CASE NO. 23-3061

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

In re: VINCENT A. PIAZZA, III, aka Vincent Anthony Piazza, III,
Debtor,

PATRICIA ELLIOTT,
Appellant,

v.

Vincent A. Piazza, III,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

OPENING BRIEF ON BEHALF OF DEFENDANT-APPELLANT AND APPENDIX VOLUME I OF II (Pages 1 - 31)

C. Stephen Gurdin, Jr.
ATTORNEY AT LAW
67-69 Public Square, Suite 501
Wilkes-Barre, PA 18701
570-826-0481
stephen@gurdinlaw.com

Counsel for Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1.1, Appellant is not aware of any publicly owned corporation with any interest in the outcome of this litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a final order of a Bankruptcy Court in an adversary proceeding in which Plaintiff-Appellant Patricia Elliot ("Appellant") sought a declaration of non-dischargeability.

The Bankruptcy Court had jurisdiction to hear the adversary proceeding under 28 U.S.C. § 1334(a) and 28 U.S.C. §157(a)-(b). The District Court had jurisdiction to hear the appeal from the Bankruptcy Court's order under 28 U.S.C. § 158(a)(1). This Court has jurisdiction of the appeal from the District Court's order under 28 U.S.C. §§ 158(d) and 1291.

STATEMENT OF THE ISSUES

1. Did the Bankruptcy Court abuse its discretion by excluding as hearsay Appellant's exhibit, the Affidavit of Bradley Strahl?

Proposed answer: Yes.

Where raised and ruled upon: A122—125, 332—413

2. Did the Bankruptcy Court err as a matter of law by finding that the Debtor was entitled to judgment on Appellant's claim for exception to discharge pursuant to 11 U.S.C. § 523(a)(2)(B)?

Proposed answer: Yes.

Where raised and ruled upon: A5, 26-29, 45-46, 95-98.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This adversary proceeding has not been before this Court previously. With respect to "any other case or proceeding that is in any way related, completed, pending or about to be presented before this court or any other court or agency, state or federal," (3d Cir. L.A.R. 28.1[a][2]), Appellant identifies the following:

(1) Appellant's action for breach of contract against the Debtor in the District Court for the State of Alaska, First Judicial District at Ketchikan, titled *Elliott v. Vincent*, Case No. 1KE-14-00146CI; and

(2) The Debtor's underlying Chapter 7 Bankruptcy in the Bankruptcy Court for the Middle District of Pennsylvania, *In re Piazza*, Case No. 5:18-bk-02300.

STATEMENT OF THE CASE

I. Procedural History

On April 10, 2014, Appellant filed and obtained judgment in an action for breach of contract against the Debtor in the District Court for the State of Alaska, First Judicial District at Ketchikan, titled *Elliott v. Vincent*, Case No. 1KE-14-00146CI (the "State Court Proceeding"). (A139--146). No appeal from the State Court Proceeding was taken or is pending.

The Debtor filed his bankruptcy proceeding under chapter 7 of the Bankruptcy Code on May 31, 2018, seeking discharge of his debt to Appellant.

Appellant filed the adversary proceeding that is the subject of this appeal, asserting claims seeking exception to discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(2)(B). (A38-57). Trial was held on March 16, 2022. (A103-130). On November 4, 2022, the Bankruptcy Court entered an Order and Opinion in favor of the Debtor. (A5, 20-31).

On appeal, the District Court upheld the Bankruptcy Court's ruling. (A4, 6-19). This appeal followed. (A1).

II. Relevant Facts

A. The Contract

In or about 2011, Appellant and the Debtor, then residents of Ketchikan, Alaska, entered into an oral contract (the "Contract") regarding the use of Appellant's Credit Cards (the "Cards"). (A105—106, 139—143). Under the contract, Appellant agreed that the Debtor and his wife, Brittney Piazza, would each be added to the Cards as authorized users, and permitted to use them for both business and personal purposes. *Id.* In exchange, the Debtor agreed to pay Appellant's bank for the purchases made on the Cards. *Id.* Upon earning airline miles on the cards, Appellant and the Debtor and his wife agreed to equally share the accumulated airline miles. *Id.*

B. The Parties' Communications and Course of Dealing

The Debtor did in fact incur business and personal expenses on the Cards, but failed to make all payments as promised. From January 12 to March 13 of 2012, the Debtor incurred tens of thousands of dollars in charges for building supplies on one of Appellant's Cards, but also, initially, made large payments--$37,047.60 in February of 2012, and $40,048.75 in March of 2012. (A107—108). The Debtor also made large charges and large payments on Appellant's credit card account ending in 6957. (A108—109).

In April of 2012, the Debtor's charges exceeded Appellant's credit limit. (A140). On April 2, 2012, Appellant asked the Debtor for security to protect her against loss due to charges he incurred and failed to pay in accordance with the Contract. (A109—110, 139—140).

In response, the Debtor made written assurances to Elliot, including that he had "a little over 1.5 million worth of work on the books over the next twelve months and that credit card is the first bill [he would] pay," that "if work ever slowed down [he had] a ton of equity in all 6 properties [he owned]," and that he could "sell one [property] and pay [Appellant] back." (A110—111, 139—140).

Following receipt of the email of April 2, 2012, Appellant, relying on the Debtor's past payment history and representations as to all the work he had, allowed the Debtor to continue to use the Cards. (A111). She believed "what he

said, that he had money coming in… [a]nd that he would pay [her] off or sell a house," and therefore did not conduct any investigation into his financial condition. (A116-117).

Thereafter, the Debtor ran up multiple additional charges, including five charges, made between May 13, 2012 and May 15, 2012, totaling $5182.90, and thirty-six charges, made between April 3, 2012 and April 9, 2012, totaling $6947.10. (A183—184).

Over the subsequent several years, in response to Appellant's repeated entreaties for payment, the Debtor sent additional communications to Appellant assuring her that payment would be made imminently on the Cards, and citing the source of funds needed for such payment, including such communications on March 13, 2013 (A112—113, 169), and April 9, 2013 (A111—113, 171). The parties also engaged in the following communications:

On July 23, 2013, the Debtor stated, "I have all my Capital credit line and CC in play on all our summer work that we will have 95 percent complete by August 15, and then I am in the billing cycle which runs 30 to 45 days where my AR currently over 500,000 will come in almost %80 [sic] by the end of September… I will make [the Cards] my first priority when we get paid." (A113—114, 170).

When asked, in discovery, to specifically identify the resources to which he was referring in his July 23, 2013 email, the Debtor responded only that he "had a $200,000.00 credit line." (A212). The Debtor claimed in testimony and in discovery that this credit line was with Northrim Bank. (A127, 221). However, Northrim Bank submitted an affidavit indicating that the Debtor in fact had no such credit line. (A298--331). In testimony, the Debtor referred to a $178,715.80 debt to Northrim Bank on his bankruptcy schedules as evidence that he had had a "commercial loan/line of credit" with Northrim Bank, (A131—132), but the bankruptcy schedules were filed in 2018, more than five years after the email claiming the existence of a credit line.

On September 5, 2013, the Debtor stated, "I apologize again it's just taking for ever [sic] to get paid on these bigger jobs…. I will get it taken care of soon." (A113, 170). On March 7, 2014 he stated,

> Due to the issues on the Auka [sic] Bay Elementary school and Hoonah schools we have not been paid the $110,000 owed to us from ASRC McGraw construction… It appears now that outstanding invoices to ASRC from Piazza Flooring are going into litigation and could be some time before we receive payment. We will continue to pay as much as we can monthly….

(A115, 172).

On October 30, 2013, the Debtor emailed Appellant, promising Appellant that "all the payments [he had] coming in [would be] going to [Appellant]," and

that he was "going to try and sell [his] boat real quick when [he got] back [to Ketchikan from Pennsylvania], and [he could] give [her] all of that, around 40K." (A174).

On February 13, 2014 he sent Appellant a letter stating,

> Piazza Flooring has been experiencing financial distress due to large unpaid invoices on two commercial projects in Juneau & Hoonah, Alaska. Both projects are in the process of being liened and sued by Piazza Flooring. Due to these unforeseen circumstances Piazza Flooring has been unable to pay it's [sic] balances on the credit card.

(A173).

C. Evidence Contradicted the Debtor's Written Representations to Appellant Regarding His Financial Condition.

1. The Debtor Did Not Have "A Ton of Equity" in Six Properties on April 2, 2012.

In his April 2, 2012 email the Debtor assured Appellant that he had "a ton of equity in all 6 properties" he owned that could be sold to satisfy his debt to her. However, as of that date, the Debtor owned only *four* properties, namely, 539 Pond Reef Road, 2506 First Avenue, 3459-3461 Bailey Blvd., and 2050 Sea Level Drive.

In his Answers to Elliot's Interrogatories, The Debtor identified six properties (the "Disclosed Properties") he claims to have been referencing in his email, (A215), but the purchase dates of two of the listed properties, 232 Madison Street and the Karlson Building, substantially postdate the April 2, 2012 email.

(A118-120). At trial, The Debtor changed his testimony and asserted that he also owned "a cabin on Prince of Wales, and a residential lot on Sunrise Lane," (A126), on which he had made down payments of $10,000 and $5,000, respectively. (A127). However, no documentation or other evidence was admitted as to the Debtor's equity position or lack thereof in those two properties allegedly owned.

Moreover, the evidence presented at trial belied the Debtor's claim that he had "a ton of equity" in *any* properties as of April 2, 2012.

At trial, The Debtor at first testified that he believed he had $25,000 in equity in Bailey Boulevard, (A126—127), but later acknowledged that he was not talking about Bailey Boulevard when he claimed to have "a ton of equity," because there were judgments against that property. (A137—138).

The Debtor testified that he believed he had made down payments of $80,000 in Pond Reef, and $95,000 in 2050 Sea Level Drive, and that he believed he had $150,000 in equity on 1st Avenue because he had purchased it for $300,000 and it appraised for $550,000. (A126—127).

The documents reflecting the Debtor's purchases, sales, and financing of the properties contradict not only his claim that there was "a ton of equity in all six properties" as of April 2, 2012, but also many of the facts the Debtor claims to have relied on in *believing* that there was equity in the properties. Of the four

properties actually owned, only 2050 Sea Level drive *in fact* had non-negligible equity. 539 Pond Reef Road was purchased at a price of $825,000 with a Seller-financed mortgage of $825,000 and sold with net proceeds from the sale of only $357.17. (A224—238). 2506 First Avenue was purchased 4 days prior to the email of 4/2/2012, at a price of $350,000 (not $300,000), with a Seller Mortgage of $320,000, and a promised labor trade by Buyer of $30,000. (A239--242). This property was foreclosed on 2/20/15. *Id*. Equity at the time of the labor trade was $0.00 since the Debtor owed the labor traded for the balance over the seller mortgage. *Id.* 3459-3461 Bailey Blvd. was purchased for $221,000 with a Seller-financed mortgage of $221,000 and subject to a second mortgage of $725,000. (A253--257). It was sold with net proceeds of $0.00. *Id.* This property never had any equity during the time that it was owned by the Debtor. *Id.* 2050 Sea Level Drive was purchased for $260,604 on 7/1/2008 subject to a Seller financed mortgage of $230,000 and sold in 1/24/2014 for $335,000 subject to a first mortgage of $113,052, a second mortgage of $134,207.85, total $247,259.85 resulting in net cash proceeds of $1752.84 and a Seller mortgage receivable of $70,000. (A276--296).

Despite the Debtor's promise, on April 2, 2012, that he could "sell [a property] and pay [Appellant] back," (A139), the Debtor failed to pay any of the $70,000 in funds received from the sale of 2050 Sea Level Drive to Appellant.

(A136). Although the Debtor testified that he did not actually receive $70,000 at the closing, he acknowledged that he received it in installments over "a year and a half or two years." (A134—136). He used the proceeds to "pay bills" rather than to pay Appellant because she "was one of 20 creditors [he] had." (A136).

The Debtor testified that he had been unable to realize the equity he believed he had when he sold the properties in 2014 because he "ended up selling the properties much cheaper than [he] would have liked" because he had "decided to move out-of-state, and from the time we decided to move to when [he] actually had to leave, [he] had about a six-month window, and [he] didn't want to deal with trying to sell the properties from out-of-state." (A127—128).

2. The Debtor Could Not Have Intended to Pay Appellant "First" From Payments Received From Construction Projects During the Period from April 2, 2012 to July 23, 2013 When He Promised Her He Would Do So.

The Debtor failed to remit any payment to Appellant from the payments he received for work projects during the same period when he was making promises that Elliot's card would be the "first bill paid" from payments received for such work (A110), and that it would be paid in full "when we get paid," (A113). During the period from June 6, 2013 to September 11, 2013, the Debtor received payments on both the Hoonah Schools Major Maintenance Renovation

contract with ASRC Earthworks LLC[1], while, during that same period, representing to Appellant that the reason for his non-payment was that it was "just taking forever [sic] to get paid on these bigger jobs." (A113). In short, *while* lamenting delays in payment for work projects and promising Appellant she would be paid first as soon as payment came in, the Debtor was actively receiving payments for such projects, concealing them from Appellant, and failing to use them to pay her.

The Debtor testified that he had expected to be paid in full for the Auke Bay School and Hoonah Schools projects but was only partially paid. (A129—130, 133—134). However, he did not dispute that he did receive payments for both projects. Even assuming that the Debtor truthfully testified that he had received only partial payments from ASRC McGraw during the period in question, not only was Appellant *not* the "first one paid" when the Debtor received those payments, he actively misled her to believe that he had not been paid at all, when in fact he had.

Appellant was denied the opportunity to present evidence that the Debtor's claim to have received only partial payment was a lie. At trial, Appellant sought to

[1] According to the Affidavit of Bradley Strahl, the final payment on the Auke Bay project was made on August 29, 2013 and the total payments made were $287,201.61, and the final payment on the Hoonah Schools project was made on October 17, 2013 and the total payments made were $63,308.00. (A411—412).

introduce into evidence the Affidavit of Bradley Strahl (the "Affidavit"), a representative of the parent company that wholly owns ASRC Earthworks, LLC, f/k/a ASRC McGraw Constructors, LLC ("ASRC McGraw"), for the purpose of showing that final payments on the Auke Bay and Hoonah Schools projects had been made in 2013, with no unpaid invoices outstanding, and that therefore the Debtor's 2014 statement that "we have not been paid the $110,000 owed to us from ASRC McGraw construction" was false. (A122—125, 332—413). The Affidavit was explicitly titled "AFFIDAVIT AND CERTIFICATION OF Bradley Strahl (the Affiant) Fed. R. Evid. 803(6); 902(11) Records of Regularly Conducted Activity" (A332 [emphasis in original]).

The Affidavit attached copies of ASRC McGraw's business records, and Strahl verified that he was familiar with the records, (A333), and that they were kept in the ordinary course of business (A334). The affidavit further stated:

> 8. I hereby assert that, to the best of my knowledge and belief, that these are true and correct records of a regularly conducted activity by the Companies [sic] and further avers [sic] and certifies [sic] as follows:
>
> (A) Each record was made at or near the time by—or from information transmitted by—someone with knowledge.
>
> (B) Each record was kept in the course of a regularly conducted activity of the Company pursuant to the Company's regularly conducted business and operations.
>
> (C) The making of each record was a regular practice of the activities referred to in sub-paragraph (B) above.

> (D) To the best of my knowledge and belief, the records attached hereto are kept, maintained, and produced in accordance with the above conditions.
>
> (E)To the best of my knowledge and belief, the source of the information contained in the records is true, correct and accurate and is obtained in accordance with the Company's standard practices and protocols and your affiant is unaware of and has no notice of any assertion to the contrary.

(A334-336).

A copy of the Affidavit was provided to the Debtor's counsel prior to trial, and it was listed in the Amended Table of Trial Exhibits filed with Appellant's Trial Brief on January 24, 2022. (*See* A122—125).

The Debtor moved to exclude the Affidavit as hearsay. The Bankruptcy Court, reviewing the affidavit aloud, specifically noted that it referred to "records maintained, ordinary course." (A122). Nonetheless, the Bankruptcy Court granted the motion, holding that he could not "let in testimony of this nature without giving the defendant an opportunity to cross-examine." (A124).

3. The Debtor Continued to Make Charges on the Cards After Making Misrepresentations to Appellant.

On July 23, 2013, the Debtor advised Appellant that "Brittany and [he would] not be using the cards anymore." (A51, 171). Nevertheless, the Debtor continued to charge purchases on the Cards up to and including December 29, 2014, without Appellant's consent. (A140, 147—167). The Debtor testified that he had not "affirmatively" used the cards after that point but that it was possible

that there may have been charges by creditors who had the ability to make withdrawals on the cards. (A132—133). He testified that the large charge of approximately $10,000 to Alaska Marine was a freight charge. (A129).

III. Rulings Presented for Review

On November 4, 2022, the Bankruptcy Court entered an Order (A5) supported by a twelve-page Opinion (A20-31) granting judgment for the Debtor, finding that the judgment debt outlined in Appellant's Amended Adversary Complaint was subject to discharge.

In pertinent part, the Bankruptcy Court rejected Appellant's claim under Bankruptcy Code Section 523(a)(2)(B) on the basis of its finding that the Debtor did not have an "intent to deceive" Appellant. The Court found that the record was "devoid of any evidence indicating that [the Debtor] intended to deceive [Appellant] in writing or otherwise in order to retain access to the Cards despite his non-payment," noting that the Debtor had made "substantial payments on both Cards during the period in question" and that his "substantial payment history on the Cards completely undermines Appellant's assertion that [the Debtor] never intended to repay his debts." (A28) The Bankruptcy Court further stated that "the totality of the circumstances in this case do not indicate that [the Debtor] intended to deceive Appellant. [The Debtor] credibly testified that he always intended to repay the balances on the Cards, but that due to unforeseen circumstances with his

business, he was ultimately unable to do so." (A29). In a footnote, the Bankruptcy Court held:

> While [Appellant] asserts that [the Debtor] intentionally misrepresented the number of properties he owned as well as his equity in these properties over the course of several emails he sent her, which she asserts should give rise to an inference of his intent to deceive her, the Court finds that these emails do not support her position. Indeed, [Appellant] bases her assertion that [the Debtor] misrepresented these facts on unforeseen factual developments in this case which post-date the emails at issue. [Appellant] failed to contradict [the Debtor's] testimony that these facts were true as of the date he represented to her that they were true. Therefore, the Court does not construe [the Debtor's] emails as intending to deceive [Appellant] for purposes of § 523(a)(2)(B)(iii).

(A29).

SUMMARY OF THE ARGUMENT

The Bankruptcy Court abused its discretion by excluding Bradley Strahl's affidavit as hearsay. Appellant presented evidence establishing the admissibility of the affidavit under the business records exception, and the Debtor failed to meet his burden to present evidence establishing that the affidavit was not trustworthy.

The Bankruptcy Court also erred as a matter of law by applying an incorrect legal standard in denying Appellant's claim of exception to discharge under §523(a)(2)(B). The undisputed evidence presented at trial established that the Debtor made materially false statements in emails to the Appellant about his present financial condition (claiming that he owned six properties with "tons of

equity" that he could use to repay her when he in fact only owned four properties with very little equity), and about his intent to repay her from specific sources of funds (sale of the real estate he owned as of April 2, 2012 and payments from anticipated "big projects," specifically including the Hoonah Schools contract).

Given the Debtor's knowledge of his own real estate holdings and the receivables of his business, a minimum, the Debtor must have been recklessly indifferent to the truth or falsity of the misrepresentations, which is sufficient to establish "intent to deceive" for purposes of § 523(a)(2)(B)(iv). The Bankruptcy Court conflated the question of whether the Debtor had the intent to deceive Appellant about specific details of his financial condition, with the separate question of whether the Debtor had an overall intent to repay the debt. The Court incorrectly held that, under § 523(a)(2)(B) a Debtor can lie to a creditor in writing about material particulars of his financial condition, as long as he has a general intent to repay the creditor eventually out of some unspecified source of funds. The evidence presented at trial clearly establishes that the Debtor had an intent to deceive Appellant about the extent of his equity in real estate holdings. It further establishes that he could not have had any intent to repay her from the proceeds of real estate sales or payments from "big projects" at the time he claimed to have such intent, because he had negligible equity in real estate and no anticipated payments from the projects in question.

The issues on appeal are interrelated, in that Stahl's Affidavit supported the Appellant's contention that the Debtor had lied about his intent to repay Appellant from receivables for the Hoonah Schools contract. Having improperly excluded the affidavit, the Bankruptcy Court could not fully or fairly consider Appellant's claim under §523(a)(2)(B).

ARGUMENT

I. The Bankruptcy Court Abused its Discretion by Excluding Bradley Strahl's Affidavit as Hearsay.

A. Standard of Review

In reviewing bankruptcy court decisions on appeal, this Court "stand[s] in the shoes" of the district court and applies the same standard of review. *In re Klaas*, 858 F.3d 820, 827 (3d Cir. 2017), citing *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 209 (3d Cir. 2011) (en banc). Accordingly, this Court "review[s] the bankruptcy court's legal determinations *de novo*, its factual findings for clear error and its exercise of discretion for abuse thereof." *Id.* citing *In re Trans World Airlines, Inc.*, 145 F.3d 124, 131 (3d Cir. 1998).

The District Court (and therefore this Court) reviews the Bankruptcy Court's "evidentiary rulings for abuse of discretion, but ... exercise[s] plenary review to the extent the rulings are based on a legal interpretation of the Federal Rules of Evidence." *Campbell v. Conway*, 611 B.R. 38, 43 (M.D. Pa. 2020) citing *United States v. Fattah*, 914 F.3d 112, 177 (3d Cir. 2019).

The District Court improperly reviewed the Bankruptcy Court's evidentiary ruling for "plain error." It is true that, where there is no objection to an evidentiary ruling, the court reviews only for plain error. *See Abrams v. Lightolier Inc.,* 50 F.3d 1204, 1213 (3d Cir.1995). However, Appellant properly preserved his objection to the Court's exclusion of Strahl's Affidavit and his argument that the affidavit was admissible under Federal Rules of Evidence 803(6) and 902(11).

Federal Rules of Evidence, Rule 103 states:

> (a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
> (1) if the ruling admits evidence, a party, on the record:
> (A) timely objects or moves to strike; and
> (B) states the specific ground, unless it was apparent from the context; or
> (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

As is clear from the rule, a claim of error in *excluding* evidence is preserved simply by informing the court of the substance of the evidence by an offer of proof, which Appellant did by offering Strahl's Affidavit into evidence. There is no requirement, as there is in a claim of error in *admitting* evidence, that the party "state the specific ground" for the objection. Moreover, even if Appellant *did* have a burden to state the specific ground for the admission of the affidavit under a hearsay exception, he met that burden. Although undersigned counsel admittedly did not explicitly *verbally* cite Federal Rules of Evidence, Rules 803 and 908 in

support of the admissibility of Strahl's Affidavit during the March 16, 2022 trial, the affidavit itself was explicitly titled "AFFIDAVIT AND CERTIFICATION OF Bradley Strahl (the Affiant) *Fed. R. Evid. 803(6); 902(11) Records of Regularly Conducted Activity*" (A332 [emphasis in original]). Additionally, as described below, the Affidavit itself set forth facts supporting the requirements for admissibility under the rules.

Research did not reveal any cases in which a party was held to a "clear error" standard on appeal for failing to preserve an objection to the court's ruling on a hearsay exception simply because the exception was set forth in written, rather than verbal form. Such a ruling would be contrary to the purpose of requiring a timely objection, which is merely to identify the disputed issue and give the trial judge a chance to correct errors which might otherwise necessitate a new trial. See *Estelle v. Williams*, 425 U.S. 501, 508 n.3, 96 S.Ct. 1691, 1695 n.3, 48 L.Ed.2d 126 (1976); *United States v. Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965) (in banc), *cert. denied*, 383 U.S. 907, 86 S.Ct. 887, 15 L.Ed.2d 663 (1966). Here, both opposing counsel and the Bankruptcy Court had reviewed Strahl's Affidavit and were informed of both the factual basis for Appellant's contention that they should be admissible under Federal Rules of Evidence 803(6) and 902(11) *and* of the citations to the specific rules upon which Appellant relied.

B. Appellant Established the Admissibility of Strahl's Affidavit Under the Business Records Exception, and the Debtor Failed to Meet His Burden to Establish that the Affidavit Was Not Trustworthy.

Federal Rules of Evidence, Rule 803(6) provides, in pertinent part, that "records of a regularly conducted activity" are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness, if:

> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;
> (D) all these conditions are shown by… a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Federal Rules of Evidence, Rule 902(11) provides, in pertinent part, that the original or copy of a domestic record of a regularly conducted activity, as shown by a certification of the custodian of the record or other qualified witness, is a self-authenticating document. Rule 902(8) provides that a "document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public" is also self-authenticating. The testimony of the custodian or other qualified witness is not required for admissibility where the requirements for qualification as a business

record can be met by documentary evidence or affidavits. See *United States v. Pelullo*, 964 F.2d 193, 201 (3d Cir. 1992), citing *In re Japanese Elec. Prod. Antitrust Litig*., 723 F.2d 238, 288 (3d Cir.1983), rev'd on other grounds sub. nom. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); see also *Martin v. Discount Smoke Shop, Inc*., 443 F. Supp. 2d 981, 987 (C.D. Ill. 2006) (business records found admissible based upon affidavit of custodian of records).

The Third Circuit construes the term "other qualified witness" in F.R.E. 803(6) broadly, but the testimony (or affidavit) must be from "someone familiar with the record keeping system who has the ability to attest to the records' foundation." *In re CGR Inv'rs Ltd. P'ship*, 464 B.R. 678, 683 (Bankr. E.D. Pa. 2010) (citations omitted).

The Bankruptcy court's statement that the Debtor lacked an "opportunity to cross-examine" Strahl is false, as the affidavit was provided to opposing counsel well in advance of trial and Appellant's pre-trial memorandum notified the Debtor that she intended to rely on it, as required by Rule 902(11). The Debtor had a fair opportunity to challenge the Affidavit prior to trial and declined to do so.

The Strahl Affidavit meets all the requirements for admissibility under the business records exception to the hearsay rule found in Federal Rules of Evidence, Rules 803(6) and 902(8). The affidavit establishes that the records in question were

"made at or near the time by—or from information transmitted by—someone with knowledge," (A334), "kept in the course of a regularly conducted activity of the Company pursuant to the Company's regularly conducted business and operations," (A335), and that "the making of each record was a regular practice" of that activity. (*Id.*) It further establishes that Strahl was a representative of ASRC McGraw and familiar with its recordkeeping practices, (A333), and that they were kept in the ordinary course of business (A334), and therefore that Strahl was a "qualified witness" pursuant to Rule 803(6) able to certify business records pursuant to Rule 902(11) and 803(6)(D).

Once a foundation is laid, the evidence should be admitted "in the absence of *specific and credible evidence* of untrustworthiness" as required by Rule 803(6)(E). *United States v. Hathaway*, 798 F.2d 902, 907 (6th Cir. 1986) (emphasis supplied); see also *Morris v. Olympiakos*, 721 F. Supp. 2d 546, 552 (S.D. Tex. 2010).

No such evidence was presented, and to the extent that the Bankruptcy Court found that the records were not "trustworthy," such a finding was without any evidentiary basis whatsoever and was an abuse of discretion.

The Debtor's sole argument that the Affidavit should be inadmissible under Rule 803(6)(E) was counsel's claim that "the company that Mr. [Strahl] apparently works for is the company that [the Debtor] has indicated has not paid him in full."

(A122). Here, the Debtor did not present any evidence whatsoever calling into question the authenticity of the business records attached to Strahl's affidavit. He did not even present any actual evidence that Strahl had any personal motive whatsoever to falsify the records at any time. The only basis for the Debtor's opposition to the admission of the records was factually unsupported speculation and innuendo by the Debtor's attorneys.

The only indication in the entire record that ASRC McGraw owed any money to the Debtor is the Debtor's own March 7, 2014 email to Appellant, (A115, 172), which is the very email that Appellant seeks to refute with Strahl's Affidavit. It would needlessly consume the entire business records exception to interpret Rule 803(6)(E) as requiring the exclusion of otherwise-reliable business records simply because they contain information that contradicts a factual claim made by the opposing party. The entire purpose of introducing evidence is generally to make showings adverse to the opposing party, and business records cannot be deemed "untrustworthy" simply because they successfully perform that function.

Even if the Debtor had actually submitted admissible evidence, that ASRC McGraw owes him money—which he did not—it would not have been sufficient to establish the "untrustworthiness" of the business records. Courts have accepted affidavits under the business records exception from sources with much greater demonstrated interest in the outcome of the litigation than Strahl had. In

Wilmington Sav. Fund Soc'y FSB as Tr. of Residential Credit Opportunities Tr. III v. Hutchins, No. 21-2094, 2022 WL 1087143, at *4 (10th Cir. Apr. 12, 2022), the Tenth Circuit held that a debtor had failed to show that an affidavit supporting business records establishing the existence of his debt "lacked trustworthiness" where the affiant was the CEO of the creditor's parent company. In *R & T Roofing Contractor, Corp. v. Fusco Corp.,* 265 F. Supp. 3d 145, 148 (D.P.R. 2017), the court held that there was "no evidence" that the affidavit of a company's own Director of Field Operations, laying the foundation for the admission of the company's own business records, was "untrustworthy," and that the evidence was admissible to support the company's breach of contract claim against its subcontractor.

"Although …records created *specifically* for the purpose of pending litigation may encounter issues of untrustworthiness… the mere existence of … an alternative motive does not require a blanket ban on legitimate business records." See *United States v. Onyenso*, No. CRIM. 12-602 CCC, 2013 WL 5322686, at *2 (D.N.J. Sept. 20, 2013), citing *United States v. Casoni,* 950 F.2d 893, 911 n. 10 (3d Cir. 1991) (noting that although trustworthiness is a factor that must be considered in determining the admissibility of business records, there is no requirement in Rule 803(6) that the records be created before a possible motive to falsify arises).

II. The Bankruptcy Court Erred as a Matter of Law by Denying Appellant's Claim of Exception to Discharge Under §523(a)(2)(B)

A. Standard of Review

Because the district court sat as an appellate court reviewing an order of the bankruptcy court, this Court's review of its determinations is plenary. *In re Trans World Airlines*, 145 F.3d 124, 130-31 (3d Cir. 1998), citing *In re Continental Airlines*, 125 F.3d 120, 128 (3d Cir. 1997), *cert. denied*, 118 S.Ct. 1049 (1998). In reviewing the bankruptcy court's determinations, this Court exercises the same standard of review as the district court. *Id.* citing *Fellheimer, Eichen Braverman, P.C. v. Charter Technologies, Inc.*, 57 F.3d 1215, 1223 (3d Cir. 1995). Thus, this Court reviews the bankruptcy court's legal determinations de novo, its factual findings for clear error and its exercise of discretion for abuse thereof. *Id.*, citing *In re Engle*, 124 F.3d 567, 571(3d Cir. 1997).

B. The Bankruptcy Court Applied an Incorrect Legal Standard in Finding that the Debtor Lacked "Intent to Deceive" Under Section 523(a)(2)(B)(iv).

Section 523(a)(2)(B) provides that a debt is nondischargeable when it is "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... use of a statement in writing—(i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit

reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive....” 11 U.S.C. § 523(a)(2)(B).

An email can satisfy the “in writing” requirement of § 523(a)(2)(B). *In re Piazza*, 605 B.R. 332, 338 (Bankr. M.D. Pa. 2019), citing *In re Owens*, 549 B.R. 337, 351 (Bankr. D. Md. 2016); *In re Hambley*, 329 B.R. 382, 399 (Bankr. E.D.N.Y. 2005); *In re May*, 579 B.R. 568, 589 & n.79 (Bankr. D. Ut. 2017). “Intent to deceive” may be shown by demonstrating that the statements were made with reckless disregard of the truth. See *Ins. Co. of N. Am. v. Cohn (In re Cohn),* 54 F.3d 1108, 1120 (3d Cir. 1995); *Giansante & Cobb, LLC v. Singh (In re Singh),* 433 B.R. 139, 159 (Bankr. E.D. Pa. 2010).

“The reasonableness of a creditor's reliance under § 523(a)(2)(B) is judged by an objective standard, i.e., that degree of care which would be exercised by a reasonably cautious person in the same business transaction under similar circumstances.” *Cohn*, 54 F.3d at 1117-18; *In re August*, 448 B.R. 331, 351 (Bankr. E.D. Pa. 2011).

Appellant has submitted evidence that the Debtor lied to her, in writing, both about his present financial condition (claiming that he owned six properties with “tons of equity” that he could use to repay her when he in fact only owned four properties with very little equity), and about his intent to repay her from specific sources of funds (sale of the real estate he owned as of April 2, 2012 and payments

from anticipated "big projects," specifically including the Hoonah Schools contract). In its Opinion, the Bankruptcy Court conflated the questions of whether the Debtor had the intent to deceive Appellant about these *specific* misrepresentations on which Appellant's §523(a)(2)(B) claim is based, and the *general* question of whether the Debtor ever had any subjective intent to repay the debts. Whether the Debtor did or did not subjectively intend to repay the debts is not relevant to Appellant's claims under § 523(a)(2)(B), which are not based on allegations of a general false promise to repay, but on allegations of a series of specific, materially false statements.

Multiple cases in Pennsylvania and elsewhere make it clear that whether a debtor had a good faith intent or desire to repay a debt is not determinative of liability under 11 U.S.C. § 523(a)(2)(B): instead, the question is whether the Debtor made a specific materially false written representation, with intent to deceive Appellant as to the truth of *that specific representation*. See *Drehsen v. Bank of St. Petersburg (In re Drehsen),* 190 B.R. 441, 445 (M.D. Fla. 1995)("In making a determination of intent with regards to § 523 (a) (2) (b), it is sufficient to show that a false representation on a financial statement was made with actual knowledge that it was incorrect, or made with reckless indifference and disregard of actual facts which were readily available.")

In *In re Lundy*, 165 B.R. 157, 163 (Bankr. W.D. Pa. 1994), the court held that a Chapter 7 debtor acted with at least "reckless disregard" and "indifference" as to accuracy of his financial statement submitted in connection with his loan applications to credit unions run by his relatives, where, in the belief that he did not have to be entirely accurate in light of his relatives' association with credit unions, he substantially overvalued his home and failed to list other debts incurred just a few months earlier on his loan applications. The court made no finding as to whether the debtor had an overall good faith intent to repay the debt but found merely that the debtor was recklessly indifferent as to the specific statements made in his financial statement, and therefore had intended to deceive the creditors. *Id.*

In *In re Rodriguez*, 184 B.R. 467, 471 (Bankr. E.D. Pa. 1995), the court found that Chapter 7 debtors had acted with the requisite intent to deceive in submitting a false financial statement which overstated their annual income by roughly $19,000. Although the debtors claimed to have merely signed the statement in blank and relied on third party to transcribe all of the information which they had provided, their gross recklessness in signing the forms in blank without concern or knowledge of their content on completion established the requisite intent to deceive. *Id.* Again, the court made no finding as to the debtors' general intent to repay the debt. *Id.*

In *Shawmut Bank v. Lyons*, 153 B.R. 95, 97 (Bankr. D.N.H. 1993), the court found that a debtor had the requisite intent to deceive when he stated on a loan application that his personal residence was owned by himself and his wife when, in fact, it was owned solely by his wife, despite an express finding that the debtor considered the inaccuracy to be a "pure technicality." The court cited several cases finding debts to be nondischargeable due to false statements despite the debtors' "subjective good intent." *Id.*[2]

In short, the Bankruptcy Court should have inquired into whether the Debtor had the subjective intent to deceive Appellant as to the specific written misrepresentations he made regarding his financial condition at, *not* whether the Debtor had the general intent to eventually repay his debt to Appellant. The Debtor may well have had a subjective intent to repay Appellant at some point, from some source of funds, but her decision to continue to extend credit to him was not based

[2] In its Order upholding the judgment of the Bankruptcy Court, the District Court sought to distinguish *Drehsen*, 190 B.R. 441, *Lundy*, 165 B.R. 157, *Rodriguez*, 184 B.R. 467 and *Shawmut Bank,* 153 B.R. 95 on the basis that they "all involve misrepresentations on financial statements (i.e., loan applications)" and "[l]ying on a loan application is itself fraud and thus precluded the given courts from having to address the debtors' general intent to repay the given debt." (A12). The District Court did not support this assertion with any citation to case law. Contrary to the District Court's analysis, "loan applications" are not a special category of written statement under Section 523(a)(2)(B): lying in *any* written statement respecting the debtor's financial condition "is itself fraud." Moreover, in *Shawmut*, the court did make an express finding that the debtor had a general intent to repay the given debt, and nonetheless found that he had violated Section 523(a)(2)(B) by knowingly making a false financial statement.

on his supposed purity of heart, but on materially false representations he made about his intent and ability to repay her from specific assets.

C. The Evidence Presented at Trial Established that the Debtor Had the Requisite "Intent to Deceive" Under Section 523(a)(2)(B)(iv).

The Debtor made at least two written representations to Appellant regarding his financial condition that were clearly false when made and, at a minimum, the Debtor must have been recklessly indifferent to their truth or falsity.

First, on April 2, 2012, the Debtor assured Appellant in writing that "if work ever slowed down [he had] a ton of equity in all 6 properties [he owned]," and that he could "sell one and pay [Appellant] back." (A110-111). The evidence presented at trial reflects that at the time he made this statement, the Debtor owned only four properties. In discovery, the Debtor falsely claimed to own two additional properties on April 2, 2012: 232 Madison Street and the Karlson Building. (A215). At trial, when confronted with the fact that he clearly did *not* yet own 232 Madison Street or the Karlson Building on April 2, 2012, he changed his testimony and asserted that he also owned "a cabin on Prince of Wales, and a residential lot on Sunrise Lane," (A126—127), on which he had made down payments of $10,000 and $5,000, respectively. (A127). No evidence other than the Debtor's own self-serving testimony was presented that he owned these additional properties, which contradicted his own prior sworn statements in discovery.

Moreover, no credible evidence was presented at trial that the Debtor had non-negligible equity in any of the four properties he in fact owned on April 2, 2012, or the two "new" properties he suddenly claimed to have owned despite having failed to disclose them in discovery. No evidence was presented at all as to the Debtor's equity position in the disputed, previously undisclosed properties, and to the extent that the Bankruptcy Court presumed that there was equity in those properties, such a presumption was improper. *In re Aughenbaugh*, 125 F.2d 887, 889 (3d. Cir. 1942) (A party to litigation is entitled to have the evidence relied upon by his opponent presented at the hearing of his case so that he may have an opportunity for cross- examination and rebuttal). The Debtor conceded that he was not talking about the Bailey Boulevard property when he claimed to have "a ton of equity," because there were judgments against that property. (A137—138).

The Debtor testified that he believed he had made down payments of $80,000 in Pond Reef, and $95,000 in 2050 Sea Level Drive, and that he had believed he had $150,000 in equity on 1st Avenue because he had purchased it for $300,000 and it appraised for $550,000. (A126—127). However, the evidence presented at trial reveals that there was in fact *no* basis for the Debtor to have believed that he had "a ton of equity" in any of these three properties on April 2, 2012.

539 Pond Reef Road was purchased at a price of $825,000 with a Seller-financed mortgage of $825,000 and sold with net proceeds from the sale of only $357.17. (A224—238). No evidence was presented that there was any reasonable basis for the Debtor to believe, on April 2, 2012, that he had "a ton of equity" in a property that had no equity whatsoever at the time of purchase and only $357.17 in equity at the time of its subsequent sale.

2506 First Avenue was purchased 4 days prior to the email of 4/2/2012, at a price of $350,000 (not $300,000), with a Seller Mortgage of $320,000, and a promised labor trade by Buyer of $30,000. (A239--242). Equity at the time of the labor trade was $0.00 since the Debtor owed the labor traded for the balance over the seller mortgage. *Id.* No evidence was presented that the Debtor had any reasonable basis to believe, on April 2, 2012, that he had "a ton of equity" in a property he had purchased with $0 in equity four days earlier.

While the Debtor does in fact appear to have had approximately $70,000 in equity in 2050 Sea Level Drive (A276--296), the daylight between "one property with $70,000 in equity" and "a ton of equity in…six properties" is blinding. The evidence presented at trial simply does not support a conclusion that the Debtor could have claimed to own "six properties" with "a ton of equity" on April 2, 2012, unless he was, at a minimum, recklessly indifferent to the truth or falsehood of that statement. The Bankruptcy Court incorrectly found that

Appellant based her assertion that The Debtor misrepresented the number of properties he owned as of April 2, 2012 and his equity position in those properties on "unforeseen factual developments in this case which post-date the emails at issue," (A29), when Appellant's assertion was clearly based on facts that were true and easily available to Appellant as of the time he sent his April 2, 2012 email. Appellant presented clear evidence that the Debtor owned only four properties as of April 2, 2012, not six, and in response the Debtor presented only self-serving and self-contradictory testimony unsupported by any documentation. Appellant also presented evidence that the circumstances and timing of the Debtor's purchases and sales of the four properties he owned gave no reasonable basis for the Debtor to believe that he had "a ton of equity" in the properties, and in response the Debtor claimed to have based a subjective belief that there was "a ton of equity" in the properties on "facts" which are contradicted by the settlement statements and unsupported by any other documents in the record.

Appellant's Section 523(a)(2)(B) claim is also based on the Debtor's false representations, made on April 2, 2012, that he would pay Appellant back with the proceeds of sale of one of the properties he owned, and that he had "a little over 1.5 million worth of work on the books over the next twelve months and that credit card is the first bill [he would] pay." (A139).

A false, written representation that a particular asset or claim would be used to pay the creditor can satisfy the first two requirements of Section 523(a)(2)(B). *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1757-58 (2018). In *Appling*, the debtor told his attorneys that he was expecting a tax refund of "'approximately $100,000,'" enough to cover his owed and future legal fees. *Id.* When the debtor and his wife subsequently filed their tax return, however, they requested only $60,718, and ultimately received only $59,851 in October 2005. *Id.* Rather than paying their attorneys, they spent the money on their business. *Id.* The Supreme Court held that this and other related misrepresentations by the debtor constituted statements respecting the debtor's financial condition which brought them under the authority of §523(a)(2)(B), but that the attorneys could not block discharge of the debt because the statements were not "in writing" as required for nondischargeability under that provision. *Id.*

Here, notwithstanding the Debtor's promise that he could "sell [a property] and pay [Appellant] back," (A139), the Debtor failed to pay any of the $70,000 in funds received from the sale of 2050 Sea Level Drive to Appellant. (A276—296). Although the Debtor testified that he did not actually receive $70,000 at the closing, he acknowledged that he received it in installments over "a year and a half or two years," (A134—136), and used the proceeds to "pay bills" rather than to pay Appellant because she "was one of 20 creditors [he] had." (A136).

Similarly, on April 2, 2012, the Debtor promised that Appellant's Card would be first bill paid from payments received for his receivables from upcoming work (A139), and that it would be paid in full "when we get paid," (A113), but the Debtor failed to remit any payment to Appellant from the payments he received for work projects. During the period from June 6, 2013 to September 11, 2013, the Debtor received $63,308.00 on the Hoonah Schools Major Maintenance Renovation contract with ASRC Earthworks LLC (A411-412), while, during that same period, representing to Appellant that the reason for his non-payment was that it was "just taking forever [sic] to get paid on these bigger jobs." (A113). The Debtor testified that he had expected to be paid in full for the Auke Bay School and Hoonah Schools projects but was only partially paid. (A129—130, 133—134). However, he did not dispute that he did receive payments for both projects.

As set forth in Section II of this Brief, above, the Affidavit of Bradley Strahl lends further support to Appellant's contention that the Debtor's representation was intentionally fraudulent, as the Debtor not only made a false promise that he intended to pay her first when he received payment for the projects, but had in fact *already been paid in full* for the projects and had no reason to expect additional payments. Because the Bankruptcy Court improperly excluded the affidavit, it ruled on Appellant's §523(a)(2)(B) claim without

properly considering all of Appellant's evidence impeaching the Debtor's credibility.

Just like the debtor in *Appling*, the Debtor here made a false promise to pay his creditor from a specific asset, and simply chose not to dedicate any of the asset to the debt in question. Unlike the debtor in *Appling*, the Debtor here made his false promise in writing, and it is therefore actionable under Section 523(a)(2)(B).

It is clear from the context in which the Debtor's statements were made--in response to Elliot's entreaties for payment and/or security-- and from The Debtor's continued use of the Cards after making them, that the statements were intended to deceive Appellant into continuing to extend credit to The Debtor.

Appellant affirmed that she relied on these statements. (A110, 116—117). Appellant's reliance was objectively reasonable: although she did not do any independent investigation of The Debtor's real estate holdings, and obviously could not do any investigation of his subjective intent to pay her from specific sources, his claims and promises appeared to her to be consistent with his past history of payment and evidence from the cards of substantial ongoing business. *Id.* As set forth above, Appellant suffered a loss as a result of her reliance. Thus, Appellant met her burden to establish her claims under Section 523(a)(2)(B).

.

CONCLUSION

In consideration of the foregoing, Plaintiff-Appellant Patricia Elliot respectfully requests that this Court reverse the decision and Order of the Bankruptcy Court determining that the debts in question are dischargeable.

Dated: Wilkes-Barre, Pennsylvania
April 30, 2024

Respectfully submitted,

/s/ C. Stephen Gurdin, Jr.
C. Stephen Gurdin, Jr.
67-69 Public Square Ste. 501
Wilkes-Barre, PA 18701-2512
Phone: 570-826-0481
Fax: 570-822-7780
Stephen@gurdinlaw.com
Attorney for Plaintiff-Appellant

COMBINED CERTIFICATES

I. Statement of Bar Membership

Pursuant to Local Appellate Rule 46.1(e), C. Stephen Gurdin, Jr., certifies that he is counsel of record and is a member of the bar of the United States Court of Appeals for the Third Circuit.

II. Statement of Compliance with Frap 32(a)(7)(b)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 8,749 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman.

III. Statement Of Service and ECF Filing

I, C. Stephen Gurdin, Jr., certify that on April 30, 2024, I electronically filed the foregoing Opening Brief on Behalf of Appellant by using the CM/ECF system with the Clerk of the Court for the United States Court of Appeals for the Third Circuit. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify, I sent seven (7) copies of the Opening Brief on Behalf of Appellant and Appendix Volume II, via FedEx, to the Clerk of the Court for the United States Court of Appeals for the Third Circuit.

IV. Statement of Identical Compliance Briefs

I, C. Stephen Gurdin, Jr., hereby certify that the text of the electronically filed brief is identical to the text of the original copies that were dispatched on April 30, 2024, by FedEx delivery, to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

V. Statement of Virus Check

I, C. Stephen Gurdin, Jr., hereby certify that on April 30, 2024, I caused a virus check to be performed on the electronically filed copy of the forgoing Reply Brief of Appointed Amicus Curiae Supporting Appellant using the following virus software: Vipre Virus Protection, EndpointSecurity, version 11.0.7633. No virus was detected.

/s/ C. Stephen Gurdin, Jr.
C. Stephen Gurdin, Jr.

CASE NO. 23-3061

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

In re: VINCENT A. PIAZZA, III, aka Vincent Anthony Piazza, III,
Debtor,

PATRICIA ELLIOTT,
Appellant,

v.

Vincent A. Piazza, III,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

APPENDIX VOLUME I OF II (Pages 1 - 31)

C. Stephen Gurdin, Jr.
ATTORNEY AT LAW
67-69 Public Square, Suite 501
Wilkes-Barre, PA 18701
570-826-0481
stephen@gurdinlaw.com

Counsel for Appellant

TABLE OF CONTENTS

VOLUME I OF II (*attached to Brief*)

VOLUME II OF II (*filed separately*)

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 3:22-cv-1808

In re VINCENT A. PIAZZA, III, Debtor

Patricia Elliott,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Chapter 7
	:	
Vincent A. Piazza, III,	:	Bankr. Case No. 5:18-bk-02300
	:	Adv. No. 5:18-ap-00101
Defendant.	:	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Patricia Elliott, the Plaintiff in the above-captioned action, appeals to the United States Court of Appeals for the Third Circuit for the November 2, 2023 order of the United States District Court for the Middle District of Pennsylvania, Docket No. 11, which affirmed the November 4, 2022 Order of the United States Bankruptcy Court for the Middle District of Pennsylvania granting judgment to Defendant Vincent A. Piazza, III.

The names of all parties to the Order and the names, addresses, and telephone numbers of their respective attorneys are as follows:

Appellant	**Counsel**
Patricia Elliott	C. Stephen Gurdin, Jr. 67-69 Public Square Ste 501 Wilkes-Barre, PA 18701-2512 (570) 826-0481 (570) 822-7780 (fax) Stephen@gurdinlaw.com
Appellee	**Counsel**
Vincent A. Piazza, III	Brian E. Manning The Law Office of Brian E. Manning 800 Johnson Ave. Dickson City, PA 18519 (570) 483-4949 (866) 559-9808 (fax) brianemanning@comcast.net

Respectfully submitted,

/s/
C. Stephen Gurdin, Jr.
67-69 Public Square Ste 501
Wilkes-Barre, PA 18701-2512
(570) 826-0481
(570) 822-7780 (fax)
Stephen@gurdinlaw.com
Attorney for Appellant

Dated: November 16, 2023

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served on all counsel of record via the Court's ECF system and via United States first-class mail, postage prepaid upon the following persons:

Vincent A. Piazza, III
4001 Pondview Drive
Clarks Summit, PA 18411

Dated: November 16, 2023

/s/
C. Stephen Gurdin, Jr.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PATRICIA ELLIOTT,	:	
Appellant,	:	**3-22-cv-1808**
v.	:	**(JUDGE MANNION)**
VINCENT A. PIAZZA III,	:	
Appellee	:	

ORDER

In accordance with the court's Memorandum issued this same day, **IT IS HEREBY ORDERED** that Appellant's Appeal, (Doc. 1), is **DENIED**, and the Bankruptcy Court's order denying reconsideration is **AFFIRMED**. The Clerk of Court is directed to **CLOSE** this case.

s/ Malachy E. Mannion
MALACHY E. MANNION
United States District Judge

DATE: November 2, 2023
22-1808-01 Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:	:	
	:	CHAPTER 7
VINCENT A. PIAZZA, III,	:	
	:	CASE NO. 5:18-bk-02300-HWV
Debtor,	:	
	:	
PATRICIA ELLIOTT,	:	
	:	ADVERSARY NO. 5:18-ap-00101-HWV
Plaintiff,	:	
	:	
v.	:	
	:	
VINCENT A. PIAZZA, III,	:	
	:	Nature of Proceeding: 62 Dischargeability
Defendant.	:	

ORDER

Upon consideration of the Amended Adversary Complaint, Doc. 12, and for the reasons stated in the accompanying Opinion, it is hereby

ORDERED that judgment is GRANTED for the Debtor-Defendant. The debt outlined in Plaintiff's Amended Adversary Complaint is subject to discharge in Debtor-Defendant's Chapter 7 case. The Clerk of Court is directed to close this adversary proceeding.

By the Court,

Henry W. Van Eck, Chief Bankruptcy Judge
Dated: November 4, 2022

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PATRICIA ELLIOTT,	**:**	
Appellant,	**:**	**3-22-cv-1808**
v.	**:**	**(JUDGE MANNION)**
VINCENT A. PIAZZA III,	**:**	
Appellee	**:**	

MEMORANDUM

Appellant Patricia Elliott, Chapter 7 Bankruptcy Creditor, appeals a final order of the Bankruptcy Court in an adversary proceeding seeking a declaration of non-dischargeability. The matter has been fully briefed and is ripe for disposition. Appellant asks the court to determine whether the Bankruptcy Court erred as a matter of law by finding that the Debtor, Vincent A. Piazza III, was entitled to judgment on Appellant's claim for exception to discharge pursuant to 11 U.S.C. §523(a)(2)(B) and by excluding as hearsay Appellant's Exhibit Tab 90 (the Affidavit of Bradley Strahl.) Since the court does not detect any error in the record below, the order of the Bankruptcy Court will be **AFFIRMED,** and Appellant's Appeal will be **DENIED.**

I. Background

This dispute arises out of Appellee's use of Appellant's credit cards pursuant to an oral agreement entered into in June 2011. On or prior to July

2013 Appellee incurred debts on Appellant's credit cards in excess of her credit limit. In July 2013 Appellee agreed to cease his usage of Appellant's credit cards but continued to incur debts after July 2013. Appellant demanded payment of these debts, but Appellee failed to pay her in breach of their agreement. On April 10, 2014, Appellant filed an action for breach of contract against Appellee in the District Court of the State of Alaska, First Judicial District at Ketchikan. Summary judgement was awarded in Appellant's favor on February 26, 2015, and three separate monetary judgments totaling $82,766.06 were issued. Appellee did not pay these judgments and filed for bankruptcy under Chapter 7 of the Bankruptcy Code on May 31, 2018.

On September 4, 2018, Appellant filed an adversary complaint seeking a declaration of non-dischargeability regarding the $82,766.06 in state court judgments owed to her by Appellee pursuant to 11 U.S.C. §523(a)(2)(A) and 11 U.S.C. §523(a)(2)(B). Trial was held on March 16, 2022. During trial the Bankruptcy Court excluded Appellant's Exhibit Tab 90 (the Affidavit of Bradley Strahl), which allegedly showed Appellee's intent to deceive Appellant, as hearsay. (Doc. 4) On November 4, 2022, the Bankruptcy Court entered an order supported by a twelve-page opinion granting judgment for Appellee, finding that the state court judgments owed to Appellant were

subject to discharge. (Doc. 1-2) In pertinent part, the Bankruptcy Court rejected Appellant's claim under §523(a)(2)(B), which *inter alia* excepts debts incurred by fraud from discharge, on the basis that Appellee did not have an "intent to deceive" Appellant. Specifically, the Bankruptcy Court found "the record is devoid of any evidence indicating that Piazza intended to deceive Elliott in writing or otherwise in order to retain access to the Cards despite his non-payment." Id. Appellant timely appealed arguing that the Bankruptcy Court erred as matter of law in rejecting its claim under §523(a)(2)(B) and excluding the Affidavit of Bradley Strahl as hearsay.

II. Legal Standard

This court has appellate jurisdiction over the this appeal of the Bankruptcy Court's order pursuant to 28 U.S.C. §158(a)(1) (The district court has "jurisdiction to hear appeals from final judgments, orders, and decrees" of a bankruptcy court). *See In re Michael*, 699 F.3d 305, 308 n.2 (3d Cir. 2012) ("[A] district court sits as an appellate court to review a bankruptcy court."). When a district court sits as an appellate court over a final order of a bankruptcy court, it reviews the bankruptcy court's legal determinations *de novo*, its findings of fact for clear error, and its exercise of discretion for abuse of discretion. *In re Trans World Airlines, Inc.*, 145 F.3d 124, 131 (3d Cir. 1998).

When reviewing for clear error, "it does not matter that this Court 'would have reached a different conclusion' if presented with the matter in the first instance." *Campbell v. Conway*, 611 B.R. 38, 43 (M.D. Pa. 2020) quoting *Prusky v. ReliaStar Life Ins.*, 532 F.3d 252, 258 (3d Cir. 2008) The Court must accept the Bankruptcy Court's factual findings unless it is "left with the definite and firm conviction that a mistake has been committed." *Id.*

This court reviews the Bankruptcy Court's evidentiary rulings for abuse of discretion but exercises plenary review to the extent the rulings are based on a legally permissible interpretation of the Federal Rules of Evidence. *See Id*. citing *United States v. Fattah*, 914 F.3d 112, 177 (3d Cir. 2019); *see also United States v. Reilly*, 33 F.3d 1396, 1410 (3d Cir. 1994) (discussing appellate standard of review in the context of a hearsay ruling).

Furthermore "[t]he burden of proving that a debt is nondischargeable is upon the creditor, who must establish entitlement to an exception by a "preponderance of the evidence." *In Re Cohn*, 54 F.3d 1108, 1114 (3rd Cir. 1995), citing *Grogan v. Garner*, 498 U.S. 279, 282-89 (1991). "The overriding purpose of the Bankruptcy Code is to relieve debtors from the weight of oppressive indebtedness and provide them with a fresh start. Exceptions to discharge are strictly construed against creditors and liberally construed in favor of debtors." *Id.* at 1113 (3d Cir. 1995)

III. Discussion

A. Appellant's Claim of Exception to Discharge under §523(a)(2)(B)

The Bankruptcy Court did not erroneously determine non-dischargeability under §523(a)(2)(B). Appellant claims that the Bankruptcy Court conflated the question of whether the Appellee had the intent to deceive Appellant about these specific misrepresentations on which Appellant's §523(a)(2)(B) claim is based, and the general question of whether the Appellee ever had any subjective intent to repay the debts. (Doc. 5 pg. 18) This court disagrees because the former is determined by the latter.

It is well established that "a broken promise to repay a debt, without more, will not sustain a cause of action under §523(a)(2)(A)." *In re Singh* 433 B.R. 139, 161 citing *In re Harrison,* 301 B.R. 849, 854 (Bankr.N.D.Ohio, 2003). Were it otherwise, every breach of contract would give rise to a non-dischargeability claim under §523(a)(2)(A). "Instead, central to the concept of fraud is the existence of scienter which, for the purposes of §523(a)(2)(A), requires that it be shown that at the time the debt was incurred, there existed no intent on the part of the debtor to repay the obligation." *Id.* Determining whether a debtor had the requisite fraudulent intent involves a subjective inquiry. *Field v. Mans,* 516 U.S. 59, 70–72 (1995). In the Third Circuit, intent

and knowledge may be inferred based on the "totality of the circumstances." *See In re Cohn,* 54 F.3d at 1118–19. Thus, the relevant analysis in determining non-dischargeability under §523(a)(2)(B) is whether Appellee had the subjective intent when the debt was incurred to repay the obligation.

The Bankruptcy Court made multiple factual findings that indicate Appellee had the subjective intent to repay the debts at issue when they were first incurred and in turn did not intend to deceive Appellant. For example, the Bankruptcy Court found that Appellee charged approximately $902,000 to Appellant's cards but repaid $836,000. (Doc. 1 pg. 9) While no payments were made in some months, in other months payments were made in excess of the balance due that month. Id. The Bankruptcy Court also noted that Appellee told Appellant to cancel the cards in July 2013 and "credibly testified, without opposition, that those charges were most likely 'several reoccurring monthly payments' whose accounts were set up to automatically charge the cards." Id. Likewise, the Bankruptcy Court found that the totality of circumstances of the case indicated the Appellee did not intend to deceive Appellant because Appellee credibly testified that he always intended to repay the balance on Appellant's cards but only could not do so because of unforeseen circumstances with his business. (Id. pg. 10)

This court must respect the credibility findings of the Bankruptcy Court.

See Fed. R. Bankr. P. 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.") Accordingly, this court agrees with the Bankruptcy Court that Appellee's testimony does not indicate that Appellee had the requisite intent to deceive Appellant.

Appellant cites four cases[1] to support the proposition that submissions of materially false documents not the intent to repay is the determinative analysis under §523(a)(2)(B). Besides the fact that none of these cases are binding on this court, they all involve misrepresentations on financial statements (i.e., loan applications). Lying on a loan application is itself fraud and thus precluded the given courts from having to address the debtors' general intent to repay the given debt. Appellant does not assert that Appellee lied on any loan application or similar document, she only asserts that he intentionally misrepresented his assets in emails to her. Appellant claims that this misrepresentation gives rise to an intent to deceive her, but the Bankruptcy Court disagreed finding Appellant based her assertion on

[1] *Drehsen v. Bank of St. Petersburg* (*In re Drehsen*), 190 B.R. 441, 445 (M.D. Fla. 1995); *In re Lundy*, 165 B.R. 157, 163 (Bankr. W.D. Pa. 1994); *In re Rodriguez*, 184 B.R. 467, 471 (Bankr. E.D. Pa. 1995); and *Shawmut Bank v. Lyons*, 153 B.R. 95, 97 (Bankr. D.N.H. 1993)

"unforeseen factual developments in this case which post-date the emails at issue." (Doc. 1 pg. 10 n. 12) Appellant failed to contradict Appellee's testimony that the facts in the emails were true as of the date he sent them to her and thus did not impeach Appellee's credibility in the eyes of the Bankruptcy Court. Id.[2]

Appellant claims the Bankruptcy Court also erred as a matter of law in concluding that Appellant's claims do not fall under the §523(a)(2)(B) discharge exception because the court failed to apply the facts to the proper legal test for determining discharge. This court again disagrees. Appellant claims that the proper test for determining discharge is the five-element test cited by *In re Adesanya*, 630 B.R. 435, 451 (Bankr. E.D. Pa. 2021). The Bankruptcy Court citing directly to the statute acknowledges this test. (Doc 1 pg. 8) It then engages in a thorough analysis of the fifth element: intent to deceive. Having determined that Appellant failed to meet her burden of establishing appellee intended to deceive her the Bankruptcy Court did not consider the remaining elements under §523(a)(2)(B). (Id. pg. 10 n. 13). Had the Bankruptcy Court engaged in a similar analysis of each element as

[2] Appellant claims that the Affidavit of Bradley Strahl could have impeached Appellee's credibility but on appeal a court "may not consider material or purported evidence which was not brought upon the record in the trial court." *United States ex rel. Bradshaw v. Alldredge*, 432 F.2d 1248, 1250 (3d Cir. 1970).

Appellant appears to suggest they should have done, the outcome would not have been different because failure to satisfy one element alone defeats Appellant's burden. Thus, the Bankruptcy Court did not erroneously determine non-dischargeability as a matter of law.

B. Exclusion of Bradley Strahl's Affidavit as Hearsay

Appellant attempted to enter the Affidavit of Bradley Strahl, as evidence that Appellee's representations in his emails to Appellant were false as of the date they were sent. The Bankruptcy Court excluded this evidence as hearsay but Appellant claims it was still admissible as a self-authenticating business record under Federal Rules of Evidence 803(6) and 902(8). Nonetheless Appellant did not raise this argument at trial and thus has failed to preserve the same on appeal. Appellant argues that the Strahl Affidavit meets all of the criteria for admissibility under the business record exception to the hearsay rule found in Federal Rules of Evidence, Rules 803(6) and 902(8). (Doc. 5 pg. 30) However, Appellant submits no evidence that she ever made this argument to the Bankruptcy Court. Appellee submits that "after Defendant's counsel raised the hearsay objection to the Affidavit, Appellant's failure to argue the 'business record' exception to the rule against hearsay at the time of trial or in her post-trial brief, amounts to waiver or failure to preserve that issue, which should not and cannot be raised for the

first time on appeal." (Doc. 7 pg. 9) Appellant does not rebut this argument nor could she based on the Bankruptcy Court's transcript.

According to the transcript when asked by the Bankruptcy Court why the affidavit is not hearsay, Appellant's counsel did not respond that it satisfied the requirements of Rules 803(6) and 902(8). Instead, Appellant's Counsel made only a vague argument about the affidavit's foundation to which the Bankruptcy Court responded "[t]hat's not a recognized exception to the hearsay rule." (Doc. 4 pg. 61:24-25) The Bankruptcy Court in fact even went as far to suggest that instead the Affidavit may be admissible as a statement against interest or party admission. (Id. pg. 61-62 25-1). Yet Appellant's counsel made no argument that the affidavit was admissible under these exceptions.

In *United States v. Joseph*, the Third Circuit explained how to preserve an argument on appeal: the same legal rule and same facts must have been presented in the District Court. 730 F.3d 336, 342 (3d Cir. 2013). Since this court sits as an appellant court in the instant appeal the same standard applies here. *See In re Michael*, 699 F.3d 305, 308 n.2 (3d Cir. 2012) ("[A] district court sits as an appellate court to review a bankruptcy court."). Appellant did not present the same legal rule (i.e. Rules 803(6) and 902(8)) to the Bankruptcy Court as it presented to this court. Thus, while the

Bankruptcy Court did previously rule on the general admissibility of the Affidavit it did not specifically address its admissibility as a self-authenticating business record because the applicable rules were never presented to it.

If Appellant had preserved this argument, it would have been reviewed for abuse of discretion on appeal. *Campbell v. Conway*, 611 B.R. 38, 43 (M.D. Pa. 2020) citing *United States v. Fattah*, 914 F.3d 112, 177 (3d Cir. 2019). But since defendant did not, then to prevail, she must meet the four requirements of plain-error review. *See United States v. Greenspan*, 923 F.3d 138, 147 (3d Cir. 2019).

The first prong of plain-error review examines whether the trial court erred. *See United States v. Jabateh*, 974 F.3d 281, 298 (3d Cir. 2020) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). For purposes of that prong, the difference between preserved and unpreserved error is immaterial: in either circumstance, an appellate court uses the standard of review that would have applied had the argument been preserved. *See United States v. Adair*, 38 F.4th 341, 355–56 (3d Cir. 2022). Thus, the real effect of unpreserved error comes not from the first plain-error prong but rather from the latter three prongs, which do not apply to preserved arguments and which require an appellant to make additional showings of plainness, effect on substantial rights, and serious effect on the fairness,

integrity, or public reputation of judicial proceedings. *See generally Olano*, 507 U.S. at 732–36. But if there is no error, then the latter three prongs are of no consequence, and a challenge fails regardless of whether it was preserved. *See Adair*, 38 F.4th 341, 355–56 (3d Cir. 2022).

Here there was no error. The affidavit is a written statement rather than verbal testimony which was not made at trial and which the Plaintiff is attempting to use to prove the truth of the matter being asserted. Thus, it is clearly hearsay. Although Appellant did not argue any particular exception to the Bankruptcy Court, Appellant now argues that the Affidavit meets all the requirements of admissibility as a business record under Rules 803(6) and 902(8). Still even if this was the case such a record can be excluded if it's deemed untrustworthy. See *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238, 289 (3d Cir.1983), rev'd. on other grounds, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). ("Under Rule 803(6) the court can exclude business records if the source of information or circumstances of preparation suggest untrustworthiness.)

The Bankruptcy Court viewed the Affidavit with suspicion from the onset because it was not subject to cross-examination and the Affiant, Bradley Stahl's, company allegedly owes Appellee debtor money, thus giving it a stake in the bankruptcy. (Doc. 4 pg. 60:24-61:3) This court agrees. Cross

examination of the affiant was necessary to determine if the records really did satisfy the requirements of Rules 803(6) and 902(8) (i.e. they were prepared in the ordinary course of business). Similarly, cross-examination was necessary to assess the credibility of Affiant, especially given his own potential adversity to Appellee. Appellant dismisses concerns about such adversity on the basis that there was no litigation between Appellee and Affiant. This alone does not mean the parties were not adverse nor does it mean Affiant did not have a stake in Appellee's bankruptcy. In fact, Appellee has indicated that he has records showing Affiant's company owed him money in contravention of the records submitted with the Affidavit, which both shows a stake in the bankruptcy as well as further casts doubts on the trustworthiness of the Affidavit. (Doc 7 pg. 17)

Still appellant argues that Appellee could have deposed Affiant prior to the trial. Conversely Appellant could have also just produced Affiant at trial. Either way the Affiant was never subjected to cross examination and thus the Bankruptcy Court committed no error in finding that absent such a test the Affidavit was untrustworthy. Since there was no error, this court need not further analyze this issue.

IV. Conclusion

In light of the foregoing and based on a thorough review of the record below, the court will **AFFIRM** the Bankruptcy Court's order denying reconsideration and **DENY** Appellant's Appeal. An appropriate order follows.

s/ Malachy E. Mannion
MALACHY E. MANNION
United States District Judge

DATE: November 2, 2023
22-1808-01

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:	:	
	:	CHAPTER 7
VINCENT A. PIAZZA, III,	:	
	:	CASE NO. 5:18-bk-02300-HWV
Debtor,	:	
	:	
PATRICIA ELLIOTT,	:	
	:	ADVERSARY NO. 5:18-ap-00101-HWV
Plaintiff,	:	
	:	
v.	:	
	:	
VINCENT A. PIAZZA, III,	:	
	:	Nature of Proceeding: 62 Dischargeability
Defendant.	:	

OPINION

This matter comes before the Court by way of an Amended Adversary Complaint filed by Plaintiff, Patricia Elliott ("Elliott") in which she seeks a determination that a debt owed to her by Debtor-Defendant Vincent A. Piazza, III ("Piazza") is non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(2)(B). For the reasons that follow, the Court rules against Elliott and finds that this debt is dischargeable.

I. JURISDICTION

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(a) and 28 U.S.C. § 157(a). This is a "core proceeding" under 28 U.S.C. § 157(b)(2)(J) (objections to discharge).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2011, Elliott and Piazza resided in Ketchikan, Alaska. (Doc. 127, p. 4.)[1] Elliott was the cardholder of two Alaska Airlines credit cards. (*Id.*) Piazza operated a flooring business and owned several properties. (*Id.* at 4, 8.) Sometime in 2011, the parties entered into an oral

[1] For ease of reference, and where appropriate, the Court utilizes the page numbers from the CM/ECF footer.

contract regarding the use of Elliott's Alaska Airlines credit cards ending in 6957 (the "6957 Card") and 4194 (the "4194 Card" and, collectively with the 6957 Card, the "Cards") whereby Piazza and his wife would each be added to the Cards as authorized users and be permitted to use them for both business and personal use. (*Id.* at 4.) Piazza agreed to make payments on the Cards for charges he and his wife incurred. (*Id.*) The parties agreed to share the resulting airline miles as they accrued. (*Id.*)

At first, the arrangement worked as planned; Piazza made charges and timely payments on the Cards.[2] (*Id.*) However, by March 2012, the statements for the Cards reflected a combined balance of $33,951.05 that Piazza had not paid. (*Id.*) Around this time, Piazza asked Elliott to request a credit limit increase. (Elliott Ex. 16.) On April 2, 2012, Elliott agreed to ask for an increase but stated that she would like some sort of security that the Cards would be paid in case "something unforeseen should happen." (*Id.*) Piazza responded by noting that his business had over $1.5 million worth of work over the next twelve months, and that he also had six properties with "a ton of equity" that he could sell to make payments on the Cards. (*Id.*) He also offered to add Elliott as a first loss payee on a life insurance policy to guarantee payment on the Cards in the event that he was unable to repay them. (*Id.*) Elliott never responded to this offer and it does not appear that the parties discussed the issue further or otherwise took any additional action regarding security for Elliott in the event that Piazza was unable to make payments on the Cards.[3] (Trial Tr. pp. 41–42.)

[2] Indeed, the credit card statements for the 6957 Card reflect that between the January 2012 and March 2012 statements, Piazza made over $68,000 in charges and more than $77,000 in payments. (Elliott Ex. 10.) Over the same period, the credit card statements for the 4194 Card reflect charges totaling approximately $6,000 and payments totaling approximately $7,500. (Elliott Ex. 12.) Thus, between the two Cards, Piazza charged more than $74,000 and made payments of more than $84,500 between the January 2012 and March 2012 statements. (Elliott Ex. 10, 12.)

[3] It is also unclear whether the credit limit increase occurred. Elliott testified that the credit limit "went up to $40,000" following the request. (Trial Tr. p. 24.) However, the credit card statements provided to the Court show that the credit

Thereafter, the parties' agreement continued as anticipated. The statements for the 6957 Card reflect that between the April 2012 and February 2013 statements, Piazza charged more than $644,000 and made payments totaling more than $595,000. (Elliott Ex. 10–11.) The statements for the 4194 Card reflect that Piazza charged more than $50,000 and made payments totaling more than $45,000 over the same period. (Elliott Ex. 12–13.) Thus, collectively, Piazza charged more than $694,000 and made payments of more than $640,000 between April 2012 and February 2013. (Elliott Ex. 10–13.) The Cards carried a combined balance of approximately $68,500 as of the February 2013 statements. (*Id.*)

During this time, Piazza's business began experiencing financial trouble due to non-payment on several large projects. As a result, Piazza began to fall behind on payments on the Cards. (Trial Tr. pp. 32, 11–12.) Indeed, by March 12, 2013, the 6957 Card carried an unpaid balance of $66,158.65.[4] (Elliott Ex. 11.) Accordingly, on March 13, 2013, Elliott asked Piazza to make payments on the Cards to bring the accounts below their respective credit limits. (Elliott Ex. 20.) Piazza responded that he would make payments as soon as possible, and that he was waiting on receivables totaling $231,000 to completely pay off the balance. (*Id.*) On April 10, 2013, Elliott once again asked Piazza to make payments on the accounts to bring them below their respective credit limits. (Elliott Ex. 18.) Piazza indicated that he would be able to make payments in the next week and that he would not exceed the Cards' credit limits again. (*Id.*)

limit on the 6957 Card did not change. (Elliott Ex. 10–11.) Likewise, the statements for the 4194 Card show that the credit limit was $13,000 during the entire period in question. (Elliott Ex. 12–14.)

[4] Elliott did not provide the Court with a copy of the 2013 statements for the 4194 Card. While Exhibit 13 purports to be the 2013 statements for the 4194 Card, it appears that the exhibit is actually a re-print of Exhibit 12, which are the 2012 statements for the 4194 Card. However, based on the $7,894.21 ending balance as of the December 2012 statement, and the $12,868.72 beginning balance as of the January 2014 statement, which were admitted as exhibits, the Court surmises that there were at least some additional charges on the 4194 Card. (Elliott Ex. 12, 14.)

Following this exchange, Piazza continued to make charges and payments on the Cards when he was able.[5] (Elliott Ex. 11.)

On July 23, 2013, Piazza emailed Elliott to inform her that he and his wife would no longer be using the Cards and that Elliott could cancel them. (Elliott Ex. 22.) He also indicated that he would pay off the balances on the Cards once he received payment from several summer projects, which he estimated to be worth $500,000. (*Id.*) He anticipated being paid by the end of September. (*Id.*) Following this email, the charges on the Cards largely stopped, decreasing from tens of thousands of dollars charged per month to zero within a matter of weeks. (Elliott Ex. 10–16.) The final charge on the 6957 Card was a $149 charge on September 27, 2013 and the final charge on 4194 Card was a $718.01 charge on December 29, 2013. (Elliott Ex. 11, 14.)

After he stopped using the Cards, it appears that Piazza attempted to pay down the debt by making small payments toward the accruing interest. (*See* Elliott Ex. 11, 14.) In total, Piazza made payments of $3,185 on the 6957 Card and at least $4,190 on the 4194 Card after the date of the last charge on each respective Card. (Elliott Ex. 11, 14.) During this time, the parties continued to communicate via email, wherein Piazza repeatedly acknowledged that he was behind on his Card payments due to unpaid sums owed to his flooring business, but that he would pay Elliott back when he was able. (Elliott Ex. 24–25.) However, substantial balances remained on both Cards.

On April 10, 2014, Elliott filed a breach of contract action against Piazza in the District Court for the State of Alaska First Judicial District at Ketchikan based on his failure to pay off the balances on the Cards (the "State Court Action"). (Elliott Ex. 4.) Elliott was awarded

[5] Indeed, the July 2013 statement for the 6957 Card shows an ending balance of $37,631.76. (Elliott Ex. 11.)

$82,766.06 across three judgments from the State Court Action (the "State Court Judgments"), which included attorney's fees and interest. (Elliott Ex. 7–9.)

On May 31, 2018, Piazza filed a Chapter 7 bankruptcy petition. Thereafter, on September 4, 2018, Elliott filed the instant adversary proceeding seeking a determination from this Court that the debt owed to her from the State Court Judgments is non-dischargeable. The Court conducted a trial on this issue on March 16, 2022. The parties submitted post-trial briefs on April 12, 2022, and May 12, 2022, respectively. (Docs. 127, 129.) After review of the trial testimony, exhibits, and post-trial briefs, the Court is prepared to rule.

III. ANALYSIS

Actions to determine the dischargeability of debt are governed by 11 U.S.C. § 523(a). In dischargeability proceedings, the creditor carries the burden to prove by a preponderance of the evidence that the debt is non-dischargeable. *Grogan v. Garner*, 498 U.S. 279, 285 (1991). As the Court has already noted in this case, "exceptions to discharge are strictly construed against creditors and liberally construed in favor of debtors." (Doc. 23, p. 4 (collecting cases).)[6]

In this case, Elliott asserts that the debt owed to her pursuant to the State Court Judgments should be declared non-dischargeable under either § 523(a)(2)(A) or § 523(a)(2)(B).[7] In support of her position, Elliott argues that Piazza maintained "unfettered use of Elliott's credit to charge purchases for several years" by "making repeated false assurances to Elliott . . . that he intended imminent payment, when the circumstances and timing of his repeated broken promises make it clear that he had no intention to do so at the time the promises were made." (Doc. 127,

[6] Though not published by the undersigned, the Court previously issued two opinions in this case on dispositive motions. To avoid confusion, the Court will refer to its opinion at docket number 10 in the above-captioned matter as "Piazza I" and its opinion at docket number 23 in the above-captioned matter as "Piazza II."

[7] The Court notes that relief under § 523(a)(2)(A) and § 523(a)(2)(B) is mutually exclusive. *In re Coley*, 433 B.R. 476, 492 n.21 (Bankr. E.D. Pa. 2010). Therefore, the Court will interpret Elliott's arguments under § 523(a)(2)(A) and § 523(a)(2)(B) as though they are argued in the alternative.

p. 14.) In response, Piazza generally states that there is no evidence to support the assertion that he never intended to repay his obligations to Elliott at the time they were incurred, and that without such evidence, the debt owed to Elliott is dischargeable. (Doc. 129, pp. 6–7.) The Court considers these arguments in turn.

A. 11 U.S.C. § 523(a)(2)(A)

Under § 523(a)(2)(A) of the Bankruptcy Code, a Chapter 7 discharge "does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, 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). In other words, as stated in *Piazza II*, to prove that the State Court Judgments are non-dischargeable under § 523(a)(2)(A), Elliott must show that

> (1) the debtor made a false representation; (2) the debtor knew the representation was false when it was made; (3) the debtor intended to deprive the creditor or to induce him to act upon the representation; (4) the creditor justifiably relied upon the representation; and, (5) the creditor sustained a loss as a proximate result of the representation.

(Doc. 23, p. 6 (citing *In re Griffith*, No. 1:13-bk-4362, 2014 WL 4385743, at *3 (Bankr. M.D. Pa. Sept. 4, 2014); *In re Ritter*, 404 B.R. 811, 822 (Bankr. E.D. Pa. 2009)).)

To satisfy the above elements, Elliott must rely on a statement "*other than* a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A) (emphasis added). A statement is "respecting" a debtor's financial condition "if it has a direct relation to or impact on the debtor's overall financial status." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1761 (2018). Further, a statement about a single asset can be a "statement respecting the debtor's financial condition." *Id.* (noting that "a single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a Debtor's

overall financial condition and can help indicate whether a Debtor is solvent or insolvent, [or] able to repay a given debt or not").

Elliott asserts that Piazza made a series of false representations in eight emails between April 2012 and April 2014 that she contends were made to induce her to allow Piazza to retain access to the Cards despite his nonpayment. (Doc. 127, p. 14.)[8] These eight emails form the basis of Elliott's entire argument. Aside from the general allegation that Piazza made repeated broken promises to repay the debt, Elliott alleges that Piazza specifically lied about the number of properties that he owned, the equity that existed in those properties, and his ability to pay her from specific sources of funds, including the sale of those properties and income from two large projects relating to his business. (*Id.* at 17.)

The Court finds that Piazza's statements regarding the number of properties that he owned and the equity in those properties, as well as his ability to pay Elliott from the sale of his properties and his pending receivables for his business are fairly classified as statements that have a "direct relation to or impact on the [D]ebtor's overall financial status." *Appling*, 138 S. Ct. at 1761. As such, the Court concludes that these statements cannot be relied upon to support Elliott's assertion that the State Court Judgments are non-dischargeable pursuant to § 523(a)(2)(A). Therefore, Elliott's argument in favor of non-dischargeability of the State Court Judgments under § 523(a)(2)(A) accordingly fails. The Court thus turns to Elliott's alternative argument in favor of non-dischargeability: § 523(a)(2)(B).

B. 11 U.S.C. § 523(a)(2)(B)

Under § 523(a)(2)(B) of the Code, a debtor does not receive a Chapter 7 discharge for any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the

[8] The emails are dated April 2, 2012; "May of 2012;" March 13, 2013; April 10, 2013; July 23, 2013; September 3, 2013; February 13, 2014; and March 7, 2014. (Elliott Ex. 16–18, 20–22, 24–25.)

extent obtained by . . . use of a statement in writing[9] . . . (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive." (Doc. 23, p. 8 (citing 11 U.S.C. § 523(a)(2)(B)).) In short, a debtor may not discharge a debt in Chapter 7 to the extent that such debt was obtained by materially misrepresenting the debtor's financial condition in writing when such writing was made intending to deceive the creditor and the creditor reasonably relied on the representation. (*See id.*)

Importantly, success on a § 523(a)(2)(B) claim requires a showing of intent to deceive.[10] "[A] broken promise to repay a debt, without more," is insufficient to prove such intent to deceive. *In re Singh*, 433 B.R. 139, 161 (Bankr. E.D. Pa. 2010). Otherwise "every breach of contract would give rise to a nondischargeability claim[.]" *Id.* "[B]ecause a debtor will rarely, if ever, admit that deception was his purpose, intent to deceive may be inferred from the totality of the surrounding facts and circumstances." *In re Adesanya*, 630 B.R. 435, 452 (Bankr. E.D. Pa. 2021) (citations omitted); *see also In re Cohn*, 54 F.3d 1108, 1119 (3d Cir. 1995). In addition, "a creditor can establish intent to deceive by proving reckless indifference to, or reckless disregard of, the accuracy of the information in the financial statement of the debtor when the totality of the circumstances supports such an inference." *In re Adesanya*, 630 B.R. at 452 (citing *In re Williams*, No. 15-23287, 2018 WL 3344174, at *16 (Bankr. D.N.J. July 05, 2018)).

[9] As mentioned in *Piazza II*, an email can satisfy the "writing" requirement of § 523(a)(2)(B). (Doc. 23, p. 9 (citing *In re Owens*, 549 B.R. 337, 351 (Bankr. D. Md. 2016); *In re Hambley*, 329 B.R. 382, 399 (Bankr. E.D.N.Y. 2005); *In re May*, 579 B.R. 568, 589 & n.79 (Bankr. D. Ut. 2017)).)

[10] The Court notes that for purposes of § 523(a)(2)(A) and § 523(a)(2)(B), the intent requirement is the same. *See In re Pfender*, 2022 WL 696947, at *8 (noting that "the intent to deceive . . . element[] of [a] § 523(a)(2)(A) claim appl[ies] equally with respect to [a] § 523(a)(2)(B) claim").

In this case, the Court finds that the record is devoid of any evidence indicating that Piazza intended to deceive Elliott in writing or otherwise in order to retain access to the Cards despite his non-payment. Indeed, the record in this case shows the opposite. A cursory review of the credit card statements reveals substantial payments on both Cards during the period in question. With regard to the 6957 Card, the statements reflect that between February 2012 and July 2013, Piazza made over $850,000 of charges and more than $800,000 in payments. (Elliott Ex. 10–16.) Over the same period, the statements for the 4194 Card reflect charges totaling approximately $52,000 and payments totaling approximately $36,000. (*Id.*) Thus, between the two Cards, Piazza charged approximately $902,000 and made payments of approximately $836,000 between February 2012 and July 2013. (*Id.*) While the Court acknowledges that no payments were made in certain months, it is noteworthy that in other months, payments were made that far exceeded the balance due that month. Therefore, Piazza's substantial payment history on the Cards completely undermines Elliott's assertion that Piazza never intended to repay his debts.

The Court also notes that in the July 23, 2013 email, Piazza acknowledged the outstanding debt owed to Elliott and told her that she could cancel the Cards because he would no longer be making charges on the accounts. (Elliott Ex. 22.) While Elliott contends that there were additional charges on both Cards after Piazza's July 23, 2013 email,[11] Piazza credibly testified, without opposition, that those charges were most likely "several reoccurring monthly payments" whose accounts were set up to automatically charge the Cards. (Trial Tr. 3–9, 79.) Piazza's testimony is consistent with the record evidence since the number of charges dropped precipitously after July 23 and nearly all of the charges in these months are from a handful of

[11] Charges post-dating the July 23, 2013 email total approximately $15,000 on the 6957 Card and at least $6,300 on the 4194 Card. (Elliott Ex. 10–16.)

vendors, many of which appear in the same dollar amount each month, consistent with a reoccurring charge. (Elliott Ex. 11.) Despite these additional charges, the Court notes that Piazza continued to make more than $9,000 in payments on the Cards over the same period. Therefore, the Court finds that the July 23, 2013 email was not made with the intent to deceive Elliott, and cannot support her § 523(a)(2)(A) claim.

Moreover, the Court notes that the totality of the circumstances in this case do not indicate that Piazza intended to deceive Elliott. Piazza credibly testified that he always intended to repay the balances on the Cards, but that due to unforeseen circumstances with his business, he was ultimately unable to do so. As the Court has already stated, "a broken promise to repay a debt, without more," is insufficient to prove such intent to deceive. *In re Singh*, 433 B.R. at 161. Otherwise "every breach of contract would give rise to a nondischargeability claim[.]" *Id.* Elliott has failed to indicate any facts, other than the existence of her State Court Judgments, that would give rise to an inference that Piazza intended to deceive her at any point while Piazza and his wife were authorized users on her Cards.[12]

For the foregoing reasons, the Court finds that Elliott has failed to establish that the State Court Judgments are exempted from Piazza's Chapter 7 discharge under 11 U.S.C. § 523(a)(2)(B).[13]

[12] While Elliott asserts that Piazza intentionally misrepresented the number of properties he owned as well as his equity in these properties over the course of several emails he sent her, which she asserts should give rise to an inference of his intent to deceive her, the Court finds that these emails do not support her position. Indeed, Elliott bases her assertion that Piazza misrepresented these facts on unforeseen factual developments in this case which post-date the emails at issue. Elliott failed to contradict Piazza's testimony that these facts were true as of the date he represented to her that they were true. Therefore, the Court does not construe Piazza's emails as intending to deceive Elliott for purposes of § 523(a)(2)(B)(iii).

[13] Because Elliott failed to meet her burden of establishing that Piazza intended to deceive her, the Court does not consider the remaining elements under § 523(a)(2)(B).

C. Collateral Estoppel

At prior stages of this case, Elliott argued that the Court should give preclusive effect to the State Court Judgments. Though Elliott did not maintain this argument at trial or discuss it in her brief, Piazza's brief nevertheless continued to raise the issue. To the extent the argument has not already been waived due to its lack of inclusion in post-trial briefing, the Court finds that collateral estoppel is inapplicable here.

Under Pennsylvania law, collateral estoppel applies when:

> (1) an issue is identical to one that was presented in a prior case;
>
> (2) there has been a final judgment on the merits of the issue in the prior case;
>
> (3) the party against whom the doctrine is asserted was a party in, or in privity with a party in, the prior action;
>
> (4) the party against whom the doctrine is asserted, or one in privity with the party, had a full and fair opportunity to litigate the issue in the prior proceeding; and
>
> (5) the determination in the prior proceeding was essential to the judgment.

In re Jacobs, 381 B.R. 128, 142 (Bankr. E.D. Pa. 2008) (citing *Cohen v. Workers' Comp. Appeal Bd.* (*City of Philadelphia*), 909 A.2d 1261, 1264 (Pa. 2006); *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 245–46 (3d Cir. 2006); *In re Randall*, 358 B.R. 145, 164 (Bankr. E.D. Pa. 2006)).

Here, the State Court Judgments were based on a breach of contract action. (Doc. 127, p. 13.) Proving breach of contract under Alaska law does not require proof of intent. *See, e.g.*, *Brooks Range Petroleum Corp. v. Shearer*, 425 P.3d 65, 79 (Alaska 2018) (noting that "[a] breach of contract claim depends on proof of the existence of a contract, breach, and damages"). Conversely, as was discussed at length above, dischargeability proceedings under § 523(a)(2) do require such a finding. Because the State Court Judgments contain no such finding, this Court is

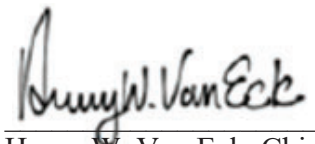
not bound to give them preclusive effect in determining their non-dischargeability, and the Court therefore declines to do so.

IV. CONCLUSION

For the foregoing reasons, the Court finds that the State Court Judgments are dischargeable in the Debtor's Chapter 7 case.

An appropriate Order will follow.

By the Court,



Henry W. Van Eck, Chief Bankruptcy Judge
Dated: November 4, 2022