skill, and experience. Aforementioned ethical considerations aside, had Goss and Eubanks abandoned the Debtor when Country Credit filed the appeal, he would have had a difficult time obtaining new representation to defend the appeals. This further evidences the reasonable nature of the fee requested.

K. Nature and Length of Professional Relationship with Client

When Goss and Eubanks initially undertook representation of the Debtor in the Bankruptcy Case in 2013, they charged the standard "no look" fee of $3,000.00.[30] (Mot. at 6-7). "As a result of Country Credit's decisions to litigate this matter to appeal, [the Debtor] was forced to incur additional fees well in excess of the standard 'no look' fee." (*Id.*). In light of the fact that the Debtor's attorneys have represented him since the Bankruptcy Case in 2013 and throughout the pendency of the Adversary, including the appeals, the Court finds that the fee charged is reasonable.

L. Awards in Similar Cases

As the Court noted in considering the "customary fee" factor, the fee charged by the Debtor's attorneys appears to be low in comparison to fees awarded in similar cases. A case litigated all the way to the Fifth Circuit could reasonably be expected to gross attorneys' fees in excess of $45,651.72. Goss reduced his hourly rate and did not charge for all of the hours he spent working on the Adversary. Additionally, Harris reduced his own hourly rate and agreed to a much lower flat rate fee. Despite the fact that the Debtor's attorneys were not required or obligated to reduce their fees, they did so anyway. The Debtor's attorneys request a modest fee of $45,651.72 for three (3) years of effort. The Court finds that this is a reasonable fee.

Conclusion

Throughout the entirety of this litigation, a staggering amount of judicial resources have been utilized by this Court, the District Court, and the Fifth Circuit, all to entertain Country Credit's claims and appeal revolving around a $1,200.00 debt it would have been paid in full

[30] *See* U.S. Bankruptcy Court for the Southern District of Mississippi, Standing Order Regarding Attorney Fees in Chapter 13 Cases (effective Feb. 1, 2012), *available at* http://www.mssb.uscourts.gov.

through the Plan. As discussed herein, Country Credit's initial dischargeability claim and its subsequent appeals lacked merit. To require the Debtor to file separate fee applications for fees incurred on appeal would require more judicial resources and time, when § 523(d) allows the Court to determine appellate fees at this juncture.

The Court finds that Country Credit was not substantially justified in initiating the Adversary or appealing the Bankruptcy Court Opinion to the District Court and the Fifth Circuit. Country Credit retained bankruptcy attorneys who should have known that exceptions to discharge are narrowly construed against the creditor. Nonetheless, it filed the Adversary, seeking a Court ruling that the $1,200.00 debt the Debtor proposed to pay in full through the Plan was nondischargeable. Country Credit proceeded well past the point where it should have known that it could not carry its burden of proving that the Debtor violated § 523(a)(2)(A) or (B), causing the Debtor to incur nearly $50,000.00 in litigating and wasting a significant amount of judicial resources. Because Country Credit was not substantially justified in initiating the Adversary, the Court concludes that the Debtor is entitled to the attorneys' fees incurred as a result of litigating the Adversary under § 523(d).

The Court also concludes that § 523(d) authorizes the award of appellate attorneys' fees under the facts of the Adversary. The purpose of § 523(d) would be frustrated if the Court were to hold that a debtor cannot recover attorney's fees incurred on appeal when the creditor was not substantially justified in appealing. Country Credit's attorneys should have known that the standard of review on appeal was for clear error, and give their repeated reference to the Bankruptcy Court Opinion as "a close call," it should have known that the Bankruptcy Court Opinion would likely be affirmed. A creditor's pursuit of a claim through the appeals process is as potent a financial threat as the initial filing of and trying of a claim. Additionally, not

allowing a debtor to recover appellate fees under the facts of the Adversary would compromise the Bankruptcy Code's policy of providing an honest but unfortunate debtor with a fresh start. Thus, the Debtor is entitled to the attorneys' fees he incurred on appeal.

After reviewing the Goss Affidavit, the Eubanks Affidavit, the Itemization, the Harris Affidavit, and the Harris Itemization, the Court concludes that the $45,651.72 fee requested by the Debtor is reasonable. Goss reduced his hourly rate in order to make the fee for more reasonable and did not bill for at least forty (40) hours of work he performed in the Adversary. Harris also reduced his rate, charging a flat rate of $5,000.00 to represent the Debtor in the Fifth Circuit. As Goss testified at the Hearing, the Debtor's attorneys also did not charge for expenses or costs. After reviewing and analyzing the *Johnson* factors, the Court concludes that the fee requested by Goss, Eubanks, and Harris is reasonable. Therefore, the Motion should be granted and the Debtor should be awarded attorneys' fees in the amount of $45,651.72.

A separate final judgment consistent with this Opinion and the Bankruptcy Court Opinion will be entered in accordance with Federal Rule of Bankruptcy Procedure 9021.

##END OF OPINION##