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5 UNITED STATES BANKRUPTCY COURT  
6 EASTERN DISTRICT OF CALIFORNIA  
7

8  
9 In re ) Case No. 12-91507-E-7  
10 DOUG GLENNON JEFFERS and )  
11 KELLY JANEEN JEFFERS, )  
12 Debtor(s). )  
13 AMERICREDIT FINANCIAL ) Adv. Pro. No. 12-9024  
14 SERVICES, INC., )  
15 Plaintiff(s), )  
16 v. )  
17 DOUG GLENNON JEFFERS and )  
18 KELLY JANEEN JEFFERS, )  
Defendant(s). )

19 This memorandum decision is not approved for publication and may  
20 not be cited except when relevant under the doctrine of law of the  
21 case or the rules of claim preclusion or issue preclusion.

22 MEMORANDUM OPINION AND DECISION

23 An Adversary Proceeding was commenced on August 9, 2012, by  
24 Americredit Financial Services, Inc., dba GM Financial  
25 ("Plaintiff") seeking to have the debts of Doug Glennon Jeffers and  
26 Kelly Janeen Jeffers ("Defendant-Debtors") determined  
27 nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(2)(B),  
28 and (a)(2)(C)(i)(I). The Complaint, Dckt. 1, allegations include

1 the following:

2 1. Jurisdiction for the Adversary Proceeding exists pursuant  
3 to 28 U.S.C. §§ 1334, 157, and the reference to this bankruptcy  
4 judge by the District Court for the Eastern District of California,  
5 and that this is a core proceeding as defined in 28 U.S.C.  
6 § 157(b)(2)(I). The Defendant-Debtors commenced a voluntary  
7 Chapter 7 case on May 23, 2012.

8 2. The Plaintiff is a creditor of the Defendant-Debtors,  
9 which is in the business of financing the purchase of motor  
10 vehicles from retail merchants.

11 3. The Defendant-Debtors received their Certificate of  
12 Counseling (which is necessary to commence a bankruptcy case,  
13 11 U.S.C. § 109(h)) on March 31, 2011. A copy is attached as  
14 Exhibit A to the Complaint.

15 4. On April 19, 2012, the Defendant-Debtors executed a  
16 Retail Installment Sale Contract with Heritage Ford, Inc., for the  
17 purchase of a 2011 Ford Edge. The Retail Installment Contract was  
18 assigned to Plaintiff in the ordinary course of business.

19 5. The Defendant-Debtors did not notify Heritage Ford, Inc.  
20 nor the Plaintiff that the Defendant-Debtors were in the process of  
21 filing a bankruptcy case.

22 6. The Defendant-Debtors commenced their voluntary Chapter 7  
23 case on May 24, 2012, thirty-five days after executing the Retail  
24 Installment Contract.

25 7. The outstanding balance due on the Retail Installment  
26 Contract is \$26,155.98.

27 8. The First Cause of Action asserts that the obligation  
28 owing under the Retail Installment Contract is nondischargeable

1 based on the Defendant-Debtors having obtained the purchase of a  
2 vehicle and incurred the debt evidenced by the Retail Installment  
3 Contract based on false pretenses, a false representation, or  
4 actual fraud, other than a written statement respecting the  
5 Defendant-Debtors financial condition - the failure to disclose  
6 that the Defendant-Debtors were in the process of filing  
7 bankruptcy. 11 U.S.C. § 523(a)(2)(A). The Plaintiff alleges that  
8 it relied upon the disclosures of information provided by  
9 Defendant-Debtors, and that if it had been disclosed that the  
10 Defendant-Debtors were in the process of filing bankruptcy it would  
11 not have extended the credit. The Plaintiff alleges that it stands  
12 to lose the benefit of the bargain with the Defendant-Debtors if  
13 the debt is discharge. Implicit in this allegation is that the  
14 "benefit lost" is the right to a deficiency judgment if the  
15 Defendant-Debtors subsequently default on the obligation, the  
16 Plaintiff has to repossess the vehicle, and because of the  
17 depreciation on a late model vehicle, the Plaintiff will suffer the  
18 loss of the deficiency created by the depreciation (or possible  
19 damage to the vehicle).

20 9. The Second Cause of Action alleges that the Credit  
21 Application provided by the Defendant-Debtors to obtain the credit  
22 extended by Plaintiff pursuant to the Retail Installment Contract  
23 contained a materially false statement concerning the Defendant-  
24 Debtors' financial condition because it did not disclose that they  
25 were in the process of filing bankruptcy. Plaintiff alleges that  
26 it relied upon the Financial Statement, that such reliance was  
27 reasonable as part of the ordinary course of business of automobile  
28 financing, that it would not have extended credit if the Credit

1 Application had disclosed the Defendant-Debtors were in the process  
2 of filing bankruptcy, and will suffer damages as alleged under the  
3 First Cause of Action. 11 U.S.C. § 523(a)(2)(B).

4 10. Exhibit C attached to the Complaint is a copy of the  
5 Credit Application. No specific reference is made (either in the  
6 Complaint or Motion for Entry of Default Judgment) to any specific  
7 portion of the Credit Application being relevant to this cause of  
8 action.

9 11. The Third Cause of Action asserts that the 2011 Ford Edge  
10 is not necessary for the support or maintenance of the Defendant-  
11 Debtors or their dependants. Schedule B filed by the Defendant-  
12 Debtors lists ownership of three vehicles. The debt to Plaintiff  
13 for the purchase of the 2011 Ford Edge is in excess of \$600.00, was  
14 incurred within ninety days of the commencement of the Defendant-  
15 Debtors' bankruptcy case, and is therefore presumed to be  
16 nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(C)(i)(I).

17 12. The Complaint alleges that the Retail Installment  
18 Contract provides for attorneys' fees, and thereon the Plaintiff  
19 requests reasonable attorneys' fees in connection with this  
20 Adversary Proceeding. A copy of the Retail Installment Contract is  
21 attached to the Complaint as Exhibit A. Though the contractual  
22 provision is not identified by the Plaintiff (either in the  
23 Complaint or Motion for Entry of Default Judgment), the court's  
24 review of the Retail Installment Contract identifies Paragraph 3c.  
25 which states,

26 3. IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES

27 c. You may have to pay collection costs. You will  
28 pay our reasonable costs to collect what you owe,  
including attorney fees, court costs, collection

1 agency fees, and fees paid for other reasonable  
2 collection efforts. You agree to pay a charge not  
3 to exceed \$15 if any check you give us is  
4 dishonored.

#### 5 **APPROPRIATE ENTRY OF DEFAULT JUDGMENT**

6 Federal Rule of Civil Procedure 55 and Federal Rule of  
7 Bankruptcy Procedure 7055 govern default judgments. *In re McGee*,  
8 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default  
9 judgment of nondishchargeability of a claim is a two-step process  
10 which requires: (1) entry of the defendant's default, and (2) entry  
11 of a default judgment. *Id.* at 770.

12 Even when a party has defaulted and all requirements for a  
13 default judgment are satisfied, a claimant is not entitled to a  
14 default judgment as a matter of right. 10 Moore's Federal Practice  
15 - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd  
16 ed.). Entry of a default judgment is within the discretion of the  
17 court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986); *In re*  
18 *McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006) (citing *In re*  
19 *Kubick*, 171 B.R. 658, 659-60 (B.A.P. 9th Cir. Alaska 1994).  
20 Default judgments are not favored, as the judicial process prefers  
21 determining cases on their merits whenever reasonably possible. *Id.*  
22 at 1472. Factors which the court may consider in exercising its  
23 discretion include:

- 24 (1) the possibility of prejudice to the plaintiff,
- 25 (2) the merits of plaintiff's substantive claim,
- 26 (3) the sufficiency of the complaint,
- 27 (4) the sum of money at stake in the action,
- 28 (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil  
Procedure favoring decisions on the merits.

*Eitel v. McCool*, 782 F.2d at 1471-72 (citing 6 Moore's Federal

1 Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R.  
2 Coquillette & Gregory P. Joseph eds. 3rd ed.)); *In re Kubick*, 171  
3 B.R. at 661-662.

4 In fact, before entering a default judgment the court has an  
5 independent duty to determine the sufficiency of Plaintiff's claim.  
6 *Id.* at 662. Entry of a default establishes well-pleaded  
7 allegations as admitted, *In re McGee*, 359 B.R. at 772, but factual  
8 allegations that are unsupported by exhibits are not well-pleaded  
9 and cannot support a claim. *Id.* at 774. Thus, a court may refuse  
10 to enter default judgment if Plaintiff did not offer evidence in  
11 support of the allegations. *See id.* at 775. Finally, Federal Rule  
12 of Civil Procedure 9(b), made applicable through Federal Rule of  
13 Bankruptcy Procedure 7009, raises the bar by requiring that  
14 allegations of fraud be stated with particularity.

15 In *Kubick*, the Bankruptcy Appellate Panel held that the  
16 Bankruptcy Court must exercise its independent duty, arising under  
17 Federal Rule of Bankruptcy Procedure 55(b)(2), to determine the  
18 sufficiency of the plaintiff's claim before entering a default  
19 judgment. *In re Kubick*, 171 B.R. at 662. In *Kubick*, the  
20 plaintiff-creditor filed a complaint objecting to Debtor's  
21 discharge. *Id.* at 171 B.R. at 659. The debtor did not file a  
22 response, and the court granted the plaintiff's motion for default  
23 judgment without a hearing. *Id.* On appeal, the Bankruptcy  
24 Appellate Panel held that the plaintiff's complaint could not  
25 support a default judgment, because it merely recited the statutory  
26 elements without sufficiently alleging elements of the claim. *Id.*  
27 at 662. In vacating the judgment, the Bankruptcy Appellate Panel  
28 held that the Bankruptcy Court must exercise its discretion to

1 determine the legal sufficiency of the complaint before entering a  
2 default judgment. *Id.*

3 Furthermore, in *McGee* the Bankruptcy Appellate Panel affirmed  
4 that the Bankruptcy Court may require Plaintiff to present evidence  
5 in support of its complaint. *In re McGee*, 359 B.R. at 775. In  
6 *McGee*, the creditor filed a complaint to establish its claim as  
7 nondischargeable under Federal Rule of Bankruptcy Procedure  
8 532(a)(2)(B). *Id.* at 767. When the defendant-debtor failed to  
9 appear, the Bankruptcy Court entered a default. *Id.* at 768.  
10 However, the court denied a motion for default judgment, because  
11 the creditor did not offer direct proof supporting an essential  
12 element of their claim: that they relied on the defendant's  
13 fraudulent misrepresentations. *Id.* On appeal, the Bankruptcy  
14 Appellate Panel affirmed, holding that merely *pleading* a *prima*  
15 *facie* case, without proving one, does not entitle the creditor to  
16 a default judgment. *Id.* at 774. The Bankruptcy Court properly  
17 used its discretion in requiring competent, admissible evidence  
18 before granting a default judgment. *Id.* at 775.

#### 19 **MOTION FOR ENTRY OF DEFAULT JUDGMENT**

20 The Motion for Entry of Default Judgment asserts that the  
21 Complaint was filed, the Complaint and Summons were served, the  
22 Defendant-Debtors have failed to respond, and entry of a default  
23 judgment is proper in the amount of \$27,836.27. (The court is  
24 instructed to read the Declarations of Jim Hogan to see the  
25 particular grounds upon which the requested relief is based.  
26 Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy  
27 Procedure 7007 require that the motion itself state with  
28 particularity the grounds upon which the requested relief is

1 based.) The prayer for the Motion includes not only the request  
2 for a \$27,836.27 nondischargeable judgment, but also a judgment for  
3 "any additional sum as yet unknown but according to proof" and "for  
4 any other relief the Court deems just and proper." The Motion does  
5 not request an award of attorneys' fees. Dckt. 13.

6 The Declaration of Jim Hogan is provided in support of the  
7 Motion. Dckt. 14. Mr. Hogan testifies that his knowledge  
8 concerning this debt is based on the books and records of the  
9 Plaintiff. Though Mr. Hogan testifies that the Defendant-Debtors  
10 signed and submitted the Credit Application and Retail Installment  
11 Contract, this does not appear to be based on any personal  
12 knowledge. Rather, it appears that he is testifying that he is  
13 providing copies of these two documents from the books and records  
14 of the Plaintiff.

15 Mr. Hogan testifies that the Credit Application affirmatively  
16 represented that a bankruptcy proceeding was not in process.  
17 However, Mr. Hogan does not direct the court to any specific  
18 provision of the Credit Application, but appears to merely be  
19 providing the court with his personal finding of fact based on his  
20 reading this document.

21 With respect to the credit extended, Mr. Hogan testifies that  
22 the Plaintiff provided the credit for the purchase of the 2011 Ford  
23 Edge. Though he states the testimony as if he had personal  
24 knowledge of the credit being extended, again, his testimony  
25 appears to be based only on the books and records of the Plaintiff.  
26 He further testifies that the Defendant-Debtors granted a security  
27 interest in the vehicle to the Plaintiff, but again, it appears  
28 that Mr. Hogan has no personal knowledge of such events.



1 Mr. Hogan does provide testimony to authenticate the Credit  
2 Application, Retail Installment Contract, Vehicle Title  
3 Certificate, Plaintiff's claim of ownership of the Retail  
4 Installment Contract, and the Plaintiff's computation of the  
5 obligation owed on the Retail Installment Contract. Federal Rules  
6 of Evidence 901, 803(6). The court accepts his testimony as a  
7 custodian of records for the Plaintiff for the exhibits produced  
8 and the testimony as to the Plaintiff owning the Retail Installment  
9 Contract and the obligation owed thereon.

10 The court also accepts Mr. Hogan's testimony that if the  
11 Credit Application had disclosed that a bankruptcy filing was in  
12 process, Plaintiff would not have extended the credit to the  
13 Defendant-Debtors.

14 Mr. Hogan testifies that as of the date of the declaration,  
15 \$25,576.05 was owed by the Defendant-Debtors. He does not testify  
16 that any defaults exist or this entire amount is presently due. He  
17 also testifies that Plaintiff has engaged the services of Cooksey,  
18 Toolen, Gage, Duffy & Woog, P.C. to prosecute this Adversary  
19 Proceeding. He further testifies that Plaintiff has incurred  
20 attorneys' fees and costs to this firm in the amount of \$2,243.00  
21 in connection with this Adversary Proceeding.

22 Plaintiff has also filed the Declaration of John Kim in  
23 support of the Motion. Dckt. 15. Mr. Kim is a partner in Cooksey,  
24 Toolen, Gage, Duffy & Woog, counsel for the Plaintiff in this  
25 Adversary Proceeding. Mr. Kim testifies as to his efforts to  
26 confirm that the Defendant-Debtors are not active duty members of  
27 the military, having obtained entry of defaults for each of the  
28 Defendant-Debtors, and how he computes prejudgement interest.

1 Mr. Kim does not provide testimony authenticating the detailed  
2 billing statements for his firm which are being used by Plaintiff  
3 in requesting entry of a default judgment that includes attorneys'  
4 fees.

5       Though not directed to the evidence provided in Exhibit C, the  
6 Credit Application, the court has reviewed this document to  
7 determine if it contains an affirmative misrepresentation as to  
8 bankruptcy as concluded by Mr. Hogan. The Exhibit to the Complaint  
9 is a very poor copy and rendered almost illegible. The court  
10 cannot identify any question on the Credit Application about  
11 bankruptcy or any affirmative representation in the Credit  
12 Application that the Defendant-Debtors have not, are not, or are  
13 not contemplating filing bankruptcy. The court has reviewed both  
14 Exhibit C attached to the Complaint, Dckt. 1, and the copy of the  
15 Credit Application filed as Exhibit A in support of the Motion for  
16 Entry of Default, Dckt. 17. To the extent that such statement is  
17 made in the Credit Application, the copies provided the court are  
18 so illegible as to prevent the court from being able to make such  
19 a finding of fact.

20       The court has also reviewed the Statement of Intention filed  
21 by the Defendant-Debtors in their Chapter 7 case. Bankr. EDC 12-  
22 91507, Dckt. 1. With respect to this debt and the 2011 Ford Edge  
23 the Debtors state that they intend to retain the vehicle and "pay  
24 per contract." The Statement of Intention does not state that the  
25 Defendant-Debtors intended to reaffirm this obligation. It appears  
26 that what they sought to do was absolve themselves of personal  
27 liability for this new vehicle but retain possession by making the  
28 monthly installment payments. The effect of not reaffirming this

1 debt would have allowed the Defendant-Debtors to return the 2001  
2 Ford Edge at any time they chose to stop paying and put the risk of  
3 loss for depreciation and wear and tear on Plaintiff.

#### 4 **DISCUSSION**

5 The Bankruptcy Code provides that certain types of debt will  
6 be nondischargeable either based on the nature of the debt or the  
7 conduct of the debtor. At issue before the court is whether the  
8 debt owed to Plaintiff is nondischargeable due to fraud. 11 U.S.C.  
9 § 523(a)(2) provide that a debt is nondischargeable if it is:

10 (2) for money, property, services, or an extension,  
11 renewal, or refinancing of credit, to the extent  
obtained, by--

12 (A) false pretenses, a false representation, or actual  
13 fraud, other than a statement respecting the debtor's or  
an insider's financial condition;

14 (B) use of a statement in writing--

15 (i) that is materially false;  
16 (ii) respecting the debtor's or an insider's  
financial condition;  
17 (iii) on which the creditor to whom the debtor is  
liable for such money, property, services, or  
18 credit reasonably relied; and  
19 (iv) that the debtor caused to be made or published  
with intent to deceive; ....

20 For a debtor to be nondischargeable for fraud pursuant to  
21 11 U.S.C. § 523(a)(2)(A) there must be showing of actual fraud.  
22 *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234  
23 F.3d 1081 (9th Cir. 2000), states,

24 Under §523(a)(2)(A) of the Bankruptcy Code, a debt  
25 for services obtained by the debtor under "false  
pretenses, a false representation, or actual fraud"  
26 is nondischargeable. 11 U.S.C. §523(a)(2)(A)  
(2000). "The purposes of this provision are to  
27 prevent a debtor from retaining the benefits of  
property obtained by fraudulent means and to ensure  
28 that the relief intended for honest debtors does  
not go to dishonest debtors." 4 Collier on

1 Bankruptcy Par. 523.08[1][a] (15th ed. rev. 2000).

2 Consistent with these purposes, the Ninth Circuit  
3 has consistently held that a creditor must  
4 demonstrate five elements to prevail on any claim  
5 arising under §523(a)(2)(A). See, e.g., *Britton v.*  
6 *Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir.  
7 1991). The five elements, each of which the  
8 creditor must demonstrate by a preponderance of the  
9 evidence, are: (1) misrepresentation, fraudulent  
10 omission or deceptive conduct by the debtor; (2)  
11 knowledge of the falsity or deceptiveness of his  
statement or conduct; (3) an intent to deceive; (4)  
justifiable reliance by the creditor on the  
debtor's statement or conduct. *American*  
*Express Travel Related Servs. Co. v. Hashemi (In re*  
*Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1997);  
*Citibank (South Dakota), N.A. v. Eashai (In re*  
*Eashai)*, 87 F.3d 1082, 1086 (9th Cir. 1996).

12 The court finds that the failure to disclose that the  
13 Defendant-Debtors were at least contemplating, and more likely in  
14 the process of actually preparing the bankruptcy documents, the  
15 filing of a bankruptcy case was a fraudulent omission of highly  
16 relevant information.<sup>1</sup> In failing to disclose that information,  
17 the Defendant-Debtors did so with the knowledge that it rendered  
18 the balance of their statements in connection with purchasing the  
19 vehicle and obtaining the credit deceptive. They did so intending  
20 to deceive the car dealer and ultimately Plaintiff in providing the  
21 financing for the Retail Installment Contract. The Plaintiff  
22 justifiably relied upon the omission of this information, and it  
23 has been damaged by the loss of any right to a deficiency for this  
24 late model vehicle which the Defendant-Debtors intend to retain and

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26 <sup>1</sup> The Defendant-Debtors had obtained the required Certificates of  
27 Counseling on March 31, 2012, to file a bankruptcy case. It is highly  
28 unlikely that the Defendant-Debtors would incur the expense and spend  
the time to obtain these certificates if they were not planning on  
filing a bankruptcy case.

1 use.

2 With respect to the First Cause of Action, the court finds  
3 that the obligation owed on the Retail Installment Contract is  
4 nondischargeable pursuant to 11 U.S.C. § 523(a) (2) (A) .

5 For the Second Cause of Action, the Plaintiff has not provided  
6 the court with any evidence of a material misrepresentation in the  
7 Credit Application upon which Plaintiff reasonably relied. The  
8 court cannot identify in the Credit Application provided as an  
9 exhibit the alleged misrepresentation in writing that the  
10 Defendant-Debtors were not in the process of filing bankruptcy.  
11 There must be both a material misrepresentation and a showing that  
12 the creditor relied upon it. *Boyajian v. New Falls Corporation*,  
13 564 F.3d 1088, (9th Cir. 2008) .

14 With respect to the Second Cause of Action, the court finds  
15 that the Plaintiff has failed to carry its burden of proof (by a  
16 preponderance of the evidence) to show that the debt is  
17 nondischargeable pursuant to 11 U.S.C. § 523(a) (2) (B) .

18 For the Third Cause of Action, the Plaintiff asserts that the  
19 debt owed on the Retail Installment Contract should be  
20 nondischargeable pursuant to 11 U.S.C. § 523(a) (2) (C) which  
21 provides, in pertinent part, that the following debts are presumed  
22 nondischargeable,

23 (C) (i) for purposes of subparagraph (A) --

24 (I) consumer debts owed to a single creditor  
25 and aggregating more than \$600 for luxury  
26 goods or services incurred by an individual  
debtor on or within 90 days before the order  
for relief under this title are presumed to be  
nondischargeable; and

27 (II) cash advances aggregating more than \$875  
28 that are extensions of consumer credit under

1 an open end credit plan obtained by an  
2 individual debtor on or within 70 days before  
the order for relief under this title, are  
presumed to be nondischargeable; and

3 (ii) for purposes of this subparagraph-

4 (I) the terms "consumer", "credit", and "open  
5 end credit plan" have the same meanings as in  
section 103 of the Truth in Lending Act; and

6 (II) the term "luxury goods or services" does  
7 not include goods or services reasonably  
8 necessary for the support or maintenance of  
the debtor or a dependent of the debtor;

9 While the Plaintiff argues that the purchase of a 2011 Ford  
10 Focus is a luxury good, it provides little evidence in support  
11 thereof. It argues that since the Defendant-Debtors list two other  
12 cars on Schedule B, then the 2011 Ford Focus had to be a luxury  
13 good. The Plaintiff does not address (1) that the other two  
14 vehicles listed are a 2000 Jeep Cherokee Sport (\$3,000.00 value)  
15 and a 2002 Saab 95 (\$3,000.00 value), (2) the Debtors have an  
16 18 year-old son and 22 year-old son listed as dependants, and  
17 (3) why the court would conclude that a Ford Focus is a *per se*  
18 luxury good. The Plaintiff's Points and Authorities offers the  
19 court no assistance on this Third Cause of Action and is devoid of  
20 stating any basis for granting judgment under this Third cause of  
21 Action.<sup>2</sup>

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22  
23 <sup>2</sup> Interestingly, the Points and Authorities also fails to  
24 contain any authorities for the contention that the debt should be  
nondischargeable pursuant to 11 U.S.C. § 534(a)(2)(A), instead  
25 devoting all of the discussion to a contention that the Credit  
Application contains a written misrepresentation. Though the Points  
26 and Authorities, like the Complaint and Declaration, make a general  
reference to the Credit Application as having a misrepresentation,  
27 they all fail to direct the court to any specific statement in the  
Credit Application. The court could well infer from this failure to  
28 make such a specific reference that either the attorneys were sloppy  
in reviewing the credit application (which copy reviewed by counsel  
may have been as nearly illegible as those provided to the court) and

1 For the Third Cause of Action, the court finds that the  
2 Plaintiff failed to carry its burden of proof (preponderance of the  
3 evidence) to establish that a presumption of nondischargeability of  
4 this debt arises under 11 U.S.C. § 523(a)(2)(C).

5 **Request for Monetary Judgment**

6 The Plaintiff requests that the court enter judgment against  
7 the Defendant-Debtors in the amount of \$25,576.05. However, the  
8 Complaint does not allege that such obligation is now due and owing  
9 in full. The Complaint merely alleges that the obligation owing  
10 under the Retail Installment Contract was \$25,576.05 at the time of  
11 the bankruptcy case being filed. No contention is made that the  
12 Defendant-Debtors owe all of that money at the present time.

13 Further, the Plaintiff asserts that it has a security interest  
14 in the 2011 Ford Focus. No allegations are made and no evidence  
15 presented concerning the status of the vehicle, when the creditor  
16 has repossessed the collateral, and what deficiency, if any,  
17 remains after the commercially reasonable resale of the collateral.

18 With only allegations and evidence that an enforceable  
19 contract has been entered into which the Defendant-Debtors are  
20 liable under and that those obligations should be nondischargeable,  
21 the court does not have a basis for granting a monetary judgment to  
22 this Plaintiff. No default under the Retail Installment Agreement  
23 has been alleged or shown in this Adversary Proceeding. Upon entry  
24 of this judgment determining that any and all obligations owing  
25 under the Retail Installment Contract are nondischargeable, the

26 \_\_\_\_\_  
27 preparing the pleadings, or that counsel was attempting to  
28 intentionally misrepresent what is stated in the credit application,  
intentionally provide the court with a nearly illegible copy, and hope  
that the court was sloppy in review of this Motion.

1 Plaintiff will be able to exercise those rights and enforce any  
2 monetary obligations thereunder against each of the Defendant-  
3 Debtors notwithstanding the entry of the discharge in the  
4 bankruptcy case. That does not entitle the Plaintiff to a monetary  
5 judgment for the current amount of the obligation which is not  
6 alleged to be in default and due in full.

#### 7 **Request for Attorneys' Fees**

8       There is no general right to recover attorneys' fees under the  
9 Bankruptcy Code. See *In re Kord Enterprises II*, 139 F.3d 684 (9th  
10 Cir. 1998) (whether included as part of secured claim); *Heritage*  
11 *Ford v. Baroff (In re Baroff)*, 105 F.3d 439 (9th Cir. 1997)  
12 (prevailing party contractual attorneys' fees in  
13 nondischargeability action). Under the American Rule, the  
14 prevailing party is not entitled to collect reasonable attorneys'  
15 fees unless provided for by statute or contract. *Travelers*  
16 *Casualty & Surety of America v. Pacific Gas and Electric Company*,  
17 549 U.S. 443, 448 (2007). (Enforcing contractual attorneys' fees  
18 provision for litigating issues arising under bankruptcy law.)  
19 Because state law controls an action on a contract, a party is  
20 entitled to attorneys' fees to the extent provided for by the  
21 contract. *In re Baroff*, 105 F3d. at 411.

22       California Civil Code authorizes an award of attorney fees "in  
23 any action on a contract" where the contract "specifically provides  
24 that attorney's fees and costs, which are incurred to enforce that  
25 contract, shall be awarded . . . ." Cal. Civ. Code § 1717(a). An  
26 action for negligent misrepresentation or for fraud are not actions  
27 to enforce the provisions of a contract. *McKenzie v. Kaiser-Aetna*,  
28 55 Cal. App. 3d 84 (1976); *Stout v. Turney*, 22 Cal. 3d 718 (1978).



1 However, as stated by the Supreme Court in *In re Travelers*, the  
2 contract may provide for attorneys' fees for issues beyond  
3 litigating the issues of the contract, such as bankruptcy law  
4 issues arising in connection with an objection to claim.

5 The Plaintiff does not direct the court to any specific  
6 provision in the Retail Installment Contract upon which it bases a  
7 right to contractual attorneys' fees in this Adversary Proceeding.  
8 The Complaint does not identify any specific contractual language  
9 upon which it seeks recovery of attorneys' fees. The Complaint  
10 merely alleges "Pursuant to the terms of the [Retail Installment  
11 Contract], Plaintiff requests its reasonable attorneys' fees in  
12 conjunction with Defendants breach of the [Retail Installment  
13 Contract]." The only language the court could identify in the  
14 Retail Installment Contract relating to attorneys' fees is in  
15 paragraph 3 to the Retail Installment Contract attached as  
16 Exhibit B to the Complaint. Dckt. 1.

17 3. IF YOU PAY LATE OR BREAK YOUR OTHER PROMISES

18 c. You may have to pay collection costs. You will  
19 pay our reasonable costs to collect what you owe,  
20 including attorney fees, court costs, collection  
21 agency fees, and fees paid for other reasonable  
collection efforts. You agree to pay a charge not  
to exceed \$15 if any check you give us is  
dishonored.

22 The Motion for Entry of Default Judgment does not state with  
23 particularity the grounds upon which the request for attorneys'  
24 fees is based, nor does it make any reference to attorneys' fees.  
25 The declaration of Jim Hogan provides his personal findings and  
26 conclusions that paragraph 3(c) provides the contractual basis for  
27 Plaintiff recovering attorneys' fees in enforcing obligations.  
28 Declaration ¶ 16, Dckt. 14.

1       The Points and Authorities merely states in its conclusions  
2 that Plaintiff “[s]eeks a money judgment in the amount of  
3 \$27,836.27 in its favor to be entered against Defendants, which  
4 consists of \$25,576.05 in principal balance, \$17.22 in prejudgment  
5 interest, \$2,067.00 in attorneys’ fees, and \$176.00 in court  
6 costs.” Dckt. 16.

7       No attorney from counsel for the Plaintiff has provided  
8 testimony as to the fees which were billed in connection with this  
9 Adversary Proceeding or authenticated the billing records which  
10 Mr. Hogan references in his declaration. While Mr. Hogan can  
11 testify as to how much in total fees and costs Plaintiff has  
12 incurred to its counsel in connection with this Adversary  
13 Proceeding, he has shown no basis for having any personal knowledge  
14 of the legal services provided, how they were billed, or how the  
15 billing statements offered as evidence are accurate.

16       In the present case the Plaintiff has established that the  
17 obligations owing under the Retail Installment Contract are  
18 nondischargeable for fraud based on the failure to disclose that  
19 the Defendant-Debtors were contemplating (or in the process of)  
20 filing bankruptcy when they obtained the financing from Plaintiff.  
21 However, the Complaint does not allege, nor has evidence been  
22 presented, that the Defendant-Debtors have defaulted in payments  
23 under the Retail Installment Agreement or broke “other promises.”

24       The Complaint does not seek to collect any amounts owing  
25 arising from a late, defaulted, or other breached promise, but only  
26 seeks to litigate whether the obligations owing under the Retail  
27 Installment Contract are nondischargeable. The contract provision  
28 for attorneys’ fees does not include an Adversary Proceeding in

1 which only a determination of nondischargeability of the debt, but  
2 there is no enforcement of the debt itself.<sup>3</sup>

3 It is significant that the Complaint, Motion for Entry of  
4 Default Judgment, and Points and Authorities offer little more than  
5 a demand for attorneys' fees. No basis is asserted under the  
6 actual language of the contractual provision for awarding  
7 attorneys' fees for litigating only the issue of whether the  
8 obligations owing under the Retail Installment Contract are  
9 nondischargeable.

10 The request for attorneys' fees is denied.

### 11 CONCLUSION

12 The court grants judgment for the Plaintiff against the  
13 Defendant-Debtors, and each of them, that the obligations owing  
14 under the Retail installment Contract dated April 19, 2012, for the  
15 purchase of a 2011 Ford Focus, VIN ending in 4116, is  
16 nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

17 The court grants judgment for the Defendant-Debtors on the  
18 Second and Third Causes of Action seeking determinations that the  
19 obligations under the Retail Installment Contract were  
20 nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(B) and (C), and  
21

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22 <sup>3</sup> The Plaintiff could have included in the contract a provision  
23 for attorneys' fees which provided,

24 3. IF YOU PAY LATE, DEFAULT, OR BREAK YOUR OTHER PROMISES,  
25 OR FILE BANKRUPTCY

26 You may have to pay collection costs. You will pay our  
27 reasonable costs to collect what you owe, including attorney  
28 fees, court costs, collection agency fees, and fees paid for  
other reasonable collection efforts, and any attorneys' fees  
and costs in any bankruptcy proceeding. You agree to pay a  
charge not to exceed \$15 if any check you give us is  
dishonored.

1 that Plaintiff take nothing by those claims.

2 The court disallows the Plaintiff any attorneys' fees in this  
3 Adversary Proceeding. Because the court has granted judgment on a  
4 motion for entry of judgment by the Plaintiff without hearing, the  
5 judgment shall grant the Plaintiff fourteen days to file a Motion  
6 for allowance of reasonable attorneys' fees and costs if it  
7 believes a good faith basis exists for such in this Adversary  
8 proceeding.

9 The court grants judgment for the amount of \$176.00 for  
10 Plaintiff.

11 This Memorandum Opinion and Decision constitutes the court's  
12 findings of fact and conclusions of law pursuant to Federal Rule of  
13 Civil Procedure 52(a) and Federal Rule of Bankruptcy Procedure  
14 7052. The court shall issue a separate order granting the motion  
15 and a separate judgment consistent with this Decision.

16 Dated: October 10, 2012

17 /s/

18 \_\_\_\_\_  
19 RONALD H. SARGIS, Judge  
20 United States Bankruptcy Court  
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