UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

In re:

RICHARD SCOTT AUSTIN,

Debtor.

Case No. 03-30970
Chapter 7
Hon. Walter Shapero

_____/

DIANE M. AUSTIN,

Plaintiff,

v.

Adv. Proc. No. 03-3087

RICHARD SCOTT AUSTIN,

Defendant.

_____/

OPINION REGARDING NON-DISCHARGEABILITY OF DEBTS
PURSUANT TO 11 U.S.C. § 523(a)(2)(A) & (a)(15)

In this adversary proceeding, Plaintiff requests a determination that certain joint debts Defendant assumed and agreed to hold Plaintiff harmless on as part of the property settlement reached between them during their divorce proceeding be non-dischargeable debts pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (a)(15).[1] For the reasons set forth below, the Court denies in part and grants in part Plaintiff's request.

This Court has jurisdiction of this adversary proceeding pursuant to 28 U.S.C. § 1334 and by the reference of the Eastern District Court of Michigan pursuant to Local District Court Rule 83.50(a)(1). This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

1. All references to the Bankruptcy Code in this opinion are to the Bankruptcy Code as it existed prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

I. Facts

In the summer of 1998, Plaintiff and Defendant were married. In April 2001, the parties separated and Plaintiff vacated the parties' manufactured home located at 6403 Trillum Court, Burton, Michigan 48509. Defendant continued to reside in the home. With representation by counsel, the parties negotiated a settlement and entered into a settlement agreement (Settlement Agreement) that was incorporated in "by reference and made a part of [their] [j]udgment" of divorce. (Pl.'s Ex. A at 2.) The state court entered the parties' judgment of divorce (Judgment) on December 20, 2002.

The relevant portions of the Settlement Agreement relating to personal property provide that

> [Plaintiff and Defendant] shall have as her/his sole and separate property, free and clear of any claim on the part of the other, the miscellaneous personal property now in her/his possession and she/he shall assume any indebtedness thereon and hold the other harmless therefrom[.]"
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> . . . .
>
> Included in the [Defendant's] personalty are [sic] the manufactured home, titled in the parties' joint names and subject to the indebtedness, including but not limited to the mortgage owing to Greenpoint Credit (which [Defendant] shall immediately refinance in his name only), the lot rent, the homeowner's insurance premiums, and all maintenance and repairs, all of which the [Defendant] shall assume and pay and hold the [Plaintiff] harmless from any liability in connection therewith[.]

See Pl.'s Ex. A, attached "Settlement Agreement," section V entitled "Property Settlement Provisions," at 3.

With regard to the payment of the parties' liabilities, the relevant portion of the Settlement Agreement states that

> [t]he [Defendant] does hereby assume and agree to pay in accordance with its terms any and all indebtedness owing to Best Buy associated with the parties' revolving charge account number 6019 1700 1338 7854, which the [Defendant] shall immediately refinance in his name only, and does hereby agree to [ ] hold the

> [Plaintiff] harmless from any liability in connection therewith.
>
> Except as hereinbefore provided to the contrary, the [Plaintiff] and [Defendant] shall each pay any and all debts which she or he has incurred subsequent to the parties' April 8, 2001 separation, or may hereafter incur, and each does hereby hold the other harmless from any liability in connection therewith.

See Pl.'s Ex. A, attached "Settlement Agreement," section VI entitled "Payment of Debts," at 4 and 5.

On March 7, 2003, Defendant filed a chapter 7 bankruptcy petition. In his Schedule D, Defendant listed Greenpoint Credit as a secured creditor possessing a claim in the amount of $44,616.72. In his statement of intention, Defendant represented that he intended to surrender the manufactured home to Greenpoint Credit. At some point during the Defendant's bankruptcy case, Greenpoint Credit repossessed and sold the manufactured home leaving a deficiency balance on the joint debt of $31,811. In his Schedule D, Defendant listed the joint debt to Best Buy relative to the charge account number ending in the numbers 7854 as an unsecured claim in the amount of $4,700. In addition, Defendant indicated that Plaintiff possessed an unsecured claim valued at $1.00.

On June 5, 2003, Plaintiff commenced the instant adversary proceeding by filing a two count complaint against Defendant. In Count I of her complaint, Plaintiff alleges that the debts to Greenpoint Credit and Best Buy should be excepted from the Defendant's discharge pursuant to 11 U.S.C. § 523(a)(15). In Count II of her complaint, Plaintiff contends that an alternate ground exists to except the debt to Greenpoint Credit from discharge pursuant to 11 U.S.C. § 523(a)(2)(A). On June 27, 2003, Defendant filed an answer to Plaintiff's complaint. In response to Count I, Defendant raised as a defense the exception provided by 11 U.S.C. § 523(a)(15)(A). In response to Count II, Defendant denied that any of the statements he made during the parties' settlement negotiations were "false representations."

A trial was held in this proceeding. At the conclusion of the trial, the Court took the matter under advisement. The parties agreed to submit post-trial briefs limited to the issue of the Court's authority to grant a partial discharge of a Section 523(a)(15) debt. The following are the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy

Procedure 7052.

II. Discussion

In this proceeding, Defendant owes a debt to the Plaintiff as a result of the parties' Settlement Agreement. While the parties' Settlement Agreement did (and could) not eliminate each of the parties' personal liability to the particular creditors (i.e., Greenpoint Credit and Best Buy), it did "create a new liability running from the [Defendant] to the Plaintiff." *Shreffler v. Shreffler*, 319 B.R. 113, 117 (Bankr. W.D. Pa. 2004) (quoting *Mannix v. Mannix*, 303 B.R. 587, 596 (Bankr. M.D. Pa. 2003). Plaintiff seeks to have the debt to Greenpoint Credit declared nondischargeable pursuant to either 11 U.S.C. §§ 523(a)(2)(A) or (a)(15), and the debt to Best Buy declared nondischargeable under 11 U.S.C. § 523(a)(15).

A. *11 U.S.C. § 523(a)(2)(A)*

Section 523(a) specifically excepts any debt

> (2) for money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained by —
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

11 U.S.C. § 523(a)(2)(A).

In the Sixth Circuit, to except a debt from discharge under § 523(a)(2)(A), a plaintiff must prove each of the following elements:

> (1) the debtor obtained [property] through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.

Rembert v. AT & T Universal Card Services, Inc., (*In re Rembert*), 141 F.3d 277, 280-81 (6th Cir. 1998) (footnote omitted) (citing *Longo v. McLaren* (*In re McLaren*), 3 F.3d 958, 961 (6th Cir. 1992)).

A creditor bears the burden of proving these elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). "[E]xceptions to discharge are to be strictly construed against the creditor." *In re Rembert*, 141 F.3d at 281 (citing *Manufacturer's Hanover Trust v. Ward*, (*In re Ward*), 857 F.2d 1082, 1083 (6th Cir. 1988)).

Under the first element of *Rembert*, the Plaintiff was required to prove that the "debtor obtained [property] through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth." *In re Rembert*, 141 F.3d at 280-81. Plaintiff contends the "material misrepresentation" made by the Defendant occurred during the parties' settlement negotiations when Defendant repeatedly stated that he wanted to retain the manufactured home and that he could refinance the loan on it. Plaintiff argues these representations rose to the level of being "reckless" in light of his subsequent decision to incur a substantial amount of credit card debt after the parties' separated, thus hindering Defendant's ability to refinance the loan. Plaintiff testified that Defendant was adamant about being able to keep the manufactured home and he assured her that he could refinance it since his attorney advised him that he could afford to keep the home. The Court determines that the nature and amount of that debt do not permit an inference that its incurrence was totally in his mind at the time of the representation or that it was sufficiently material to have made the representation "reckless." Among other things, as noted below, the indicated debt was incurred for ongoing living expenses. Even if the Court were to find that Defendant's representations rose to the level of being reckless, Plaintiff's § 523(a)(2)(A) action would still fail for reasons hereinafter set forth.

Under *Rembert*, Plaintiff was also required to prove that Defendant "intended to deceive" her at the time he indicated that he would refinance the joint debt with Greenpoint Credit.

> In order to establish that a debtor knowingly acted with the intent to deceive, it must be shown that at the time the debt was incurred, the debtor never had any intention of repaying the obligation in full. To make such a determination, it is almost always necessary for a court to look to circumstantial evidence as rarely, if ever, will a debtor admit to intentionally acting in a fraudulent manner. Such circumstantial evidence is normally derived from the traditional badges of fraud--e.g., financial difficulty, suspicious timing of events,--which are then viewed in the aggregate to determine whether the debtor's conduct presents a picture of deceptive conduct.

Woodward v. Bethel, (*In re Bethel*), 302 B.R. 205, 208 (Bankr. N.D. Ohio 2003) (citations omitted).

It is Plaintiff's position that an intent to deceive is evident from Defendant's (1) choice to incur substantial credit card debt during the period of time the parties' were separated, (2) failure to timely make the monthly loan payment to Greenpoint Credit, and (3) bankruptcy filing less

than 90 days after entry of the parties' Judgment. Defendant maintains he intended to refinance the loan to Greenpoint Credit at the time he made his representation to Plaintiff, but it was only after he attempted to obtain the necessary refinancing did he realize he would not be able to do so.

The totality of the evidence leads the Court to conclude that at the time Defendant made his statement to Plaintiff, he intended to pay the debt to Greenpoint Credit even though he may not have fully appreciated or understood that the state of his financial affairs would hinder or preclude him from actually being able to do so. Defendant testified that he wanted to keep the home so he had some place to live. Defendant's intention to refinance the loan on the manufactured home was primarily motivated by his desire to fulfill an individual basic need during a difficult time in his life. Nothing in the record indicates that Defendant was motivated by a desire to deceive the Plaintiff. It is undisputed that Defendant continued to reside in the manufactured home after the parties separated. In an effort to stay in the manufactured home, undisputed testimony showed that Defendant took on roommates to cover the costs associated with the manufactured home. When these arrangements did not work out, Defendant incurred credit card debt to pay his living expenses. There is no evidence in the record that Defendant used his credit cards or obtained cash advances to make any luxury purchases. Instead, Defendant testified that his purchases consisted of items to meet his day-to-day needs and to pay other debts such as the joint debt to Greenpoint Credit and the attorney fees he incurred due to the parties' divorce. Defendant's decision to use his credit cards to pay expenses associated with his day-to-day needs may or may not have been ill-advised or an exercise of poor judgment, but even if it is the latter such is not proof of an intent not to pay the debt to Greenpoint Credit. Second, and importantly, subsequent to the entry of the parties' Judgment, Defendant followed through on his intention when he made an effort to refinance the loan to Greenpoint Credit. Undisputed testimony showed that Defendant was turned down due to a low credit score and the specialized nature of financing associated with manufactured homes. In hindsight, it now appears that Defendant possessed an overly optimistic and/or unrealistic belief about his ability to obtain the necessary refinancing. But such a belief does not rise to the level of deception required under § 523(a)(2)(A). *Palmacci v. Umpierrez*, 121 F.3d. 781 (1st Cir. 1997) (stating that "fraudulent intent requires an intent to mislead, which is more than mere negligence. . . . A

'dumb but honest' [debtor] does not satisfy the test."). Based on the totality of the circumstances, the Court concludes that Plaintiff failed to prove that Defendant possessed the requisite "intent to deceive" at the time he made his representations to her.

Although the Court could cease its analysis of Plaintiff's § 523(a)(2)(A) count at this point since Plaintiff is required to prove each of the elements under *In re Rembert*, the Court nevertheless, also concludes that Plaintiff failed to prove by a preponderance of the evidence that her reliance on Defendant's representation was justifiable.

In *Fields v. Mans*, 516 U.S. 59 (1995), the Supreme Court addressed the level of reliance that a creditor must establish under 11 U.S.C. § 523(a)(2)(A). In holding that a creditor must show that her reliance was justifiable and not reasonable, the Court explained that

> [a] person is justified in relying on a representation of fact "although he might have ascertained the falsity of the representation had he made an investigation." Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases." Justifiability is not without some limits, however[,] . . . a person is "required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. . . .
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> Similarly, . . . the edition of Prosser's Law of Torts available in 1978 (as well as its current successor) states that justifiable reliance is the standard applicable to a victim's conduct in cases of alleged misrepresentation and that "[i]t is only where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own."

Fields v. Mans, 516 U.S. at 71 (quoting RESTATEMENT (SECOND) OF TORTS (1976) and W. PROSSER, LAW OF TORTS, § 108 at 718 (4th ed. 1971)).

Plaintiff contends that her reliance on Defendant's representation was justifiable because she "trusted" that Defendant would be able to pay the loan to Greenpoint Credit. The Court found Plaintiff to be an articulate and credible witness. However, evidence in the record persuades the Court that Plaintiff's reliance on Defendant's representation with regard to the debt to Greenpoint Credit was not justifiable. First, Plaintiff knew that Defendant was experiencing financial difficulties after the parties separated. She stated that during their relationship she handled the parties' finances, maintained their checkbook, and was well aware of Defendant's financial condition. Plaintiff explained that when they first separated she would meet with Defendant to go over their bills. She testified that Defendant struggled to make the payments on the house and admitted that she contributed money so this obligation could be paid. Nonetheless, Plaintiff testified that she believed that Defendant was going to able to pay the joint debt to Greenpoint Credit from the rent he received from his roommates. Plaintiff represented that she put some effort into making sure Defendant could afford to keep the home by checking into his living arrangements with his roommates. She stated that she thought each roommate could contribute a "couple hundred bucks" and with Defendant paying the same amount, the house and lot rent payments could be made. Yet, other evidence contradicts Plaintiff's belief. For instance, Plaintiff also testified that only one of Defendant's roommates actually paid him rent and that Defendant received something else in lieu of money from another roommate. She stated that one roommate provided Defendant with the use of a cell phone as his rental payment. The testimony of another witness, Mr. William Riggs, is consistent with this portion of the Plaintiff's testimony. Mr. Riggs is a friend and current roommate of the Defendant.[2] After the parties separated, Mr. Riggs lived with the Defendant in the manufactured home for a brief period of time. Mr. Riggs testified that he made monthly rental payments to the Defendant and that other roommates did not. He testified that this was one of the reasons he moved out. He stated that he didn't think it was fair for him to pay the expenses of his other roommates. In addition, the Court finds it most telling that Mr. Riggs, who was the only roommate to pay Defendant rent on a consistent basis, moved out of the manufactured home in September 2002.

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2. After he moved out of the manufactured home, Mr. Riggs rented a house and when he learned of Defendant's situation, he asked Defendant to move in with him.

This would have occurred during the time the parties were engaged in settlement negotiations. The record does not contain any evidence that indicates the Defendant misled or failed to inform the Plaintiff that he was no longer receiving rental payments from his roommates or that Mr. Riggs had moved out.

Second, Plaintiff knew at the time the parties' were engaged in settlement discussions that Defendant earned insufficient income to meet his expenses. The record establishes that Plaintiff knew that Defendant's employment skills were limited and that it was highly unlikely that Defendant would pursue any further education or training to increase his income in the near future. Plaintiff testified that one the factors that contributed to the parties' failed relationship was Defendant's decision not to better himself and to take advantage of opportunities. The Defendant's financial situation, abilities, and propensities were known and there to be seen — for better or worse. Plaintiff's choices were thereby tempered or limited. Nor is there any credible evidence as to what might have been or become different if Defendant had not made the indicated statement. As is said, one cannot make a silk purse out of a sow's ear. Their circumstances were what they were and there were essentially no secrets. Furthermore, it would not be amiss to say that the alleged "misrepresentation" was in substance nothing more than a statement by Defendant that he was going, or intended, to pay what he already was legally bound to pay anyway. Query: is that even a "MIS" representation in the first place? If there was a misrepresentation and if Plaintiff relied on it, that reliance cannot be said to have either been justified or to her detriment under the recited circumstances. When applying the evidence in the record against the required elements under *In re Rembert*, the Court thus concludes that Plaintiff failed to meet her burden of proof.

B. *11 U.S.C. § 523(a)(15)(A)*

Plaintiff also seeks to have her claim declared non-dischargeable pursuant to 11 U.S.C. § 523(a)(15), which provides,

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
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> . . . .

> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless–
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> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
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> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

11 U.S.C. § 523(a)(15).

"Under § 523(a)(15), a debtor is not discharged from any marital debt that is not in the nature of alimony, maintenance, or support unless (1) the debtor is unable to pay the debt, or (2) the benefit to the debtor would outweigh the detriment to the debtor's former spouse." *Patterson v. Patterson*, (*In re Patterson*), No. 96-6374, 1997 WL 745501 at *2 (6th Cir. Nov. 24, 1997).[3]

The standard of proof in a § 523(a)(15) proceeding is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991). Initially, a plaintiff is required to prove that (1) a debt was "incurred," (2) "in the course of a divorce or separation," and (3) the debt is "not of the kind" described in § 523(a)(5). 11 U.S.C. § 523(a)(15)(A); *see also Crosswhite v. Ginter*, 148 F.3d 879, 884-85 (7th Cir. 1998) (concluding that a creditor bears the initial burden of proof under § 523(a)(15)). Once a plaintiff meets this burden, the burden shifts to the debtor to come forward with evidence to establish either of the exceptions expressly provided under § 523(a)(15)(A) or (B). *Id*. (citing in support of its holding *In re Jodoin*, 209 B.R. 132, 140 (B.A.P. 9th Cir. 1997) and *In re Moeder*, 220 B.R. 52, 56 (B.A.P. 8th Cir. 1998)); *see also Gamble v. Gamble*, 143 F.3d 223, 226 (5th Cir. 1998).

The parties stipulated that the debt to Plaintiff was incurred in connection with the

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3. Although the Court is not bound by unpublished decisions of the Sixth Circuit Court of Appeals, such decisions "may be cited by the Court if persuasive and no published decisions serve as well." *Gibson v. Gibson*, (*In re Gibson*), 219 B.R. 195, 201 (B.A.P. 6th Cir. 1998)(citing *Belfance v. Black River Petroleum* (*In re Hess*), 209 B.R. 79, 82 n.3 (B.A.P. 6th Cir. 1997)).

parties' Settlement Agreement and that the debt was "not of the kind" described in 11 U.S.C. § 523(a)(5). As a result, Plaintiff met her burden under § 523(a)(15). Defendant relies on the "ability to pay" exception provided by § 523(a)(15)(A).

1. *Standard to determine "ability to pay" under § 523(a)(15)(A)*

Plaintiff contends that the Court should apply the eleven factors articulated in *Hart v. Molino*, (*In re Molino*), 225 B.R. 904, 909 (B.A.P. 6th Cir. 1998) to determine whether Defendant has the ability to pay the debt to Plaintiff. Defendant disagreed with Plaintiff's reliance on *In re Molino*. Defendant argues that the list of eleven factors were applied by the *Molino* court in relation to 11 U.S.C. § 523(a)(15)(B) and not § 523(a)(15)(A). In addition, Defendant argues that the proper standard to apply under § 523(a)(15)(A) is the "disposable income test."

Like the parties in this proceeding, *Molino* involved a former spouse's effort to except from a debtor's discharge debts the debtor agreed to pay and hold his spouse harmless on as part of the parties' divorce settlement. The former spouse alleged that the debts were nondischargeable pursuant to 11 U.S.C. § 523(a)(5) and (a)(15). Unlike the Defendant in this proceeding, the debtor in *Molino* relied on both defenses set forth in 11 U.S.C. § 523(a)(15)(A) and (B). In affirming the bankruptcy court's finding that the debtor had the ability to pay these debts, the *Molino* court's discussion of the "ability to pay" standard under § 523(a)(15)(A) was limited to its conclusion that "a court may look to a debtor's prior employment, future employment opportunities, and health status to determine the future earning potential" of a debtor. *In re Molino*, 225 B.R. at 908 (citing *Florio v. Florio*, (*In re Florio*), 187 B.R. 654, 657-58 (Bankr. W.D. Mo. 1995)). As recognized by Defendant, the "non-exclusive list of 11 factors" were only considered with regard to § 523(a)(15)(B). As explained by the *Molino* court, the Court of Appeals for the Sixth Circuit, in an unpublished decision, "affirmed [a] bankruptcy court's adoption of a non-exclusive list of 11 factors in its consideration of § 523(a)(15)(B)." *In re Molino*, 225 B.R. at 908 (citing *Patterson v. Patterson*, (*In re Patterson*), No. 96-6374, 1997 WL 745501 (6th Cir. Nov. 24, 1997) (citing *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996)). Use of these 11 factors is inappropriate to the Court's analysis under § 523(a)(15)(A) because such factors involve a balancing of a debtor's interest in receiving a discharge of the debts in relation to the harm that could occur to a creditor once the debts are discharged. Such

an analysis takes into consideration the financial circumstances of the creditor. This is contrary to the analysis required under § 523(a)(15)(A), which is solely limited to a debtor's financial situation.

Section 523(a)(15)(A) requires that a debtor prove that he "does not have the ability to pay such debt." But the phrase "ability to pay" is not defined under the Code. As a result, definitions have developed through a wide body of case law. Although some ambiguities and confusion exist in the case law,[4] the majority of courts define "ability to pay" by relying on the "disposable income test" under 11 U.S.C. § 1325(b)(2). *Hammermeister v. Hammermeister* (*In re Hammermeister*), 270 B.R. 863, 877 (Bankr. S.D. Ohio 2001) (citing *Pino v. Pino* (*In re Pino*), 268 B.R. 483, 497 (Bankr.W.D.Tex.2001) ("[M]ost courts rely on the 'disposable income test' of § 1325(b)(2) of the Bankruptcy Code because that section's language essentially mirrors the language [of] § 523(a)(15)(A).") (other citations omitted). A few courts define "ability to pay" by the undue hardship test found in 11 U.S.C. § 523(a)(8), a totality of the circumstances test, and a case-by-case analysis. *Id*.

When applying 'the disposable income test,' courts often begin by determining the amount of a debtor's income at the time of trial and the amount of reasonable and necessary expenses. In addition to these two factors, courts then consider several other factors associated with a debtor's financial situation in order to obtain a more thorough assessment of a debtor's ability to pay. These factors include:

> (1) [the] presence of more lucrative employment opportunities which might enable the debtor to fully to satisfy his divorce-related obligation;
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> (2) the extent to which the debtor's burden of debt will be lessened in the near term;
>
> (3) the extent to which the debtor previously has made a good faith effort towards satisfying the debt in question;
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> (4) the amount of the debts which a creditor is seeking to have held nondischargeable and the repayment terms and conditions of those debts;

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4. *See* Humiston v. Huddelston, (In re Huddelston), 194 B.R. 681, 686 (Bankr. N.D. Ga. 1996) (This case provides a thorough discussion on the difficulties courts have experienced in defining the "ability to pay" standard of 11 U.S.C. § 523(a)(15)(A).).

(5) the value and nature of any property the debtor retained after his bankruptcy filing;

(6) the income of the debtor's new spouse as such income should be included in the calculation of the debtor's disposable income; and

(7) any evidence of probable changes in a debtor's expenses.

In re Hammermeister, 270 B.R. 863, 878 (Bankr. S.D. Ohio 2001) (citing *Armstrong v. Armstrong* (*In re Armstrong*), 205 B.R. 386, 392 (Bankr. W.D. Tenn.1996)).

The Court concludes that each of these factors should be considered in the "ability to pay" analysis required by § 523(a)(15)(A).

a. *Analysis*

Pursuant to the parties' Settlement Agreement, both debts to Greenpoint Credit and Best Buy that Defendant owes to Plaintiff total in excess of $36,000. There are no repayment terms associated with these debts. As a result of his bankruptcy, Defendant experienced a decrease in his debt burden. Defendant discharged, not including the debts associated with Plaintiff's claim, approximately $30,000 in debts. At the same time, Defendant did not retain property of any value. The Court is troubled by the extent of Defendant's good faith efforts to meet his obligations under the Settlement Agreement. While the Defendant made some effort to refinance the loan with Greenpoint Credit, he apparently did not make any effort to fulfill his obligation with regard to the Best Buy debt. It is undisputed that a payment has not been made on the Best Buy account since July 2002.

The Court must review the Defendant's income and expenses to determine whether he can afford to pay those reasonably necessary expenses plus the debts to Greenpoint Credit and Best Buy. *In re Mannix*, 303 B.R. at 596 (recognizing that "[s]ubsection 523(a)(15)(A) or the 'ability to pay' test, forces the court to 'engage in the unenviable task of scrutinizing'" debtors' income and expense schedules)(citations omitted). A debt "will be discharged under § 523(a)(15)(A) only if repaying it reduces a debtor's current income below the level reasonably needed for the support of the debtor or his or her dependents." *In re Hammermeister*, 270 B.R. at 877 (citing *Carroll v. Carroll* (*In re Carroll*), 187 B.R. 197, 200 (Bankr. S.D. Ohio 1995)). "Only those expenses "reasonably necessary" for that support will be considered when

calculating the ability of a debtor to pay the debt arising from a divorce decree or property settlement. Reasonably necessary expenses are those that are adequate, not first class or luxury items." *Id*. (citing *In re Brooks*, 241 B.R. 198, 186 (Bankr S.D. Ohio); *Nelson v. Easley* (*In re Easley*), 72 B.R. 948, 949 (Bankr M.D. Tenn. 1987)).

Defendant's Schedule I reflects income in the amount of $1,507.14 and his Schedule J indicates expenses of $1,525.00. (Def.'s Ex. 1). At the time of trial, Defendant presented a current budget that reflected income of $ 1,230.25 and expenses of $1,263.16. (Def.'s Ex. 1). According to the his Schedules and budget, Defendant does not have any disposable income to pay on the debts he owes Plaintiff.

At trial, Defendant testified that the decrease in his income occurred because of his recent change in employment. Approximately two weeks before trial, Defendant began work as a laborer earning an hourly rate of $12.00. Defendant indicated that he was told by his employer that his hours of employment would be at least 40 hours. The week prior to trial Defendant worked 45 hours. Assuming that Defendant worked an average of 40 hours and deducting 25% for taxes, Defendant weekly net pay would be $360.00. Multiplying the amount of Defendant's net weekly pay by 4.333 weeks, results in monthly net income for the Defendant of $1,558.80. In addition, Defendant testified that he did not receive medical benefits or any retirement options through his current employment.

With regard to Defendant's future earning potential, Defendant is 37 years old and did not complete high school. These factors standing alone eliminate a wide range of employment opportunities for Defendant. It was undisputed that the Defendant did not have any immediate plans to participate in a GED course or any other educational or vocational courses to enable him to earn more income.

Prior to his employment as a laborer, Defendant was employed as a line cook with Archie's Restaurant for three years. In 2002, Defendant's gross income from this employment was $22,405.76. (Def.'s Ex. 2). Defendant testified that at the time he left Archie's Restaurant he earned $12.50 an hour and he worked 35 hours per week. Based on this testimony and after deducting 25% for taxes, Defendant would have earned at least $1,410.94 per month. Although not substantially, Defendant's income should increase as a result of his current employment. Also, Defendant's current employment will be the sole source of any additional income for him.

Defendant testified that the week prior to trial he worked 45 hours. Defendant did not elaborate on how often he would work in excess of 40 hours or if he is entitled to receive overtime compensation. The Court is not persuaded that it is proper to impute additional income to the Defendant based on the mere possibility that he may work in excess of 40 hours. Based on the Defendant's past earnings, current earnings, and future earning potential, it is apparent to the Court that Defendant's earnings are in line with his education and skills. The Court finds that the likelihood of Defendant's income increasing substantially due to a higher paying job is slight. Based on the figures listed below, from the date of Defendant's bankruptcy filing to the time of trial, Defendant experienced a decrease in certain expenses of $649.01 and at the same time experienced an increase in other expenses in the amount of $397.17. Overall, Defendant's expenses deceased by approximately $261.84. The decrease in expenses may be attributed in large part to the elimination of the loan payment to Greenpoint Credit.

	Filing	Trial	Change (+/-)
Rent	$ 710.00	$ 375.00	$ 335.00 -
Electricity	200.00	150.00	50.00 -
Water	35.00	20.00	15.00 -
Telephone	75.00	50.00	25.00 -
House repairs	60.00	0.00	60.00 -
Food	200.00	139.00	61.00 -
Clothing	40.00	45.00	5.00 +
Laundry/Dry Cleaning	30.00	7.99	22.01 -
Medical/Dental	0.00	0.00	0.00
Transportation	60.00	54.00	6.00 -
Recreation, etc.	30.00	64.97	34.97 +
Auto	85.00	0.00	85.00 -
Cable	0.00	10.00	10.00 +
Auto Insurance	0.00	142.20	142.20 +
Pet Supplies	0.00	80.00	80.00 +
Personal loan from friend	0.00	50.00	50.00 +
Cigarettes	0.00	75.00	75.00 +
TOTAL	$ 1,525.00	$ 1,263.16	

A comparison of the expenses Defendant incurred at the time of trial and the income projected by the Court reveals that Defendant would realize $294.84 in disposable income. However, this determination does not end the Court's analysis.

After a careful review of the Defendant's expenses, it is apparent that the Defendant does not lead an extravagant lifestyle nor incur luxury expenses. Initially, the Court recognizes that Defendant could make more of an effort to minimize certain expenses. For example, the expense

incurred by Defendant for electricity seems particularly high in light of the fact that Defendant shares this expense with his roommate. Also, Defendant failed to provide any explanation for the almost $35.00 increase in his recreational expenses. In addition, Defendant chose to incur expenses post-petition that he failed to explain. For example, Defendant's budget reflects a monthly payment of $50.00 toward a personal loan from a friend. Defendant did not provide any explanation to the Court about his need to incur this loan or the terms of the loan. Also, Defendant's current budget reflects that he spends approximately $80.00 a month on pet supplies and $75.00 a month on cigarettes. But even if the Court were to conclude that the Defendant could decrease these expenses in order to increase his disposable income, the existence of other reasonable and necessary expenses that were not accounted for in Defendant's current budget would substantially reduce or eliminate any increase.

As previously indicated, if the Court relies on Defendant's expenses at the time of trial, Defendant's disposable income would be $294.84. Add to this amount another $150.00 from Defendant's additional belt tightening efforts. The amount of Defendant's disposable income would increase to roughly $445.00. However, undisputed testimony requires that this amount be reduced by at least $300.00 for reasonable medical and transportation expenses. With regard to medical expenses, Defendant testified that he (1) had no medical insurance, (2) had been diagnosed as suffering from depression at the time of the parties' divorce but ceased treatment because he no longer had medical insurance and could not afford to pay for prescriptions, and (3) would need to undergo surgery in the near future to remove nasal polyps. With regard to transportation, Defendant testified that he will need a replacement vehicle in the near future since his current vehicle had over 200,000 miles on it. An additional $50.00 should be deducted to account for fluctuations that occur due to unanticipated increases in housing expenses, health expenses, or fuel costs. This leaves Defendant with $95.00 a month in disposable income to apply toward a debt in excess of $36,000. The Court finds that Defendant has proven that he has the ability to pay some of the debt he owes Plaintiff but he does not have the ability to pay the entire amount he assumed pursuant to the parties' Settlement Agreement. But, questions arise from this conclusion. Does Defendant's ability to pay a portion of the debt require a determination that the debt is a nondischargeable debt, which results in the Defendant being burdened with an excessive amount of debt he cannot pay and that prevents him from fully

realizing the benefits of the "fresh start" policy of the Bankruptcy Code? Is the Court required to determine that the debt is dischargeable when a debtor only has the ability to pay a small portion of the involved debt, which means the debtor's former spouse is now financially burdened with such debt or harmed in some other manner? Does the Court have the authority to determine that the portion of the debt Defendant is able to pay is nondischargeable and any remaining amount is dischargeable or craft some other equitable remedy? These questions require the Court to consider the second issue that arose at trial concerning its power to award a partial discharge of a Section 523(a)(15)(A) debt.

2. *Scope of the Court's Power under 11 U.S.C. § 523(a)(15)(A)*

Plaintiff contends that the Court has the authority to award a partial discharge under § 523(a)(15)(A) pursuant to its equitable powers derived by 11 U.S.C. § 105(a). Plaintiff relies on *In re Hornsby*, 144 F.3d 433 (6th Cir. 1998) in support of her position. Plaintiff argues that the reasoning articulated by the Sixth Circuit Court of Appeals in *In re Hornsby* may be extrapolated to permit the Court to grant a partial discharge of a debt under § 523(a)(15)(A). Plaintiff represented that the Court of Appeals for the Ninth Circuit in *In re Myrvang*, 232 F.3d 1116 (9th Cir. 2000) relied on *In re Hornsby* to support its determination that a court possesses the authority to grant a partial discharge of a debt under § 523(a)(15)(A). Defendant opposes the Court's use of its § 105(a) powers in this proceeding. Defendant recognizes that the Court "may in appropriate circumstances" use its equitable powers provided by 11 U.S.C. § 105(a). However, Defendant contends that *Hornsby* is distinguishable and that the Court's use of its § 105(a) powers in this proceeding would be improper.

The Sixth Circuit Court of Appeals, in an unpublished decision, alluded to but did not address the concept of partial discharge under § 523(a)(15)(A) when a debtor establishes an "inability to pay all of a non-dischargeable debt over a 'reasonable' period of time.'" *Patterson v. Patterson* (*In re Patterson*), No. 96-6374, 1997 WL 745501 (6th Cir. Nov. 24, 1997) (citing decisions approving and disproving the partial discharge of a debt under § 523(a)(15)(A)). The *Patterson* court explained that the facts of the case before it did not warrant consideration of the possibility of a partial discharge since the bankruptcy court found that the debtor "had an ability

to pay the debt . . . over a 'reasonable' period of time."[5] *Id*. at **3.

Substantial disagreement exists among the courts on whether it is possible to partially discharge or otherwise equitably modify a § 523(a)(15)(A) debt when a debtor's particular circumstances indicate an inability to pay all of the debt. Some courts rely on the plain language of the statute to conclude that "they lack the power to grant partial discharges of subsection 523(a)(15) debts in Chapter 7 cases." *In re Mannix*, 303 B.R. at 598 (Bankr. M.D. Pa. 2003) (citing *In re Ballard*, 2001 WL 1946239 (Bankr. E.D. Va. Jul.18, 2001); *Brasslett v. Brasslett* (*In re Brasslett*), 233 B.R. 177 (Bankr. D. Me.1999); *Fitzsimonds v. Haines* (*In re Haines*), 210 B.R. 586 (Bankr. S.D. Cal.1997); *In re Iler*, 1997 WL 33474942 (Bankr. S.D. Ga. Sept. 3, 1997); *Taylor v. Taylor* (*In re Taylor*), 191 B.R. 760 (Bankr. N.D. Ill.1996); *Collins v. Florez* (*In re Florez*), 191 B.R. 112 (Bankr. N.D. Ill. 1995); *Silvers v. Silvers* (*In re Silvers*), 187 B.R. 648 (Bankr. W.D. Mo.1995). Known as the "all or nothing" approach, these courts reason that there is nothing in the statutory language of subsection 523(a)(15) that permits a court to grant a partial discharge. As stated by the *Mannix* court,

> Congress is well-versed in statutory construction and knows how to articulate the partial discharge option within the Code. In particular, Congress permits a court to partially discharge other debts enumerated in subsection 523(a). *See* 11 U.S.C. §§ 523(a)(2), (5), and (7). The inclusion of the phrase "to the extent" within these subsections indicates that a partial discharge is possible with respect to each individual subsection. . . .Such limiting language is absent from subsection 523(a)(15). . . .Had Congress intended to permit partial discharges of subsection 523(a)(15) debts, it presumably would have articulated this intent as it did in subsections 523(a)(2), (5), and (7).

In re Mannix, 303 B.R. at 599 (*quoting Bates v. United States*, 522 U.S. 23, 29 (1997) (citing *Russello v. United States*, 464 U.S. 16 (1983))).

As a result, these courts determine that it is inappropriate to rely on the equitable powers provided by 11 U.S.C. § 105(a) because it would "circumvent Congress' treatment on this issue

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5. The debt at issue was comprised of two debts; $25,000 for one-half value of a marital business and $6,606.88 in credit card debt for a total amount owed of $31,606.88. After engaging in a detailed analysis of the debtor's income and expenses, the bankruptcy court found that the debtor failed to meet his burden under § 523(a)(15)(A) because he was able to pay the debt from his disposable income of $670.00 per month. *In re Patterson*, 199 B.R. at 23.

within the Code." *Id*. (citing *United States v. Locke*, 471 U.S. 84, 95 (1985)).

In direct contrast are those courts[6] that rely on 11 U.S.C. § 105(a) to partially discharge or otherwise equitably modify a § 523(a)(15)(A) debt once a debtor proves that he is unable to pay the entire amount of the debt at issue because he has the ability to pay a portion of the debt. *Myrvang v. Myrvang*, 232 F.3d 1116 (9th Cir. 2000) (holding that "a bankruptcy court has the discretion to order a partial discharge of a separate debt arising out of the terms of a divorce decree."); *Simpson v. Simpson* (*In re Simpson*), 336 B.R. 739, 746 (Bankr. W.D. Ky. 2006) (finding that "[t]here is no "all or nothing" requirement [under § 523(a)(15)(A)] that either the debt be paid as originally set out or not at all."); *Rushlow v. Rushlow* (*In re Rushlow*), 277 B.R. 216 (Bankr. D. Vermont 2002); *Alexander v. Alexander* (*In re Alexander*), 263 B.R. 800 (Bankr. W.D. Ky. 2001); *Bahr v. Bahr* (*In re Bahr*), 276 B.R. 444 (Bankr. N.D. Miss. 2000); *Newcomb v. Miley* (*In re Miley*), 228 B.R. 651 (Bankr. N.D. Ohio 1998); *Perkins v. Perkins* (*In re Perkins*), 221 B.R. 186 (Bankr. N.D. Ohio 1998); *McGinnis v. McGinnis* (*In re McGinnis*), 194 B.R. 917 (Bankr. N.D. Ala. 1996) (finding that an "all or nothing" approach is not mandated by 11 U.S.C. § 523(a)(15)); *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996); and *Comisky v. Comisky (In re Comisky*), 183 B.R. 883 (Bankr. N.D. California 1995) (finding 11 U.S.C. § 523(a)(8) similar to § 523(a)(15)). Courts justify this approach by reasoning that the use of their § 105(a) powers strikes the appropriate balance between a debtor's right to a fresh start and Congress' recognition "that debtors should not be able to use bankruptcy as a means of avoiding their nonsupport divorce related obligations." *In re Bahr*, 276 B.R. at 452.

The case most often relied on and cited in support of this position is *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996). This case involved a former spouse's effort to have two obligations declared nondischargeable pursuant to 11 U.S.C. §§ 523(a)(5) and (a)(15). The first debt involved the debtor's obligation to pay his former spouse's attorney fees of $13,168.00. The court found this debt to be a nondischargeable debt pursuant to 11 U.S.C. § 523(a)(5). The

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6. A few courts have determined that "a partial discharge is justified by § 523(a)(15)(A), but not by analogy to § 523(a)(8)." *Greenwalt v. Greenwalt* (*In re Greenwalt)*, 200 B.R. 909, 914 (Bankr. W.D. Wash. 1996). These courts construe the "such debt" language contained in § 523(a)(15)(A) to mean that "the court may review each liability separately." *Id*.; *See also Sparagna v. Metzger* (*In re Metzger*), 232 B.R. 658, 663 (Bankr. E.D. Va. 1999) and *Carlisle v. Carlisle* (*In re Carlisle*), 205 B.R. 812, 819 (Bankr. W.D. La. 1997).

second debt involved an "equalization of martial property award of $2,994.00 plus interest." *Id*. at 104. After engaging in a detailed analysis of the debtor's income and expenses, the court determined that the debtor had disposable income of "approximate[ly] $415.00 . . . per month with which to pay" the remaining debt. *Id*. at 109. As a result, the court inquired as to whether "this monthly excess [is] sufficient to pay his $3,500+ debt to his former spouse." *Id*. The *Smither* court

> reject[ed] the argument that a harsh "all or nothing" result is mandated by 11 U.S.C. § 523(a)(15). Such a mechanical reading of this provision of the Bankruptcy Code is clearly contrary to dictates of reasonable statutory interpretation as well as 11 U.S.C. § 523(a)(15)'s legislative history. By the same logic, a mere mathematical possibility that a debt could be paid in full over many years due to the existence of a small amount of excess income in relation to the § 523(a)(15) debt in question is also not the correct interpretation of this law.

Id.

By comparing the "ability to pay" analysis to the "undue hardship" analysis embodied in 11 U.S.C. § 523(a)(8) dischargeability proceedings, the *Smither* court concluded that bankruptcy courts may rely on their § 105(a) equitable powers to grant a partial discharge or otherwise equitably modify a § 523(a)(15)(A) debt under certain circumstances. *Id*. (*citing In re Comisky*, 183 B.R. 883 (Bankr. N.D. Cal. 1995) and *Cheesman v. Tennessee Student Assistance Corp*. (*In re Cheesman*), 25 F.3d 356 (6th Cir. 1994)). The *Smither* court held that

> a [d]ebtor has the ability to pay an obligation, for purposes of 11 U.S.C. § 523(a)(15)(A), if the [d]ebtor has sufficient disposable income to pay all or a material part of a debt within a reasonable period of time. If the [d]ebtor has the ability to pay only a portion of that indebtedness, then the court may discharge in part and/or equitably modify the obligation. This analysis must be applied on a case-by-case basis after a careful review of the particular facts and circumstances surrounding each non-dischargeability action.

In re Smither, 194 B.R. at 110.

The *Smither* court found that the debtor failed to establish his inability to pay the second debt. In light of its determination that the first debt the debtor owed to his former spouse was a nondischargeable debt pursuant to 11 U.S.C. § 523(a)(5), the court relied on its holding to equitably modify the second debt at issue. The court delayed the commencement of payments and the accrual of interest on the debt for one year and then required that debtor pay $500.00 per

month until the debt was completely paid with the additional condition that in the event the debtor missed one payment, the entire amount of the second debt would be immediately due and payable. *Id*. at 112.

The Court is persuaded by the *Smither* analysis and respectfully disagrees with those courts that follow the "all or nothing" approach. Based on the direction of Sixth Circuit precedent and the well-reasoned decisions of those courts approving of partial discharge, the Court determines that it may exercise the authority provided by § 105(a) to grant a partial discharge of, or otherwise equitably modify, a debt under § 523(a)(15)(A) in certain circumstances.

In a series of cases beginning with *Cheesman v. Tennessee Student Assistance Corp*. (*In re Cheesman*), 25 F.3d 356 (6th Cir. 1994), the Sixth Circuit Court of Appeals has attempted to define the scope of equitable power possessed by bankruptcy courts pursuant to 11 U.S.C. § 105(a) in order to provide relief to a debtor constrained by student loans through partial discharge of, or otherwise equitable modification of, the student loan debt despite the presumption of nondischargeability under 11 U.S.C. § 523(a)(8).

In re Cheesman, the debtors sought to discharge $14,267 of student loan debt on the ground that the debt imposed an undue hardship pursuant to 11 U.S.C. § 523(a)(8). *Id*. at 357. At the conclusion of the trial, the bankruptcy court found that the student loan debt posed an undue hardship to the debtors, but it delayed determination of the dischargeability of the debt for 18 months because evidence existed that debtors' employment and financial situation could improve. *Id*. at 359. The student loan creditor appealed arguing that the bankruptcy court exceeded its equitable authority when it postponed final determination of the dischargeability of the debt. *Id*. at 360. The Sixth Circuit Court of Appeals disagreed and held that the bankruptcy court properly exercised "its equitable power pursuant to § 105(a) in a manner consistent with the Bankruptcy Code." *Id*. at 360-61. The *Cheesman* court explained that

> [a]lthough the [bankruptcy] court decided that discharge was appropriate at the present time, it stayed its order on the ground that the Cheesmans' financial situation might improve in the near future, thereby making discharge unwarranted. In so doing, the court appropriately attempted to balance the Bankruptcy Code's goal of providing a fresh start to the Cheesmans with Congress's goal of preventing abuse of the student loan program.

Id.

Four years later in *Hornsby v. Tennessee Student Assistance Corp*. (*In re Hornsby*), 144 F.3d 433 (6th Cir. 1998), the Sixth Circuit Court of Appeals expanded the boundaries of equitable authority bankruptcy courts possessed pursuant to § 105(a) to discharge in part, or otherwise equitably modify, a student loan debt. In *Hornsby*, the debtors had amassed $30,000 in student loan debt, which they sought to discharge on undue hardship grounds. The bankruptcy court found that the debtors met their burden of proving undue hardship and ordered the discharge of their student loan obligations. Creditor, Tennessee Student Assistance Corporation, filed a timely appeal. Subsequent to a remand to the bankruptcy court for specific findings, the district court affirmed the bankruptcy court's decision. In reversing the district court, the Sixth Circuit Court of Appeals found that the bankruptcy court's analysis was not sufficient enough to support its finding of undue hardship. *Id*. at 438. The *Hornsby* court further explained that

> [t]he motivation behind the bankruptcy court's decision to discharge the Hornsbys' student loans was apparently a belief that the Hornsbys were oppressed by their student loans and would be unable to make a "fresh start" without relief. . . . Although the bankruptcy court should not have discharged the Hornsbys' entire student loans, we believe it had the power to take action short of total discharge . . . [pursuant to its authority from] 11 U.S.C. § 105(a), which permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" so long as such action is consistent with the Bankruptcy Act. . . . In a student-loan discharge case where undue hardship does not exist, but where facts and circumstances require intervention in the financial burden on the debtor, an all-or-nothing treatment thwarts the purpose of the Bankruptcy Act.

Id. at 438-39 (citations omitted). The *Hornsby* court concluded that the bankruptcy court could rely on "its powers codified by § 105(a) . . . to fashion a remedy allowing the Hornsbys ultimately to satisfy their obligations to TSAC while at the same time providing them some of the benefits that bankruptcy brings in the form of relief from oppressive financial circumstances." *Id*. at 440.

Most recently, in *Miller v. Pennsylvania Higher Education Assistance Agency*, (*In re Miller*), 377 F.3d 616 (6th Cir. 2004), the Sixth Circuit Court of Appeals discussed and clarified the scope of such equitable power in student loan discharge cases in light of its *Hornsby*

decision. *In re Miller* involved a chapter 7 debtor's attempt to obtain an undue hardship of student loan debt of $89,832.16 pursuant to 11 U.S.C. § 523(a)(8). The bankruptcy court found that payment of the student loans would not impose an undue hardship on the debtor. Despite this finding, the bankruptcy court then solely relied on its § 105(a) powers to grant the debtor a partial discharge by discharging approximately $55,000 of the debt with the remainder of the debt being nondischargeable. *Id*. at 619. The bankruptcy court's decision was affirmed by the district court. In reversing the district court's decision, the Sixth Circuit determined that the bankruptcy court "impermissibly used its equitable authority." *Id*. at 624. The *Miller* court explained that

> *Hornsby* acknowledged . . . the correct proposition that a bankruptcy court may only act pursuant to § 105(a) "so long as such action is consistent with the Bankruptcy Act.". . . Although § 105(a) permits a bankruptcy court to use its equity powers to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," "[t]he equitable powers of section 105(a) may only be used in furtherance of the goals of the Code." *Childress v. Middleton Arms, L.P.* (*In re Middleton Arms, Ltd. P'ship*), 934 F.2d 723, 725 (6th Cir.1991). As the Supreme Court has recognized, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). Therefore, it cannot be true that *Hornsby* endorsed the idea that, while § 523(a)(8) sets the condition for "[a] discharge" of student loan indebtedness, a bankruptcy court could rely on § 105(a) to evade the plain language of that provision by granting a partial discharge for reasons other than undue hardship.

In re Miller, 377 F.3d at 620.

The Court concludes that *Cheesman*, *Hornsby*, and *Miller* all indicate the nature of the analysis involved in § 523(a)(8) permits the Court to exercise its equitable powers under 11 U.S.C. § 105(a). Given primarily (1) the relative comparability of the "undue hardship" inquiry called for under § 523(a)(8) and the "ability to pay" inquiry called for under § 523(a)(15)(A); and (2) the nature of the reasoning and the basis for the partial discharge conclusions reached in the cited Sixth Circuit cases involving § 523(a)(8) situations, this Court concludes there is no logical distinction to be made between its ability and authority to determine the availability of a partial discharge in the former and its ability to do so in the latter. When it does, it must do so in the context of the "ability to pay" requirement of § 523(a)(15)(A). If a debtor's particular

circumstances establish that the debtor does not have the "ability to pay" the entire amount of the debt but does possess the "ability to pay" a portion of the debt, the bankruptcy court may partially discharge, or otherwise equitably modify, the debt. Having reached this conclusion, the Court must now decide to what extent it should exercise its equitable powers to devise an appropriate remedy based on the facts and circumstances in this proceeding.

A variety of remedies have been developed by those courts that determine they possess the authority to award a partial discharge of § 523(a)(15)(A) debt. Some courts require a debtor to follow a structured payment plan of the nondischargeable debt along with other conditions. *In re Simpson*, 336 B.R. 739, 749 (Bankr. W.D. Ky. 2006) (full amount of debt in question of $6,647.13 held nondischargeable and debtor required to make monthly installment payments of $100.00 until debt paid in full but subject to acceleration provision in the event debtor failed to make timely payments); *In re Miley*, 228 B.R. 651, 657 (Bankr. N.D. Ohio 1998) (entire debt of $15,456.55 with interest at 10% per annum found nondischargeable and debtor required to pay $100.00 per month for one year with payments increasing to $300.00 until the debt was paid in full); *In re Perkins*, 221 B.R. 186, 191 (Bankr. N.D. Ohio 1998) (aggregate amount of $28,000.00 debt to former spouse consisting of five joint credit cards debtor agreed to hold former spouse harmless on held to be nondischargeable and to be paid at the rate of $300.00 per month and then increased to $400.00 per month for a period of five years but debt would become immediately due and payable if debtor failed to make any payment); and *In re Smither*, 194 B.R. 102 (Bankr. W.D. Ky. 1996) (equitable modification of nondischargeable single debt of approximately $3,500.00 by requiring debtor to make monthly payments of $500.00 until the entire debt is paid in full, eliminating the accrual of interest for a brief period of time, and the debt would be become immediate due and payable if the debtor failed to make one payment).

Other courts discharge the portion of the debt the debtor does not have the ability to pay and the remaining amount is found to be a nondischargeable debt, which is then required to be paid pursuant to a payment plan for a set period of time. *In re Rushlow*, 277 B.R. 216, 223-24 (Bankr. D. Vt. 2002) (determining that amount of debt excepted from discharge to be $13,000 (instead of $35,856), at the 6% annual interest rate as set forth in the parties' divorce decree and requiring debtor to follow a graduated payment plan beginning at $100 per month for two years and increasing to $300 per month until the nondischargeable debt was paid in full); *In re*

Alexander, 263 B.R. 800, 805 (Bankr. W.D. Ky. 2001) (finding debtor only had the ability to pay $2,500.00 of joint credit card debt of $5,000.00 pursuant to monthly payments of $100.00 for a period of 25 months); and *In re Comisky*, 183 B.R. 883, 884 (Bankr. N.D. Cal. 1995) (finding that debtor had the ability to pay $10,000 of $18,619.00 property settlement debt based on his disposable income of $200 to $300 per month and requiring debtor to make monthly payments of at least $200.00 until debt was paid in full along with interest and precluding former spouse from taking any action to enforce court order unless debtor did not make a payment). One court has simply found a certain amount of the debt to be nondischargeable and discharged the remaining portion without formulating a payment plan. *In re McGinnis*, 194 B.R. 917, 922 (Bankr. N.D. Ala. 1996) (finding $10,800.00 of $18,906.00 property settlement debt to be nondischargeable).

In the context of § 523(a)(8) proceedings, the *Hornsby* court recognized the various equitable remedies[7] courts had fashioned when a debtor's circumstances did not constitute undue hardship and explained that

> some bankruptcy courts have thus given a debtor the benefit of a "fresh start" by partially discharging loans, whether by discharging an arbitrary amount of the principal, interest accrued, or attorney's fees; by instituting a repayment schedule; by deferring the debtor's repayment of the student loans; or by simply acknowledging that a debtor may reopen bankruptcy proceedings to revisit the question of undue hardship.

In re Hornsby, 144 F.3d 433, 440 (6th Cir. 1998).

Guided by this case law and having determined that it may grant a partial dischage of a § 523(a)(15)(A) debt, the Court concludes that Defendant does not have the ability to pay the entire debt of $36,000 to Plaintiff since the amount of his disposable income could be approximately $95.00 per month. If Defendant were required to pay all of this debt, his financial situation would border on hopelessness and his basic standard of living would be compromised. However, Defendant does have the ability to pay a portion of the indebtedness and he should be required to do so. In light of Defendant's income, expenses, age, health, education, work history

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7. The *Hornsby* court acknowledged that a bankruptcy court had "effectively accomplished a partial discharge by treating each student loan separately [since they had not been consolidated] and discharging those student loans that worked an undue hardship." *In re Hornsby*, 144 F.3d at 440 (citing *Hinkle v. Wheaton College* (*In re Hinkle*), 200 B.R. 690, 692 (Bankr. W.D. Wash. 1996)).

and the fact that Defendant exercised a small amount of good faith toward fulfilling his obligation to Plaintiff, the Court determines that Plaintiff's claim is nondischargeable to the extent of $5,400.00 and the balance of her claim is discharged. Defendant shall make monthly payments of $90.00 on a pro rata basis directly to the creditors at issue (i.e., Greenpoint Credit and Best Buy) but Defendant's obligation to pay Plaintiff will terminate to the extent for any reason Plaintiff's obligation to repay these debts terminates. Subject to Plaintiff's agreement, Defendant may instead make the monthly payments of $90.00 directly to her by the 15th of each month. Payments are to begin on November 15, 2006. In the event Defendant fails to make any payment, the entire debt will become due in full and bear interest at the then applicable federal judgment interest rate.

V. Conclusion

For the reasons stated above, the Court determines that Plaintiff's claim that is comprised of the debt to Greenpoint Credit is not excepted from Defendant's discharge pursuant to 11 U.S.C. § 523(a)(2)(A). The Court further finds that Plaintiff's claim is nondischargable and dischargeable in part pursuant to 11 U.S.C. § 523(a)(15)(A). An order in accordance with this opinion is being entered contemporaneously.

Dated: _____ _____

Entered: October 13, 2006

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge