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03/30/2007

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	
	§	
CARGO CONNECTIONS, INC.,	§	Case No. 01-44836
	§	
Debtor.	§	
	§	
In re:	§	
	§	
DINO J. ANTOVONI,	§	Case No. 01-44837
	§	
Debtor.	§	
	§	
CHRIS THOMAS and	§	
ARTHUR WHITNEY WHEATON,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Adv. Nos. 02-4203 and 02-4207
	§	
CITIBANK, DINO ANTOVONI,	§	
Individually, CARGO CONNECTIONS,	§	
INC., COLLIN CREEK TRAVEL,	§	
GREEN'S GOLD AND DIAMONDS, INC.,	§	
and STEVE and KATHY SLIGER, owners	§	
of DALLAS JEWELRY EXCHANGE/	§	
SLIGER JEWELRY, formerly known as	§	
PRESTON GOLD AND DIAMONDS,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION[1]

This matter is before the Court following trial of the Third Amended Complaint (the "Complaint") filed by Chris Thomas and Arthur Whitney Wheaton (collectively, the "Plaintiffs") and the counterclaims asserted by Defendant Citibank (South Dakota), N.A. ("Citibank"). In the Complaint, the Plaintiffs seek, among other things, a judgment that

[1] This Memorandum Opinion is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case, or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

Dino Antovoni is obligated to them and that his obligation is not dischargeable in bankruptcy under 11 U.S.C. §523(a)(2). This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 as well as the standing order of reference in this district. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (B), (I) and (O).

II. PROCEDURAL BACKGROUND

Dino Antovoni ("Antovoni") initiated Bankruptcy Case No. 01-44837 in this Court by filing a voluntary petition under Chapter 7 of the Bankruptcy Code on November 21, 2001. Antovoni's company, Cargo Connections, Inc. ("Cargo"), initiated Bankruptcy Case No. 01-44836 in this Court by filing its voluntary petition under Chapter 7 of the Bankruptcy Code on the same date. Antovoni scheduled the Plaintiffs as having an unsecured claim against his bankruptcy estate in the amount of $48,000. Cargo scheduled the Plaintiffs as having an unsecured claim against its bankruptcy estate in the amount of $27,000.[2]

On March 12, 2001, the Plaintiffs initiated identical adversary proceedings in Antovoni's bankruptcy case and Cargo's bankruptcy case. Adversary Proceeding No. 02-4207 is associated with *In re Antovoni*, Case No. 01-44837. Adversary Proceeding No. 02-4203 (together with Adversary Proceeding No 02-4207, the "Adversaries") is associated with *In re Cargo Connections, Inc.*, Case No. 01-44836. Both Adversaries are

[2] The bankruptcy cases filed by Antovoni and Cargo were "no asset" Chapter 7 cases. Since there was to be no distribution to unsecured creditors, unsecured creditors such as the Plaintiffs were not required to file proof of any claims against the bankruptcy estates.

identical as to parties and causes of action. The defendants have asserted identical answers, affirmative defenses and counterclaims in both Adversaries.

The Adversaries challenge the dischargeability of Antovoni's and Cargo's debts to the Plaintiffs pursuant to 11 U.S.C. §523(a)(2). In particular, the Plaintiffs assert claims for theft and fraud against Antovoni and Cargo relating to Antovoni's allegedly unauthorized and fraudulent use of the Plaintiffs' credit cards. The Plaintiffs assert related claims for negligence, fraud, civil conspiracy and violation of the Texas Deceptive Trade Practices Act against several merchants, namely, Collin Creek Travel ("Collin Creek"), Green's Gold and Diamonds, Inc. ("Green's"), and Steve and Kathy Sliger (collectively, the "Sligers"). With respect to Citibank, which issued the credit cards to the Plaintiffs, the Plaintiffs assert causes of action for breach of contract, usury, violations of the Texas Deceptive Trade Practices Act, fraud and civil conspiracy.

Citibank filed a Motion for Summary Judgment in both Adversaries on September 30, 2004. The Court, by Orders entered on July 19, 2005, granted summary judgment in favor of Citibank on the Plaintiffs' claims for usury and violation of Deceptive Trade Practices Act in both Adversaries. In Citibank's *Third Amended Answer and Counterclaims*, which was filed on October 1, 2004 in both Adversaries, Citibank asserted counterclaims against the Plaintiffs for breach of contract and for a suit on a sworn account.

Because the Adversaries are identical, the Court held a consolidated, four-day trial on July 28-29, 2005, August 24, 2006, and November 2, 2006. After the close of evidence, Green's, Collin Creek, and the Sligers made oral motions for directed verdicts (collectively, the "Motions") in their favor. Additionally, during closing arguments on

November 2, 2006, the Plaintiffs' counsel stated that he objected to the admission into evidence of certain records of telephone calls between the Plaintiffs and Citibank.

III. FACTUAL BACKGROUND

The Plaintiffs are Citibank credit card holders and, at all relevant times, were roommates. The Plaintiffs had an arrangement with Thomas Edwards ("Edwards"), another roommate, whereby the Plaintiffs would charge large ticket purchases for events on their Citibank cards. Edwards would reimburse the Plaintiffs for the charges as they accrued. The Plaintiffs would receive certain "perks" in return, such as prime seating at events and an increase in the airline miles they earned on their credit cards as a result of the purchases.

The Plaintiffs agreed to a similar arrangement with Antovoni, who was a social acquaintance of the Plaintiffs. The Plaintiffs voluntarily gave their Citibank credit card information to Antovoni on or before November 27, 2000 and authorized Antovoni to make charges to their credit cards. Antovoni subsequently made the following charges to Plaintiff Thomas' Citibank account:

Date	**Merchant**	**Amount**
11/27/2000	Green's Gold and Diamond	$27,000.00
11/27/2000	MLT Vacations	$3,220.70
12/1/2000	Preston Gold and Diamond	$12,862.00
12/4/2000	MLT Vacations	$1,632.00
TOTAL		**$44,714.70**

Additionally, on November 27, 2000, Antovoni made a charge on Plaintiff Wheaton's Citibank account in the amount of $27,000 at Green's (together with the charges Antovoni made to Plaintiff Thomas' account, the "Charges").

The Plaintiffs' testimony that they only authorized Antovoni to charge two Sony Playstations to their credit cards was not credible.

The Plaintiffs gave authorization directly to Citibank for the Charges made at Green's.[3] Citibank initially refused to allow the $27,000 charge on Plaintiff Thomas' account. Twelve minutes after Citibank placed a fraud early warning referral on the account, Citibank received a call from a person who passed Citibank's verification procedure and authorized the charge. Two days later, Citibank called Plaintiff Thomas at his business phone to re-verify the Charges made on his account on November 27, 2000. The next day, Plaintiff Thomas spoke with Citibank, passed Citibank's verification procedure, and verified the Charge.

Similarly, Citibank did not allow the $12,862 charge by Preston Gold and Diamonds to go through and placed a fraud early warning referral on Plaintiff Thomas' account. Thirty minutes later, Citibank received a call from Plaintiff Thomas' home telephone number. Plaintiff Thomas passed the verification procedure and authorized the charge. Also on November 27, 2000, Plaintiff Thomas called Citibank to notify it that there would be large future purchases made on Plaintiff Thomas' credit card.

With regard to Plaintiff Wheaton, Citibank initially refused to allow the $27,000 charge by Green's. Citibank placed a fraud early warning referral on the account and left a message on Plaintiff Wheaton's answering machine at his home telephone number. Two minutes later, Citibank received a call from a person who passed Citibank's verification procedure and authorized the charge.

At the time of the Charges at Green's, Antovoni dealt with Green's owner, Bobby Green. Antovoni later returned the merchandise to Green's. Antovoni again dealt with Bobby Green when he returned the merchandise. Mr. Green was aware that Antovoni

[3] One of the purchases at Green's was a watch on consignment from Preston Gold and Diamonds. Preston Gold and Diamonds processed this charge even though Green's was the point of sale for the watch. The Sligers owned Preston Gold and Diamonds during the time at issue.

might return the merchandise. At Antovoni's request, Green's refunded the purchase price by giving Antovoni a combination of cash, a bracelet and credit toward the amount Antovoni owed Bobby Green on a boat Antovoni had purchased from him during the summer of 2000.

The Charges to Plaintiff Thomas' credit card from MLT Travel were made by Collin Creek, a travel agent. Collin Creek sold Antovoni a vacation package and an upgrade from MLT Travel. Collin Creek received a commission from MLT Travel for its services.

In December of 2000, the Plaintiffs received billing statements from Citibank reflecting the Charges. The Charges were considerably greater than anything the Plaintiffs had charged on their credit cards during the time period covered by the billing statements. The Plaintiffs noticed the Charges. Although the Plaintiffs' cardholder agreements with Citibank required them to report any lost or stolen cards at once and to report any unauthorized or erroneous charges within 60 days, the Plaintiffs did not report their credit cards as stolen or dispute the Charges for approximately five months.

Plaintiff Thomas reported his credit card information stolen on April 10, 2001. Plaintiff Wheaton reported his credit card information stolen on April 25, 2001. The Plaintiffs testified that they did not report the Charges until April of 2001 because (1) they thought the Charges were errors that would correct themselves, (2) they were on vacation in February and March of 2001, (3) they were afraid of Antovoni, and (4) they were waiting to see if Antovoni would reimburse them for the Charges.

Antovoni wrote a $3,000 check to Citibank and a check for $2,000 to Plaintiff Thomas, each dated January 17, 2001. Antovoni wrote another check to Citibank for

$37,000 in either late December of 2000 or early January of 2001. This check was returned for insufficient funds. Plaintiff Thomas, who was a loan officer for Compass Bank, submitted Antovoni's information to Compass Bank for a home equity loan to generate cash to pay the Charges. Antovoni's loan application was denied. Finally, when it became obvious to the Plaintiffs that Antovoni was not going to repay the Charges, the Plaintiffs reported their credit card information as stolen.

In his initial report to Citibank, Plaintiff Thomas suggested that Antovoni might have stolen his credit card information during a holiday party at the Plaintiffs' house. Plaintiff Thomas made this report even though he knew that he and Plaintiff Wheaton had given their credit card information to Antovoni voluntarily. In a subsequent conversation with Citibank's fraud investigator, Chip Bulin ("Bulin"), on June 26, 2001, Plaintiff Thomas denied that he knew Antovoni. Plaintiff Wheaton likewise denied that he knew Antovoni. Both statements were false.

In the Plaintiffs' Original Complaint, the Plaintiffs stated in paragraph 16 that "Defendant Dino Antovoni, while a social guest of Plaintiffs took the credit card numbers he found in Plaintiffs' home …." However, in paragraph 16 of the Plaintiff's Third Amended Complaint, the Plaintiffs state that "Defendant Dino Antovoni was at one time given Plaintiffs' credit card account numbers because he told both Plaintiffs that his company had in stock two Sony Playstation video games." Based on the facts set forth herein, the Court finds that the Plaintiffs are not credible witnesses and that Antovoni had either actual or implied authority to make each of the Charges.

IV. DISCUSSION

A. Plaintiffs' Evidentiary Objection

In closing arguments, the Plaintiffs' counsel stated that he objected to the admission into evidence of Citibank's records of telephone calls showing that the Plaintiffs authorized the Charges. The Plaintiffs' counsel took issue with Bulin having crossed out the word "no" on one of the documents.[4] This objection was untimely.

As an initial matter, the Plaintiffs waived any objection to the admissibility of Citibank's records of telephone conversations with the Plaintiffs. The Plaintiffs' counsel did not file an objection to any of Citibank's exhibits prior to the objection deadline set forth in the Court's Scheduling Order, as modified by the Order Granting Motion to Modify Scheduling Order, and the Plaintiffs' counsel stipulated to the admission of Citibank's telephone records into evidence prior to trial. Moreover, the Plaintiffs' counsel did not object to the admission of the records into evidence. The Plaintiffs' counsel even used Citibank's telephone records on direct examination of Bulin during trial. Because (1) the Plaintiffs' counsel stipulated to the admission of Citibank's telephone records into evidence, (2) the Plaintiffs' counsel used these records in questioning a witness at trial after having so stipulated, (3) the Plaintiffs' counsel failed to make a timely objection to the admission of the records in accordance with Federal Rule of Evidence 103(a)(1), and (4) Bulin gave live and affidavit testimony authenticating the records, the records were properly admitted into evidence. *See, e.g.*,

[4] The notation in the document originally read "no match" to indicate that the phone number of the person calling Citibank did not match the phone number Citibank had on file for Plaintiff Thomas. During the course of Bulin's investigation, he discovered that Plaintiff Thomas had submitted this same phone number to Citibank on his Affidavit of Unauthorized Use. Bulin corrected the entry to indicate that the phone number of the person that called Citibank was a match to Plaintiff Thomas' phone number.

Jenkins v. General Motors Corp., 446 F.2d 377, 383 (5th Cir. 1971); *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1285-86 (11th Cir. 2000); *United States v. Kanovsky*, 618 F.2d 229, 231 (2nd Cir. 1980); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 610 F.Supp. 891, 906 (W.D. Mo. 1985); *P.D. Marchessini (New York), Inc. v. H.W. Robinson & Co., Inc.*, 287 F.Supp. 728, 731 (S.D.N.Y. 1967); *Belmont Industries, Inc. v. Bethlehem Steel*, 62 F.R.D. 697, 701-703 (E.D. Pa. 1974).

Even if the Plaintiffs had not waived their objection to Citibank's records of its telephone conversations with the Plaintiffs, the records would be admissible under Federal Rule of Evidence 803(6). Bulin is a Citibank employee who regularly investigates fraud for Citibank. It is his regular custom to make notes of his findings in fraud investigations. Bulin's notation on Citibank's telephone records – which the Plaintiffs assert makes those records inadmissible – was made at or near the time of his investigation and falls within the business records exception to hearsay. Bulin's notation goes to the weight of the evidence and not its admissibility. Additionally, Bulin was available to testify at trial and did testify and explain the contemporaneous notation made to the records during his investigation. For all the foregoing reasons, Citibank's records are admissible. *See United States v. Kramer*, 289 F.2d 909, 921 n. 10 (2nd Cir. 1961) (citing *Klein v. United States*, 176 F.2d 184, 188 (8th Cir. 1949).

B. Plaintiffs' Claim for Nondischargeability

1. 11 U.S.C. §523(a)(2)

The Plaintiffs allege that Antovoni and Cargo should be denied a discharge of their debts to the Plaintiffs pursuant §523(a)(2) of the Bankruptcy Code. However, as a preliminary matter, a discharge is not available to a corporation. *See* 11 U.S.C.

§727(a)(1). The Court, therefore, will deny the Plaintiffs' request for a judgment of nondischargeability against Cargo.

As to Antovoni, the Plaintiffs have the burden of establishing by a preponderance of the evidence that the debt to them is not dischargeable under 11 U.S.C. §523(a)(2). *Grogan v. Garner*, 498 U.S. 279, 286 (1991). "Intertwined with this burden is the basic principle of bankruptcy that exceptions to discharge must be strictly construed against a creditor and liberally construed in favor of a debtor so that the debtor may be afforded a fresh start." *Hudson v. Raggio & Raggio, Inc. (In re Hudson)*, 107 F.3d 355, 356 (5th Cir. 1997); *In re Whitaker*, 225 B.R. 131, 139 (Bankr. E.D.La. 1998). A fresh start is not promised to all who file for bankruptcy relief, only to "the honest but unfortunate debtor." *Grogan*, 498 U.S. at 286-87.

Section 523(a) of the Bankruptcy Code implements this policy by providing that a debtor may not discharge certain types of debts in bankruptcy. As it relates to this case, §523(a)(2)(A) of the Bankruptcy Code provides that:

> [A] discharge under §727 . . . of this title does not discharge an individual debtor from any debt for money, property, or services, . . . to the extent obtained by 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). This section encompasses similar but distinct causes of action. Though other circuits have applied a uniform standard to all §523(a)(2)(A) actions, the Fifth Circuit has distinguished the elements of "actual fraud" on the one hand and "false pretenses and false representations" on the other. *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1292 (5th Cir. 1995).

To prove that a debt is non-dischargeable as having been obtained by false pretense or representation, a creditor must establish (i) the existence of a knowing and

fraudulent falsehood, (ii) describing past or current facts, and (iii) that was relied upon by the creditor. *See Allison v. Roberts (In re Allison)*, 960 F.2d 481, 483 (5th Cir. 1992); *Bank of La. v. Bercier (In re Bercier)*, 934 F.2d 689, 692 (5th Cir. 1991); *RecoverEdge L.P.* at 1292-93.[5] Actual fraud requires the additional proof of the debtor's intent to deceive and a loss by the creditor which is proximately caused by the fraud. *See RecoverEdge L.P.* 44 F.3d at 1293, as modified by *Field v. Mans*, 516 U.S. 59 (1995).

To establish fraud, or false pretenses, or a false representation, a plaintiff must show that its reliance on the defendant's representations was justifiable as well as actual. *Beijing Metals & Minerals Import/Export Corp. v. American Business Ctr., Inc.*, 993 F.2d 1178, 1186 (5th Cir.1993). "Reliance is *justifiable* 'if the *existence* of the intention is *material* and the recipient has *reason to believe* that it will be carried out.'" *In re Mercer*, 246 F.3d at 416. (emphasis in original) (quoting RESTATEMENT (SECOND) OF TORTS §544). "The second prong for justifiable reliance on a statement of *intention* is *reason to believe* the intention will be carried out." *Id*. (emphasis in original) "If the recipient '*knows facts* that will make it *impossible* for the maker to [carry out his intention, the recipient] *cannot be justified* in his reliance.'" *Id*. at 417 (emphasis in original). "[F]or *justifiable reliance* on a *representation of intention*, the recipient is *not* required to conduct an investigation." *Id*. (emphasis in original).

Here, Antovoni represented to the Plaintiffs that he would repay the Charges. The Plaintiffs relied upon his representation by allowing Antovoni to place the Charges upon their Citibank credit cards. However, Antovoni had no intention of repaying the

[5] It does not matter whether Antovoni made an affirmative misrepresentation or concealed his intent to not repay the Plaintiffs. Concealment by silence, or fraudulent concealment, is a type of misrepresentation. *In re Mercer*, 246 F.3d 391, 404 (5th Cir. 2001).

Plaintiffs and intentionally deceived the Plaintiffs regarding this fact. The Plaintiffs could not have known of Antovoni's intention not to repay them when they authorized the Charges and, thus, justifiably relied on Antovoni's false representation.

For all the foregoing reasons, the Court concludes that the Plaintiffs have sustained their burden of proving the elements necessary to deny Antovoni a discharge of his obligation to them for the Charges pursuant to §523(a)(2)(A) of the Bankruptcy Code. To the extent the Plaintiffs' request an additional award against Antovoni for their attorneys' fees, the Bankruptcy Code does not expressly provide for an award of attorneys' fees to a prevailing creditor in a dischargeability action. *Jordan v. Southeast Nat'l. Bank (In re Jordan)*, 927 F.2d 221, 226 (5th Cir. 1991), overruled on other grounds by *Coston v. Bank of Malvern (Matter of Coston)*, 991 F.2d 257 (5th Cir. 1993). A prevailing party in a dischargeability action can only recover attorney's fees when that right arises from state law. *See Id.* at 227. Here, the Plaintiffs have failed to show any contractual or state statutory right to such fees, and any request by the Plaintiffs for an award of attorneys' fees against Antovoni will be denied.

2. 11 U.S.C. § 523(a)(4) and/or (a)(6)

The Court next turns to the Plaintiffs' claim against Antovoni for what they describe as "theft." The Plaintiffs ask this Court to conclude that Antovoni "stole the credit card numbers issued to Plaintiffs…." *See Plaintiffs' Findings of Fact and Conclusions of Law* at ¶14. It is not entirely clear whether the Plaintiffs are advancing a claim for embezzlement, a common law claim for conversion under Texas law or a claim under the Texas Theft Liability Act, TEX. CIV. PRAC. & REM. CODE. § 134.001 *et seq*.

(the "Texas Act").[6] The Plaintiffs also failed to explain why their claim against Antovoni for "theft" should be excepted from discharge.

Two possible grounds for nondischargeablity are §523(a)(4) and §523(a)(6) of the Bankruptcy Code. Section 523(a)(4) excepts from discharge a debt for embezzlement, which is defined as a "fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." *In re Miller*, 156 F.3d 598, 602 (5th Cir. 1998). Alternatively, §523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Conversion of another's property may constitute a willful and malicious injury precluding discharge under §523(a)(6) of the Bankruptcy Code. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 245 (1986).

Here, the Plaintiffs knowingly and voluntarily gave their credit card numbers to Antovoni and authorized the Charges. Conversion under Texas law, embezzlement, larceny and theft under the Texas Act each require an unauthorized and unlawful act by Antovoni. *See Burns v. Rochon*, 190 S.W.3d 263, 268 (Tex. App. – Houston [1st Dist.] 2006) (describing the elements of conversion); TEX. CIV. PRAC. & REM. CODE §134.003(a) (citing TEX. PENAL CODE §31.03). Thus, under the circumstances of this case, the Court concludes that the Plaintiffs have failed to establish by a preponderance of the evidence a nondischargeable claim for "theft" pursuant to §523(a)(4) and/or (a)(6) of the Bankruptcy Code.

[6] A person who commits theft is civilly liable under the Act "for the damages resulting from the theft." TEX. CIV. PRAC. & REM. CODE §134.003(a).

D. The Plaintiffs' Other Claims

1. Fraud Claim Against Green's and the Sligers

In their Complaint, the Plaintiffs allege that Green's and the Sligers purposefully acted to defraud them. In paragraph 38, the Plaintiffs specifically allege that Green's and the Sligers allowed Antovoni "to charge jewelry in excess of 72862.00 [sic]. Then, immediately after Antovoni purchased the jewelry, he gave the exact jewelry back to Defendants, who thereafter issued a cashier's check to Antovoni rather than crediting the 'return' of the jewelry to Plaintiffs' own credit card accounts." With respect to Green's, the Plaintiffs further allege in paragraph 39 of the Complaint that Green's owner, Bobby Green, "kept $10,000 of the 'refund' given to Antovoni because Green sold his boat to Antovoni and this was his 'payment' for the boat."

Under Texas law, "[a] person commits fraud by (1) making a false material representation, (2) that the person either knows to be false or asserts recklessly without knowledge of its truth, (3) with the intent that the misrepresentation be acted upon, (4) and the person to whom the representation is made acts in reliance upon it, (5) and is injured as a result." *Fondren Construction Co., Inc. v. Briarcliff Housing Development Associates, Inc.*, 196 S.W.3d 210, 217 (Tex. App. – Houston [1st Dist.] 2006) (citing *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47-48 (Tex. 1998)). However, at trial, the Plaintiffs failed to establish what, if any, material misrepresentation Green's or the Sligers made to them. The Plaintiffs also failed to establish that Green's or the Sligers had any contact with the Plaintiffs at the time the Charges were made. Further, because the Plaintiffs authorized the Charges in question, the Plaintiffs were not injured as a result of any material misrepresentations by these

parties. The Court, therefore, concludes that the Plaintiffs failed to establish a claim for fraud against Green's or the Sligers.

2. Civil Conspiracy Claim against Cargo, Green's, Collin Creek, and the Sligers

In their Complaint, the Plaintiffs allege a conspiracy among the named Defendants to defraud them. At trial, however, the Plaintiffs failed to establish which Defendants were involved in the alleged conspiracy or to provide any other detail to support their claim. The Plaintiffs merely argued that Green's and Antovoni conspired to charge the Plaintiffs' credit cards, refund the purchase prices and use the proceeds to pay off a boat and buy a house.

Under Texas law, "[a]n actionable civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983) (citations omitted). "The essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Id*. The Plaintiffs bear the burden of proof on their fraud cause of action by a preponderance of the evidence. *Fossier v. Morgan*, 474 S.W.2d 801, 804 (Tex. Civ. App. – Austin 1971).

Here, the Plaintiffs failed to establish that there was a meeting of the minds between any two of the Defendants. Moreover, the Plaintiffs authorized the Charges. The Court, therefore, concludes that the Plaintiffs failed to establish that Green's and Antovoni (or any other combination of Defendants) conspired to defraud the Plaintiffs.

3. Negligence Claim against Green's, Collin Creek and the Sligers

The Plaintiffs allege that Green's, Collin Creek and the Sligers were negligent as

merchants for charging the items Antovoni purchased using the Plaintiffs' credit card numbers. "In a negligence case, a plaintiff must prove the defendant owed a legal duty to the plaintiff, the defendant breached that duty, and that the breach proximately caused the plaintiffs' injuries." *Connaway v. Village Farms, L.P.*, 200 S.W.3d 353, 356 (Tex. App. – Dallas 2006) (citing *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005)). In this case, it is not clear what duty(ies) of care these Defendants owed to the Plaintiffs. Moreover, the Plaintiffs had authorized Antovoni to make the Charges. Although this authorization was procured by Antovoni's fraud, it was still the proximate cause of the Plaintiffs' economic loss. The Court, therefore, concludes that the Plaintiffs failed to establish a claim for negligence against Green's, Collin Creek or the Sligers.

4. DTPA Claim Against Green's and the Sligers

In their Complaint, the Plaintiffs allege that Green's and the Sligers violated the Texas Deceptive Trade Practices – Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41 *et. seq*. (the "DTPA"). The Plaintiffs assert that Green's and the Sligers committed actions that are prohibited by DTPA §17.46(b) and engaged in "unconscionable conduct" in violation of DTPA §17.50(a)(3). In particular, the Plaintiffs allege that Green's violated §17.50(a)(3) by allowing Antovoni to make unauthorized Charges and return the merchandise in exchange for a cashier's check after deducting the cost of the boat Antovoni purchased from Green's owner, Bobby Green.

The DTPA created a new statutory cause of action similar to common law claims for fraud and breach of warranty. *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). The purpose of the DTPA is to "protect consumers against false, misleading, and deceptive trade practices, unconscionable actions, and breaches of warranty." TEX. BUS.

& COM CODE §17.44. "To recover under the DTPA, the plaintiff must show that (1) he or she is a consumer, (2) the defendant engaged in a false, misleading or deceptive act, and (3) the act constituted a producing cause of economic damages …." *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 623 (Tex. App. – Fort Worth 2006) (citing TEX. BUS. & COM. CODE ANN. §17.50(a)(1); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995)).

Here, the Plaintiffs were not customers of either Green's or the Sligers. Although the Plaintiffs authorized the Charges by Antovoni, the Plaintiffs did not request the merchandise or even know what the specific items were that Antovoni purchased. Indeed, the purchases were not made for their benefit, and none of the merchandise was delivered to the Plaintiffs. Based on these facts, the Court finds that the Plaintiffs did not "seek or acquire" the merchandise from Green's or the Sligers and do not qualify as "consumers" under the DTPA. *See Henry v. Cullum Cos., Inc.*, 891 S.W.2d 789, 794 (Tex. App. – Amarillo 1995). Moreover, neither Green's nor the Sligers (i) misrepresented to the Plaintiffs that they possessed any particular knowledge, experience or skill, (ii) sold the Plaintiffs faulty merchandise, or (iii) committed any of the acts prohibited by DTPA §17.46(b). Accordingly, the Court concludes that the Plaintiffs have failed to establish a claim against Green's or the Sligers under the DTPA.

E. Citibank's Counterclaim Against the Plaintiffs for Breach of Contract[7]

The Plaintiffs asserted in their Complaint that they fully performed their

[7] In its answer to the Complaint, Citibank also asserts a counterclaim against the Plaintiffs for a suit on a sworn account. The Court applies the law of Texas -- the state with the most significant relationship to the transactions in this case -- to Citibank's common law suit on a sworn account. *See Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 727 (5th Cir. 2003). Under Texas common law, a credit card debt cannot be recovered through a suit on a sworn account. *Tully v. Citibank (South Dakota), N.A.*, 173 S.W.3d 212, 216 (Tex. App. – Texarkana 2005). The Court therefore need not address Citibank's claim for a suit on a sworn account in this Memorandum Opinion.

contractual obligations to Citibank. The Plaintiffs further asserted that Citibank had breached its obligation to the Plaintiffs under the cardholder agreements by failing to hold the Plaintiffs harmless for purchases the Plaintiffs did not make or authorize. However, as the Court has previously discussed in this Memorandum Opinion, the Plaintiffs authorized the Charges. The Plaintiffs failed to establish any breach of contract by Citibank with respect to the Charges.

Citibank's answer to the Complaint included a counterclaim against the Plaintiffs for breach of contract. The cardholder agreements required the Plaintiffs/Counter-Defendants to report any unauthorized or erroneous charges within 60 days of receiving notice of such charges. The cardholder agreements also required the Plaintiffs/Counter-Defendants to report any lost or stolen cards at once. In this case, however, the Plaintiffs/Counter-Defendants waited approximately five months to report the Charges as unauthorized. Further, the charges were not actually erroneous or unauthorized.

The Plaintiffs/Counter-Defendants' cardholder agreements provide that they are governed by the law of South Dakota. The elements for a breach of contract under South Dakota law are (1) an enforceable promise, (2) a breach of that promise, and (3) resulting damages. *Weitzel v. Sioux Valley Heart Partners*, 714 N.W.2d 884, 894 (S.D. 2006) (citations omitted). Here, the Plaintiffs/Counter-Defendants authorized the Charges, and Citibank paid the amounts of the Charges to the merchants as per its cardholder agreements with the Plaintiffs/Counter-Defendants. The Plaintiffs/Counter-Defendants failed to repay the Charges to Citibank as they came due. The Court therefore concludes that the Plaintiffs/Counter-Defendants breached their cardholder agreements with Citibank.

Citibank has incurred the following in damages as a result of the Plaintiffs/Counter-Defendants' breach of their agreements with Citibank:

	Principal	**Interest**[8]	**Total**[9]
Arthur Wheaton	$27,000.00	$59,812.50	$86,812.50
Chris Thomas	$44,714.70	$74,546.76	$119,261.46

Interest continues to accrue to Plaintiff/Counter-Defendant Thomas' account at the contractual rate of 19.24% per annum. Interest continues to accrue to Plaintiff/Counter-Defendant Wheaton's account at the contractual rate of 19.74% per annum.

Citibank has also requested its attorneys' fees in connection with its breach of contract claim. Under South Dakota law, each party to a breach of contract action bears its own attorneys' fees and costs unless there is a contractual agreement that the prevailing party recover its attorneys' fees. *Credit Collection Services, Inc. v. Pesicka*, 721 N.W.2d 474, 476-77 (S.D. 2006). Here, there are contractual provisions in the Plaintiffs/Counter-Defendants' cardholder agreements providing that "[i]f [Citibank] refer[s] your account to a lawyer who is not our salaried employee, you will have to pay our attorney's fees plus court costs or any other fees, to the extent permitted by law." Thus, Citibank may recover from the Plaintiffs its reasonable attorneys' fees in the amount of $40,000 and costs in the amount of $7,500 as requested in its counterclaim against the Plaintiffs. *See Plaintiffs Arthur Wheaton and Chris Thomas and Defendant Citibank's Agreed Stipulations of Facts* at ¶1.

F. The Truth in Lending Act Does Not Limit the Plaintiffs' Liability to Citibank

The Truth in Lending Act ("TILA"), enacted in 1968, is codified at 15 U.S.C. §§1601 *et seq.* and applies to most consumer credit transactions. Section 1643(a) of

[8] As of August 24, 2006.

[9] As of August 24, 2006.

TILA limits a cardholder's liability for the unauthorized use of a credit card to $50.00 and is echoed in the Plaintiffs/Counter-Defendants' cardholder agreements with Citibank. However, under the circumstances of this case, TILA will not insulate the Plaintiffs/Counter-Defendants from liability for the Charges.

The Plaintiffs/Counter-Defendants voluntarily gave Antovoni their credit card numbers and authority to make the Charges. The Plaintiffs/Counter-Defendants did not notify Citibank of possible unauthorized use until more than five months after the Charges had been made. If a cardholder has given the card to another voluntarily, most courts hold the cardholder liable for the person's use which occurred before any notice of a possible unauthorized use was given to the card issuer. *See, e.g., Michigan Nat. Bank v. Olson*, 723 P.2d 438, 442 (Wash. App. 1986) (citing *Martin v. American Express, Inc.*, 361 So.2d 597 (Ala. Civ. App. 1978)). Even if the cardholder has only authorized the person to use the credit card for a specific purpose, it is not an "unauthorized use" within the meaning of TILA if the person uses the card for another purpose. *Milwaukee v. Town of Newport*, 396 N.W.2d 345, 348 (Wis. App. 1986). Any other construction would permit a cardholder to defraud the issuer by allowing others to run up large charges on the card and then limit the cardholder's liability to $50.00 by notifying the issuer. *See Martin v. American Express, Inc.*, 361 So.2d at 601.

V. CONCLUSION

For all the foregoing reasons, Antovoni will be denied a discharge of his debt to the Plaintiffs pursuant to 11 U.S.C. §523(a)(2)(A). Additionally, the Court will enter a judgment for Citibank against the Plaintiffs/Counter-Defendants on Citibank's counterclaim for breach of contract. The remaining Defendants are entitled to judgment

in their favor on all other causes of action asserted by the Plaintiffs. Because the Court has ruled in favor of Green's, Collin Creek, and the Sligers on the causes of action that are the subject of their motions for directed verdict, the motions for directed verdict will be denied as moot.

A separate judgment will be entered consistent with this Memorandum Opinion. To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings as necessary or as requested by any party.

Signed on 3/30/2007

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE