



UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: RITCHIE R. ROBERTS, Debtor.	Case No. 2:11-bk-59389-RK Chapter 7 Adv. No. 2:12-ap-01329-RK
PACIFIC RESOURCE CREDIT UNION, Plaintiff, vs. RITCHIE R. ROBERTS, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER TRIAL

On December 2, 2011, Ritchie R. Roberts ("Roberts" or "Defendant") initiated this bankruptcy case filing a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. On March 1, 2012, Plaintiff Pacific Resource Credit Union (the "Credit Union" or "Plaintiff") initiated the instant adversary proceeding by filing its Complaint for Determination of Dischargeability of Debt under 11 U.S.C. § 523 (the "Complaint") with the court (Docket No. 1). Roberts was named as the defendant in the Complaint. *Id.*

1 On October 19, 2012, the Credit Union filed a Motion for Summary Judgment or
2 Partial Summary Adjudication (the "Motion") with the court (Docket No. 53). On January
3 23, 2013, a hearing was held on the Motion. The court granted the Motion in part by
4 granting the Motion for Partial Summary Adjudication as to items 1 through 32 and 44 of
5 the Separate Statement of Undisputed Material Facts in Support of Plaintiff's Motion for
6 Summary Judgment (Docket No. 53-17), the Motion was denied in part as to the
7 remaining items of the Motion.

8 A trial on the remaining matters to be litigated was conducted before the
9 undersigned United States Bankruptcy Judge on April 25 and 26 and May 13 and 20,
10 2013. After trial, the parties submitted proposed findings of fact and conclusions of law
11 and interposed objections to the same, the last of which was filed on December 4, 2013.

12 Having considered the testimony of the witnesses at trial and the evidence
13 received at trial, the court makes the following additional findings of fact after trial¹:

14 **FINDINGS OF FACT**

15 **A. Defendant's Income**

16 The Defendant's actual gross income year-to-date, including deferred income and
17 benefits, as an employee of BP West Coast Products, LLC's ("BP West"), on the
18 following dates was:

- 19 a. August 9, 2005: \$47,053.82
20 b. November 1, 2005: \$66,420.47
21 c. December 2, 2005: \$77,717.08
22 d. August 1, 2006: \$66,607.56.

23 *Cheryl Monteleone Rietzel ("Monteleone")² Trial Testimony, April 25, 2013, WA at 1:42–*
24 *1:47³; Exhibit 103, BP West Archive Records for Payments Made to Ritchie R. Roberts*

25
26 ¹ To the extent that any finding of fact is more properly characterized as a conclusion of law, or vice versa, the court adopts it as such.

27 ² Employee of BP West Coast Products, LLC who testified as the person most knowledgeable with respect
28 to employee records for B.P. West Coast Products, LLC, and as custodian of records for BP.

1 *during 2005; and Exhibit 104, BP West's Archive Records for Payments Made to Ritchie*
2 *R. Roberts during 2006.* According to BP West records, Defendant did not earn
3 \$120,000.00 per year for either year 2005 or year 2006 working for BP West. *Id.*

4 As of December 31, 2005, Defendant had only earned the following sums working
5 for BP West, according to the IRS Form W-2, Wage Statement, issued by BP West.

- | | | | |
|---|----|--------------------------|--------------|
| 6 | a. | Wages, tips, other comp. | \$76,198.97. |
| 7 | b. | Medicare wages and tips | \$81,970.15. |
| 8 | c. | Deferred compensation | \$5,771.18. |

9 The Defendant's total gross income, including deferred income, was equal to the amount
10 of the Defendant's Medicare income. *Monteleone Trial Testimony, April 25, 2013, WA at*
11 *1:32; Exhibit 100, Form W-2, Wage and Tax Statement issued by BP Products North*
12 *America, Inc., to Ritchie R. Roberts for 2005.*

13 Defendant would have been able to obtain his income information using a BP
14 West computer. Defendant's total gross income (including deferred income and other
15 benefits) was \$77,771.08. This sum is the amount which Monteleone testified that the
16 Defendant had earned as of December 2, 2005. *Monteleone Trial Testimony, April 25,*
17 *2013, WA at 1:46.* Defendant was aware that he had access to his actual earnings and
18 had previously accessed his earnings information through BP West computer system.
19 *Defendant's Trial Testimony, May 13, 2013 at 0:18; Monteleone Trial Testimony, April 25,*
20 *2013, WA at 1:25.*

21 **B. Original Secured Credit Card Account**

22 In 2004, Defendant represented to the Credit Union that he was earning \$5,000.00
23 per month working for BP West. *Exhibit 94, Defendant's 2004 Credit Card application.*
24 At that time, Defendant only qualified for a share secured credit card account. *Rudy*

25
26
27 ³ Attorney for Plaintiff used a Windows Audio file recording of the trial. This court as a practice generally
28 uses FTR Gold for citations to trial testimony. Therefore, those citations that reference a Windows Audio
file will be denoted with ("WA"), those that reference an FTR Gold file will be denoted with ("FTR").

1 *Martin*⁴ *Trial Testimony, April 25, 2013, WA at 4:19; Defendant's Trial Testimony, April*
2 *25, 2013, WA at 1:00; Exhibit 94, Defendant's 2004 Credit Card application.* A condition
3 of the share secured credit card was that the Defendant deposit one-hundred twenty-five
4 percent (125%) of the amount of the credit card's line of credit with the Credit Union as
5 collateral for the account. *Id.*

6 **C. Unsecured Credit Card Account**

7 On or about August 9, 2005, Defendant executed and delivered to the Credit
8 Union a written application and agreement for an unsecured credit card account with the
9 Credit Union. *Defendant's Trial Testimony, April 25, 2013, WA at 1:00; Martin Trial*
10 *Testimony, April 25, 2013, WA at 4:20; Exhibit 10, August 9, 2005 Credit Card*
11 *Application.* On the August 9, 2005 Credit Card Application, Defendant wrote that he was
12 the owner of residential property, had zero mortgages and zero mortgage or rental
13 payment obligations, was earning \$100,000.00 per year from BP West and had
14 \$80,000.00 other income. *Defendant's Trial Testimony, April 25, 2013, WA at 1:02;*
15 *Exhibit 10, August 9, 2005 Credit Card Application.*

16 **Defendant Misrepresented his Earnings in the Unsecured Credit Card**
17 **Application.**

18 On the August 9, 2005 unsecured credit card application, Defendant represented
19 that he was earning \$100,000 per year from his employer, BP West. During his Rule
20 2004 Examination⁵, Defendant admitted that he was earning less than \$100,000.00 per
21 year working for BP West for 2005. *Exhibit 108, Transcript from Defendant's January 13,*
22 *2012 Rule 2004 Examination at 192:7 - 197:21.* As of August 9, 2005, Defendant had
23 only earned \$47,053.82 (including benefits and income that he deferred into his 401k
24 retirement plan). *Monteleone Trial Testimony, April 25, 2013, WA at 1:42; Exhibit 103,*
25 *BP West's Archive Records for Payments Made to Roberts during 2005; Exhibit 88,*

26 _____
27 ⁴ Director of Lending and Collections for Pacific Resource Credit Union.

28 ⁵ Rule 2004 refers to Federal Rule of Bankruptcy Procedure 2004.

1 *Spreadsheet listing each of the records of earning and benefits received by Defendant*
2 *from BP West.*

3 As of August 9, 2005, Defendant's base annual salary paid by BP West was only
4 \$62,816.00, or \$5,234.87 per month. *Defendant's Exhibit H, BP West Salary and Bonus*
5 *statement for Roberts.* This sum includes income that was deferred into Defendant's
6 401k. *Id.* As of August 9, 2005, Defendant's monthly income (including benefits and
7 income deferred into his 401k retirement plan, but excluding his annual bonus paid March
8 25, 2005 of \$7,959.00) was always less than \$8,333.00 per month. *Monteleone Trial*
9 *Testimony, April 25, 2013, WA at 1:48; Defendant's Trial Testimony, April 25, 2013, WA*
10 *at 5:13; Plaintiff's Exhibit 103, BP West's Archive Records for Payments Made to Ritchie*
11 *R. Roberts during 2005; Exhibit 88, Spreadsheet listing each of the records of earning*
12 *and benefits received by Defendant from BP West.* The monthly breakdown for the year
13 2005 was as follows:

14 a. During the months of January, April, May and June 2005, the
15 Defendant earned less than \$5,000.00 each month (including benefits and income
16 deferred into his 401k).

17 b. During the month of February 2005, the Defendant earned \$7,022.28
18 (including benefits and income deferred into his 401k retirement plan).

19 c. During the month of March 2005, the Defendant earned \$4,728.50
20 plus a once a year bonus of \$7,959.00, for a total of \$12,687.50 (including benefits
21 and income deferred into his 401k retirement plan).

22 d. During the month of July 2005 the Defendant earned \$7,269.20
23 (including benefits and income deferred into his 401k retirement plan). In July the
24 Defendant received three pay checks because he was paid every other week and
25 the month contained three pay dates. As a result, his income for July was higher
26 than the other months. Even with three pay periods, the Defendant did not earn
27 \$8,333.00 per month.
28

1 e. During the month of August 2005 the Defendant only earned
2 \$6,493.55 (including benefits and income deferred into his 401k retirement plan).
3 *Monteleone Trial Testimony, April 25, 2013, WA at 1:48; Defendant's Trial Testimony,*
4 *April 25, 2013, WA at 3:50; Plaintiff's Exhibit 103, BP West's Archive Records for*
5 *Payments Made to Ritchie R. Roberts during 2005; Exhibit 88, Spreadsheet listing each*
6 *of the earnings records and benefits received by Defendant from BP West.*

7 During August 2005, the month in which Defendant applied for the unsecured
8 Credit Card account, he was earning less than the stated \$100,000 per year (or
9 \$8,333.00 per month). As discussed above, Defendant had access to his monthly
10 earnings statements. Defendant has offered no explanation as to why he stated on the
11 credit card application that his income was \$100,000 per year (or \$8,333.00 per month)
12 when it was not.

13 Defendant received salary increases from BP West on the following dates as
14 shown below:

		<u>Base Annual Salary</u>	<u>Base Monthly Salary</u>
15			
16	a. February 1, 2005	\$54,038.40	\$4,503.20
17	b. March 16, 2005	\$56,201.60	\$4,683.47
18	c. May 16, 2005	\$60,611.20	\$5,050.93
19	d. June 8, 2006	\$62,816.00	\$5,234.67
20	e. October 10, 2005	\$65,832.00	\$5,486.00
21	f. December 10, 2005	\$67,038.40	\$5,586.53
22	g. February 1, 2006	\$69,388.80	\$5,782.40
23	h. February 1, 2007	\$71,822.40	\$5,983.20

24 *Defendant's Exhibit H, BP Salary and Bonus History Statement for Ritchie R. Roberts.*

25 Defendant's income during the second half of 2005 included two raises, both of
26 which occurred *after* he applied for his August 9, 2005 unsecured Credit Card. *Plaintiff's*
27 *Exhibit 10, August 9, 2005 Credit Card Application; Defendant's Exhibit H, BP Salary and*
28 *Bonus History Statement for Roberts.*

Defendant Misrepresented his Mortgage and Rental Payment Obligations in
the Unsecured Credit Card Application

On July 26, 2005, Defendant purchased real property on Senator Avenue (hereafter the "Senator Property"). *Exhibit 1, Grant Deed for Senator Property, recorded on July 26, 2005.*

As of July 26, 2005, Defendant was personally obligated to make \$1,288.89 in monthly payments to Fremont Investment & Loan ("Fremont") on a \$464,000.00 mortgage encumbering the Senator Property. *Exhibit 83, Fremont Investment & Loan Deed of Trust recorded against Senator Property; Exhibit 31, Debtor's August 11, 2006 Credit Report.*

In August 2005, Defendant owned at least four mobile homes. Each of the mobile homes was parked in a mobile home park. *Docket No. 149, Transcript from Defendant's January 13, 2012 Rule 2004 Examination* at 192:7-197:21, 12:21-13:14, 13:18-21, 14:19-17:7, 59:15-71:2, 79:18-81:4 140:4-22, 143:16-145:28, 151:21-153:5, 153:12-157:13, 158:10-21. As of August 9, 2005, Defendant was obligated and paying rent payments he owed to mobile home parks for the spaces occupied by his mobile homes. *Docket No. 149, Transcript from Defendant's January 13, 2012, Rule 2004 Examination* at 12:21-13:14.

During his Rule 2004 Examination, Defendant testified that (1) he was paying \$450.00 per month in rent to a trailer park for the Gramercy trailer; (2) he was paying about \$500.00 per month in rent to the mobile home park for the Western mobile home; and (3) he was paying \$500.00 per month in rent, per mobile home for the two Frampton mobile homes. Therefore, in 2005 and 2006, Defendant was paying at least \$2,000.00 per month in rent to the mobile home parks, until he sold the Frampton mobile homes after August 17, 2006. *Defendant's Trial Testimony, April 25, 2013, WA* at 0:37; *Docket No. 149, Transcript from Defendant's January 13, 2012, 2004 Examination*, at 12:21-13:14, 13:18-21, 14:19-17:7, 59:15-71:2, 79:18-81:4, 97:25-99,11; 140:4-22, 143:16-

1 145:28, 151:21-153:5, 153:12-157:13, 158:10-21; *Exhibit GG, Roberts' 2006 Federal Tax*
2 *Return produced by Richard Vasquez.*

3 Defendant's mother and aunt lived in the mobile homes, and he was not charging
4 them rent, and as such, he had expenses which were not offset by any rental income.
5 *Defendant's Trial Testimony, April 25, 2013, WA at 0:57; Docket No. 149, Transcript from*
6 *Defendant's January 13, 2012, 2004 Examination at 12:21-13:14, 13:18-21, 14:19-17:7,*
7 *59:15-71:2, 79:18-81:4 140:4-22, 143:16-145:28, 151:21-153:5, 153:12-157:13, 158:10-*
8 *21.*

9 Defendant did not declare any rental income for any mobile home which he and
10 his family owned on his 2003, 2004, 2005 or 2006 tax returns. *Defendant's Trial*
11 *Testimony, April 25, 2013, WA at 4:45; Ex. 109, 2003, Tax Return; Exhibit EE, Roberts'*
12 *2004 Tax Return produced by Richard Vasquez; Exhibit FF, Roberts' 2005 Tax Return*
13 *produced by Richard Vasquez; and Exhibit GG, Roberts' 2006 Tax Return produced by*
14 *Richard Vasquez.* Defendant testified that his tax returns were true and correct. *Id.*
15 Defendant has presented no credible evidence that he received any rental income from
16 the mobile homes and trailers in which he claimed an interest. *Id.* Defendant presented
17 no evidence that he was receiving rental income for the Western Avenue mobile home
18 when he submitted the August 9, 2005 VISA application to Plaintiff. *Id.* As discussed
19 above, Defendant testified during his Rule 2004 Exam that he was paying rent to the
20 mobile home park for space at that time. *Id.*

21 When Defendant completed his August 9, 2005 and April 2006 credit card
22 applications, he failed to disclose to the Credit Union any of the rental payments he was
23 making to mobile home parks on his mobile homes. *Docket No. 149, Transcript from*
24 *Defendant's January 13, 2012, Rule 2004 Examination at 12:21-13:14, 13:18-21, 14:19-*
25 *17:7, 59:15-71:2, 79:18-81:4, 140:4-22, 143:16-145:28, 151:21-153:5, 153:12-157:13,*
26 *158:10-21; Exhibit 10, Roberts' August 9, 2005 Credit Card Application; and Exhibit 92,*
27 *Roberts' April 3, 2006 Consumer Loan Application.*

1 According to the Credit Union, had Defendant listed the rental expenses on these
2 applications for credit, Plaintiff would not have approved Defendant's credit applications.
3 *Rudy Martin Trial Testimony, April 25, 2013, WA at 4:52:00.* Defendant's failure to list
4 rental expenses was a material omission.

5 Defendant failed to disclose his ownership of the Senator Property on his August
6 9, 2005, written credit card application and agreement with Pacific Resource Credit Union
7 Credit Union. *Exhibit 10, Roberts's August 9, 2005 Credit Card Application.*

8 Defendant failed to disclose his mortgage payments of \$3,165.00 to Fremont on
9 the real estate secured loan secured by the Senator Property on his August 9, 2005
10 written credit card application and agreement with Pacific Resource Credit Union Credit
11 Union. *Exhibit 10, Roberts's August 9, 2005 Credit Card Application.*

12 During his Rule 2004 Examination, Defendant testified that he was making
13 payments to the former owner of one of the mobile homes he purchased on Frampton.
14 The monthly payments for the mobile home were between \$900.00 and \$1,000.00.
15 *Docket No. 149, Transcript from Defendant's January 13, 2012, 2004 Examination at*
16 *156:12-157:15 and 158:10-158:21.*

17 In his August 9, 2005 unsecured credit card application, Defendant failed to
18 disclose to the Credit Union the following:

19 a. That he owned the Senator Property. *Exhibit 1, Grant Deed for Senator*
20 *Property, recorded on July 26, 2005.*

21 b. He was personally liable on the note secured by a deed of trust in favor of
22 Fremont with monthly payments of \$3,165.00. *Exhibit 83, Fremont Investment &*
23 *Loan Deed of Trust recorded against Senator Property.*

24 c. Defendant was making rent payments on at least three mobile homes.
25 *Docket No. 149, Transcript from Defendant's January 13, 2012, 2004 Examination*
26 *at 12:21-13:14, 13:18-21, 14:19-17:7, 59:15-71:2, 79:18-81:4, 97:25-99:11, 140:4-*
27 *22, 143:16-145:28, 151:21-153:5, 153:12-157:13, 158:10-21; Exhibit GG, Roberts'*
28 *2006 Tax Return produced by Richard Vasquez, Capital Gains and Losses page.*

1 d. Defendant was making payments on the Frampton motor home.

2 Defendant's monthly average income based upon his year-to-date total gross
3 income including benefits and deferred income was not sufficient to qualify Defendant for
4 unsecured credit using the Credit Union's criteria. *Martin Trial Testimony, April 25, 2013,*
5 *WA at 4:57.* The Credit Union reasonably relied upon the information the Defendant
6 provided to it on Defendant's written credit application, which did not take into account
7 these expense items.

8 The Credit Union did not know about the Senator real property secured loan when
9 it issued the unsecured credit card to Defendant. It did not appear on the Defendant's
10 August 10, 2005 credit report because it was too new. *Exhibit 82, Credit Report on the*
11 *Defendant, dated August 10, 2005; Martin Trial Testimony, April 25, 2013, WA at 4:48.*
12 According to Martin, had the Credit Union known the Defendant's actual income and his
13 outstanding debt obligations, Defendant would not have qualified for any unsecured
14 credit from the Credit Union. *Martin Trial Testimony, April 25, 2013, WA at 4:21.*

15 In reliance on the Defendant's inaccurate income representations, the Credit
16 Union issued the Defendant a \$500.00 unsecured VISA credit card account. *Martin Trial*
17 *Testimony, April 25, 2013, WA at 4:20.*

18 Defendant Misrepresented his Earnings and Debt Obligations When he
19 Applied for a Credit Line Increase on the Unsecured Credit Card in April
20 2006

21 Defendant applied for a credit line increase on the unsecured credit card in April
22 of 2006. *Defendant's Trial Testimony, April 25, 2013 at FTR 2:36. Exhibit 92,*
23 *Defendant's April 3, 2006 Consumer Loan Application.*

24 Defendant claimed to be earning \$110,000.00 per year in April of 2006 on the
25 written credit line increase application. *Exhibit 92, Defendant's April 3, 2006 Consumer*
26 *Loan Application.* Defendant's monthly earnings, including deferred income and benefits,
27 in the months prior to his applying for the credit line increase in April 2006, were as
28 follows:

- 1 a. January 2006 \$4,834.50
- 2 b. February 2006 \$6,441.10
- 3 c. March 2006 \$9,685.80, plus a \$4,663.00 bonus
- 4 d. April 2006 \$7,524.69

5 *Exhibit 104, BP West 2006 pay records, which include deferred income and benefits.*

6 This averages \$7,121.52 per month or \$85,458.25 per year if this average is annualized
7 for 12 months. *Id.*

8 Defendant failed to disclose his payments on the Frampton motor home or rental
9 payments on his mobile homes on his April 2006 credit card application. *Docket No. 144,*
10 *Transcript from Defendant's January 13, 2012, 2004 Examination* at 12:21-13:14, 13:18-
11 21, 14:19-17:7, 59:15-71:2, 79:18-81:4, 97:25-99:11, 140:4-22, 143:16-145:28, 151:21-
12 153:5, 153:12-157:13, 158:10-158:21; *Exhibit 92, April 6, 2006 Consumer Loan*
13 *Application; Exhibit GG, Roberts' 2006 Tax Return produced by Richard Vasquez,*
14 *Capital Gains and Losses page; Exhibit 104, BP West's Archive Records for Payments*
15 *Made to Roberts during 2006.*

16 Based upon the face of Defendant's application for a credit line increase, he
17 qualified for the additional credit using the Credit Union's loan criteria. *Martin Trial*
18 *Testimony, April 25, 2013, WA* at 4:30, and *May 20, 2013, WA* at 0:40. The Credit Union
19 would have declined Defendant's request for an increase in the credit line had Defendant
20 truthfully disclosed his income and expenses. *Martin Trial Testimony, April 25, 2013, WA*
21 *at 4:25.*

22 As of April 2006, Defendant was earning substantially less than he represented on
23 his April 2006 Credit Card Application for a credit line increase. *Exhibit 104, BP West*
24 *2006 pay records including Bonus, gifts deferred income and benefits; Defendant's*
25 *Exhibit HH, Defendant's Computations of Income; Docket No. 149, Transcript from*
26 *Defendant's January 13, 2012, 2004 Examination* at 192:15-197:21.

27 Based upon these representations by Defendant, the Credit Union on two different
28 occasions agreed to increase the spending limit on Defendant's unsecured credit card,

1 until he was given a line of credit for \$5,000.00. *Martin Trial Testimony, April 25, 2013,*
2 *WA at 4:50.*

3 The Credit Union did not know the Defendant's true income in 2005 or 2006.
4 *Martin Trial Testimony, April 25, 2013, WA at 4:52.* Had the Defendant provided accurate
5 information on his credit application regarding his income and expenses, he would not
6 have qualified for credit on an unsecured credit card from the Credit Union. Defendant
7 only would have qualified for a secured (deposit secured) credit card account. *Martin*
8 *Trial Testimony, April 25, 2013, WA at 4:52 and May 20, 2013 WA at 0:40.*

9 **D. Home Equity Lines of Credit**

10 ***The 2005 Home Equity Line of Credit:***

11 Defendant submitted an application seeking a Home Equity Line of Credit
12 ("HELOC") from the Credit Union on November 9, 2005. *Exhibit 50, Defendant's*
13 *handwritten November 19, 2005 HELOC Application.*

14 Defendant indicated on his November 8, 2005 application that he was working for
15 BP West and that his "Base Income" was \$10,000.00 per month or \$120,000 per year.
16 *Id.* The BP Salary and Bonus statement specifically indicates the base salary for its
17 employees. *Exhibit H, BP Salary and Bonus Statement for Roberts.*

18 When Defendant applied for the HELOC, he gave the Credit Union two BP West
19 pay stubs to support his claimed income. The two pay stubs had the following dates:

- 20 a. October 21, 2005 for the pay period ending October 16, 2005 (the
21 "October 21, 2005 pay stub").
22 b. November 4, 2005, for the pay period ending October 30, 2005 (the
23 "November 4, 2005 pay stub").

24 *Exhibit 89, October 31, 2005 and November 4, 2005 Pay Stubs.*

25 Defendant's November 4, 2005 pay stub indicated that the Defendant's gross
26 taxable income was \$64,772.44 and that his total income (including benefits and deferred
27 income) was \$72,062.51. *Exhibit 89, November 4, 2005 Pay Stub.* Defendant's total
28

1 taxable income averaged \$6,477.24 per month (\$64,772.44 divided by ten months,
2 equals \$6,477.24. *Id.*

3 Based upon Defendant's November 4, 2005 pay stub, Credit Union personnel
4 calculated that he was earning an average income of only \$6,477.00 per month, not the
5 \$10,000 per month claimed on his November 9, 2005 HELOC application. *Martin Trial*
6 *Testimony, April 25, 2013, WA at 4:56; Exhibit 89, November 4, 2005 Pay Stub.*

7 Defendant did not qualify for a real estate loan from the Credit Union on the basis
8 of his November 4, 2005 pay stub. *Martin Trial Testimony, April 25, 2013, WA at 4:56;*
9 *Exhibit 89, November 4, 2005 Pay Stub.*

10 The Credit Union requires proof of income for its real estate loans, in the form of
11 two years of tax returns and pay statements or pay stubs to support the information on
12 member's applications. *Martin Trial Testimony, April 25, 2013, WA at 0:40.* The Credit
13 Union did not make loans on the basis of information on applications only. *Id.* Nor did the
14 Credit Union rely solely on the value of real property on its real estate secured loans. *Id.*

15 The Credit Union advised Defendant that he would not qualify for the credit he
16 sought based upon the income stated on the November 4, 2005 pay stub. *Martin Trial*
17 *Testimony, April 25, 2013, WA at 4:56.* The Credit Union also told Defendant that he
18 would need to present proof of the \$120,000 annual income he was claiming on the
19 HELOC application. *Id.*

20 In response to the Credit Union's request for Defendant's proof of \$120,000 in
21 income, the Defendant provided the Credit Union with what appeared to be a pay
22 statement, with the payment issue date of December 2, 2005, printed from the BP West
23 employee access computer system. *Martin Trial Testimony, April 25, 2013, WA at 4:56;*
24 *Exhibit 51, December 2, 2005 Pay Stub.* The December 2, 2005 pay statement that the
25 Defendant gave to the Credit Union under his December 3, 2005 cover letter did not
26 reflect the amount the Defendant was actually earning. *Monteleone Trial Testimony,*
27 *April 25, 2013, WA at 1:23; Exhibit 51, December 2, 2005 Pay Stub; Exhibit 100, Form*
28

1 *W-2, Wage and Tax Statement issued by BP Products North America, Inc., to Ritchie R.*
2 *Roberts for 2005.*

3 The December 2, 2005 pay statement indicated that Defendant had the following
4 earnings for the first 11 months of the year:

	<u>Fed Taxable Gross</u>	<u>Total Gross</u>	<u>Total Taxes</u>	<u>Total Deductions</u>	<u>Net Pay</u>
6 YTD:	\$86,637.88	\$98,416.47	\$18,598.98	\$9,798.17	\$68,020.64

7 *Monteleone Trial Testimony, April 25, 2013, WA at 4:56; Exhibit 51, December 2, 2005*
8 *Pay Stub; Exhibit 100, Form W-2, Wage and Tax Statement issued by BP Products North*
9 *America, Inc., to Ritchie R. Roberts for 2005; Exhibit 103, BP West's Archive Records for*
10 *Payments Made to Roberts during 2005.* These statements were false because
11 according to Defendant's Form W-2 issued by BP West, his actual gross income, taxable
12 income and total taxes for the twelve months of 2005 were less than the total amounts
13 stated on the altered December 2, 2005 pay statement, which represented only eleven
14 months of pay. *Id.* Defendant's actual earnings and taxes were as follows:

	<u>(Fed Taxable Gross)</u>	<u>(Total Gross)</u>	<u>Total Taxes</u>
17 YTD:	\$76,198.97	\$81,970.15	\$16,424.39

18 *Exhibit 100, Form W-2, Wage and Tax Statement issued by BP Products North America,*
19 *Inc., to Ritchie R. Roberts for 2005.*

20 Defendant submitted the false December 2, 2005 pay statement to the Credit
21 Union under a handwritten cover letter in which he claimed that he was making more
22 than was reflected in the pay statement because he had been given substantial pay
23 raises during the year. *Exhibit 32, Roberts' cover letter dated December 3, 2005 to*
24 *Plaintiff, explaining his raise in earnings; Exhibit 51, December 2, 2005 Pay Stub; Martin*
25 *Trial Testimony, April 25, 2013, WA at 4:58.*

26 The cover letter and the false pay statement supported the Defendant's false claim
27 that he was earning \$10,000.00 per month. *Martin Trial Testimony, April 25, 2013, WA at*
28 *4:56.*

1 The December 2, 2005 pay statement Defendant gave to the Credit Union was a false
2 statement because it did not accurately reflect Defendant's income according to the
3 records of his employer as reflected in the Form W-2 issued by BP West. *Monteleone*
4 *Trial Testimony, April 25, 2013, WA at 1:26; Exhibit 100, Form W-2, Wage and Tax*
5 *Statement issued by BP Products North America, Inc., to Ritchie R. Roberts for 2005.*
6 As of December 2, 2005, based on BP West's records, Defendant's gross income,
7 including deferred income and benefits, was only the sum of \$77,771.08. *Monteleone*
8 *Trial Testimony, April 25, 2013, WA at 1:46.* Defendant's 2005 taxable income, excluding
9 deferred income and benefits, was only the sum of \$76,198.97. *Exhibit 100, Form W-2,*
10 *Wage and Tax Statement issued by BP Products North America, Inc., to Ritchie R.*
11 *Roberts for 2005.*

12 As of December 31, 2005, Defendant's total income and deductions for the 2005
13 calendar year were actually as follows:

- 14 a. Total gross taxable income = \$76,198.97.
- 15 b. Total gross taxable income plus deferred income = \$81,970.15.
- 16 c. Total deductions = \$16,434.47. (Income tax withholding \$7,988.02 +
17 Social Security withholding \$5,082.15 + Medicare withholding
18 \$1,188.57 + Box 12 Code C \$10.08 + State withholding \$2,165.65 =
19 \$16,434.47).

20 *Id.*

21 According to Martin, had the Defendant not given the Credit Union the false
22 December 2, 2005 pay statement and his explanatory cover letter, the Credit Union
23 would have denied Defendant's request for the 2005 HELOC. *Martin Trial Testimony,*
24 *April 26, 2013 WA at 1:18 and April 25, 2013, WA at 5:00.*

25 The Credit Union reasonably relied on the December 2, 2005 pay statement, and
26 that statement was material to its determination of whether to extend credit to Defendant
27 under the 2005 HELOC. *Id.*

1 Defendant must have known he was giving the Credit Union a false pay statement
2 in order to deceive the Credit Union into granting his request for credit on a HELOC. The
3 court finds no other reasonable explanation for the discrepancies between the income
4 information given to the Credit Union and the information reflected in BP West's records
5 and Defendant's Forms W-2 for the same time period.

6 The fact that Defendant went to the extraordinary lengths of providing the Credit
7 Union with a false December 2, 2005 pay statement indicates that he knew and
8 understood he could not qualify for credit based upon his true income.

9 Defendant misrepresented his work history and income when he submitted the
10 false 2003 tax return.

11 Defendant, at the Credit Union's request, also provided copies of two tax returns to
12 the Credit Union. *Martin Trial Testimony, April 25, 2013 WA at 5:09; Exhibit 85,*
13 *Defendant's false 2003 tax return; Exhibit 86, Defendant's 2004 tax return.* Specifically,
14 he gave the Credit Union documents he represented to be copies of his 2003 and 2004
15 tax returns. *Id.*

16 The Credit Union reasonably relied upon the 2003 and 2004 tax returns provided
17 by Defendant in extending credit to Defendant. *Martin Trial Testimony, April 25, 2013*
18 *WA at 5:09; Exhibit 85, Defendant's false 2003 tax return; Exhibit 86, Defendant's 2004*
19 *tax return.*

20 The court concludes that the 2003 tax return provided to the Credit Union was a
21 false tax return because it was not actually a copy of the tax return Defendant filed with
22 the Internal Revenue Service ("IRS"), and it did not accurately reflect Defendant's
23 financial condition.

24 One reason why the Credit Union asks to see its member's last two years of
25 income tax returns when considering credit applications is that it needs to see continuity
26 of income and type of employment. *Martin Trial Testimony, May 20, 2013, WA at 0:44.*
27
28

1 The 2003 tax return made it appear that the Defendant had job stability because it
2 reflected approximately \$60,000 in income for the year. *Martin Trial Testimony, April 25,*
3 *2013, FTR at 4:21-30.*

4 The false tax return hid the fact that the Defendant did not have job stability
5 because he had in fact received taxable unemployment compensation in 2003 and had
6 received substantially less wage income than was represented (\$17,950.00 instead of the
7 \$60,000.00 indicated on the false return). *Martin Trial Testimony, May 20, 2013, WA at*
8 *0:42; Exhibit 85, 2003 Tax Return given to Credit Union; Exhibit 96, Moen computer print-*
9 *out; Exhibit 109, actual 2003 tax return produced by Richard Vasquez.*

10 The information on Defendant's actual 2003 tax return was material to the Credit
11 Union because it indicates that Defendant did not work during the entire year in 2003.
12 *Martin Trial Testimony, April 25, 2013, FTR at 4:22.* Had the Credit Union been
13 presented with the actual tax return, Defendant would not have qualified for the 2005
14 HELOC or 2006 HELOC (discussed below). *Martin Trial Testimony, April 25, 2013, WA at*
15 *4:28; Martin Trial Testimony, May 20, 2013, WA at 0:55; Exhibit 85, 2003 Tax Return*
16 *given to Credit Union; Exhibit 109, actual 2003 tax return.*

17 The Credit Union reasonably relied upon Defendant's claimed income and
18 expenses as represented in the false 2003 tax return. *Martin Trial Testimony, April 25,*
19 *2013, WA at 5:10; Martin Trial Testimony, May 20, 2013, at 0:45.*

20 Defendant's actual tax return for 2003 indicated that he earned only \$17,951.00,
21 and that he received unemployment compensation for which he paid taxes. *Richard*
22 *Vasquez Trial Testimony, May 20, 2013, WA at 0:11; Exhibit M, Social Security*
23 *Administration statement dated December 9, 2008, at 3; Exhibit 109, actual 2003 tax*
24 *return produced by Richard Vasquez.*

25 The actual 2003 tax return was prepared for Defendant by tax preparer Richard
26 Vasquez. *Vasquez Trial Testimony, May 20, 2013, WA at 0:10; Exhibit 109, actual 2003*
27 *tax return.* Richard Vasquez understood that the tax return he prepared for the
28

1 Defendant for 2003, was a final tax return. *Vasquez Trial Testimony, May 20, 2013, WA*
2 at 0:15.

3 Richard Vasquez did not prepare or sign the false 2003 tax return, despite it
4 purporting to contain his signature. *Vasquez Trial Testimony, May 20, 2013, WA* at 0:12;
5 *Exhibit 109, actual 2003 tax return*. The address on the false 2003 tax return is the same
6 as Richard Vasquez's business address. *Vasquez Trial Testimony, May 20, 2013, FTR*
7 at 9:32. However, Vasquez is the only tax preparer at his business address and name.
8 *Id.* The false 2003 tax return also looks different from the tax returns that Mr. Vasquez
9 regularly prepares. *Id.*

10 Defendant testified that the tax return that Richard Vasquez had prepared was
11 only a preliminary tax return. *Defendant's Trial Testimony, May 13, 2013, FTR* at 9:58.
12 Defendant stated that he had filed a copy of the 2003 tax return that he gave to the Credit
13 Union and that it bore Richard Vasquez' signature on it. *Id.* The court finds that this
14 testimony is not credible based on the testimony of Defendant and Mr. Vasquez, and the
15 contradictory documentary evidence in the form of the tax return prepared by Richard
16 Vasquez and Defendant's statement from the Social Security Administration showing his
17 wage earnings. *Exhibit M, Social Security Administration statement dated December 9,*
18 *2008, at 3; Exhibit 109, actual 2003 tax return; Defendant's Trial Testimony, May 13,*
19 *2013, FTR* at 9:58; *Vasquez Trial Testimony, May 20, 2013, WA* at 0:12.

20 Defendant only earned \$17,951.00 in 2003 from wages. *Id.*

21 Defendant used the false 2003 tax return to fraudulently and falsely represent that
22 he had earned the sum of \$60,004.00 in 2003 working for one employer, Moen
23 Industries. *Exhibit 85, 2003 Tax Return given to Credit Union*. Defendant attached a
24 false Form W-2 to the false 2003 tax return, which on its face indicated that it was issued
25 by MOEN Industries and stated that Defendant had earned the sum of \$60,000.65 in
26 2003. *Id.*

27 According to the 2003 tax return produced by the Defendant's tax preparer,
28 Richard Vasquez, Defendant had only earned \$17,951.00 from wages. *Exhibit 109,*

1 *actual 2003 tax return.* This sum is only \$1 different from the \$17,950 indicated on the
2 Defendant's Exhibit M, which is a statement relating the amounts reported to the Social
3 Security Administration. *Exhibit M, Social Security Administration statement dated*
4 *December 9, 2008, at 3; Exhibit 109, actual 2003 tax return.*

5 As testified to by the custodian of records for Moen, Carl Moen, Defendant only
6 worked for Moen from September 30, 2003 through December 18, 2003, and was only
7 making \$18.00 per hour regular earnings and \$27.00 per hour overtime earnings. *Carl*
8 *Moen Trial Testimony, April 25, 2013, WA at 2:44; Exhibit 96, Moen Industries computer*
9 *record printout.* The maximum Defendant could have made at those rates, working 64
10 hours per week but in a manner that did not incur double-time wages, was calculated by
11 Mr. Moen to be \$16,416.00. *Moen Trial Testimony, April 25, 2013, FTR at 1:42.*

12 Based on the evidence before the court, there is no reasonable explanation as to
13 the discrepancy between the amount Defendant earned from Moen Industries and the
14 amount reflected on the Form W-2 given to the Credit Union other than the Defendant
15 altered or fabricated the form or caused another party to do so for his use.

16 Defendant testified that he worked for a second employer during 2003, other than
17 Moen Industries. *Defendant's Trial Testimony, April 25, 2013, FTR at 10:07.* Defendant
18 was unable to remember when he worked for this second company or how much he
19 earned. *Id.* at 10:08. The court did not find Defendant's testimony to be credible, and
20 Defendant failed to provide supporting evidence to substantiate any additional wage
21 income in 2003.

22 Had Defendant given the Credit Union his real 2003 tax return, the Credit Union
23 would have denied Defendant's request for the 2005 HELOC. *Martin Trial Testimony,*
24 *April 25, 2013, WA at 5:12 and May 20, 2013, WA at 0:56.*

25 The court concludes that Defendant gave the Credit Union the false 2003 Tax
26 Return with the intent to fraudulently induce the Credit Union into extending credit to him,
27 because Defendant would not otherwise have been able to obtain that credit based on
28 his actual work history and wages earned in 2003.

1 The Credit Union reasonably relied upon the false 2003 Tax Return, and was
2 misled into believing that the Defendant had earned the sum of \$60,000.00 in 2003.
3 *Martin Trial Testimony, April 25, 2013, FTR at 4:22-26.* Defendant's 2003 income was
4 part of the Credit Union's assessment of the Defendant's ability to repay his debt to the
5 Credit Union. *Id.*

6 ***The 2006 Home Equity Line of Credit***

7 Defendant misrepresented his income and expenses in his July 2006 home
8 equity line of credit application by misrepresenting his income from wages and
9 rental income.

10 In July 2006, Defendant again applied for credit. *Exhibit 25, July 2006 loan*
11 *application; Exhibit 4, August 2006 deed of trust for new HELOC.* This time he sought to
12 increase his credit limit on the HELOC from the sum of \$57,000.00 to the sum of
13 \$116,000.00. *Id.*

14 Defendant submitted his handwritten real property loan application to the Credit
15 Union, on which he represented that he was working for BP West and had the following
16 earnings and income:

17	Base Income (From BP West):	\$80,000.00 per year, or \$6,660.00 per month
18	Overtime (From BP West):	\$30,000.00 per year, or \$2,500.00 per month
19	Bonuses (From BP West):	\$10,000.00 per year, or \$833.00 per month
20	Net Rental Income:	\$10,000.00 per year, or \$833.00 per month
21	Total:	\$130,000.00 per year or \$10,833.00 per month

22 *Exhibit 25, July 2006 loan application.* According to those representations, Defendant
23 claimed that he was earning \$120,000.00 from BP West per year, or \$10,000.00 per
24 month. *Id.*

25 Defendant's representations of the sources and amounts of his income on the July
26 2006 HELOC application were each false.

27 Defendant represented that he earned \$120,000 per year from wages as of July
28 2006. *Exhibit 25, July 2006 loan application.*

1 As is discussed above, Defendant's total 2005 taxable income from BP West was only
2 \$76,198.97. *Exhibit 100, Form W-2, Wage and Tax Statement issued by BP Products*
3 *North America, Inc., to Ritchie R. Roberts for 2005.*

4 According to the BP West's Form W-2 issued to the Defendant, he only earned the
5 following sums for the entire 2006 calendar year.

- 6 a. Gross taxable income in the sum of \$98,318.37.
- 7 b. Gross taxable income and deferred income in the total sum of
8 \$105,722.27 (Defendant's gross taxable income of \$98,318.37 and
9 his deferred income of \$7,403.90).

10 *Exhibit 101, Form W-2, Wage and Tax Statement issued by BP Products North America,*
11 *Inc., to Ritchie R. Roberts for 2006.* Even if deferred income is included, Defendant's
12 2006 income is approximately \$15,000 less than represented.

13 Defendant also did not receive \$10,000.00 in bonuses during 2004, 2005, or 2006.
14 In 2004, he did not receive any bonus. *Exhibit 102, 2004 BP West pay records.* In 2005,
15 his bonus was only \$7,959.00. *Exhibit 103, 2005 BP West pay records.* In 2006, his
16 bonus was even less - only \$4,663.00. *Exhibit 104, 2006 BP West pay records.*
17 Therefore, Defendant's representations regarding his wage income were false.

18 Defendant argued at trial that his representation of income on the July 2006
19 HELOC included non-cash benefits. The court finds that the evidence before it indicates
20 that, even if such non-cash benefits and deferred income were included, the Defendant's
21 income is still less than that represented in a sufficient amount as to be material. Further,
22 there is no evidence that lending institutions, such as the Credit Union, consider such
23 non-cash and deferred income as a source of repayment in order to support Defendant's
24 loan applications.

25 Finally, Defendant did not receive \$10,000.00 per year in net rental income.
26 Defendant had negative income from his rental properties without considering
27 depreciation. *Exhibit FF, Defendant's 2005 federal income tax return; Exhibit GG,*
28

1 *Defendant's 2006 federal income tax return.* Defendant was not even receiving
2 \$10,000.00 in gross rental income according to his tax returns. *Id.*

3 Defendant failed to disclose all of his expenses and obligations related to his rental
4 properties on his July 2006 HELOC application. *Exhibit 25, July 2006 loan application.*

5 Defendant's testimony regarding his rental properties was also not credible. For
6 example, when first asked, Defendant testified that he did not know how many rental
7 properties he had in 2005 or 2006. *Defendant's Trial Testimony, April 25, 2013, WA at*
8 *0:45, 0:53.* It is therefore difficult for the court to conclude that any testimony given
9 regarding the specific income and expenses related to these properties based on
10 Defendant's recollections is accurate. Defendant failed to offer evidence to substantiate
11 his claim of \$10,000 net rental income for 2006.

12 The court finds that Defendant's representation of \$10,000 annual net rental
13 income was false. In reality, according to Defendant's 2005 and 2006 tax returns, he did
14 not have any net rental income during those two years. *Exhibit 58, Defendant's 2005*
15 *federal tax return; Exhibit 59, Defendant's 2006 federal tax return; Exhibit FF,*
16 *Defendant's 2005 federal income tax return; Exhibit GG, Defendant's 2006 federal*
17 *income tax return.* Defendant had rental losses for both 2005 and 2006, even when
18 depreciation is excluded from the calculation. *Id.*

19 The Credit Union justifiably relied upon Defendant's representations in the July
20 2006 real property loan application in deciding to extend the July 2006 HELOC. *Martin*
21 *Trial Testimony, April 26, 2013, WA at 1:41.* In making that decision, the Credit Union
22 also reasonably relied on Defendant's continued employment at BP West and the
23 documentation provided only eight months earlier (the altered December 2, 2005 pay
24 statement, cover letter explaining the Defendant's increase in income, and the false 2003
25 tax return. *Id.*

26 Defendant had not yet filed his 2005 Tax Return when he applied for the July 2006
27 HELOC. *Exhibit FF, Defendant's 2005 federal income tax return; Martin Trial Testimony,*
28 *May 20, 2013, WA at 0:47.* As a result, the Credit Union reasonably relied upon his 2003

1 and 2004 tax returns in deciding to extend the 2006 HELOC. *Martin Trial Testimony*,
2 *May 20, 2013, WA at 0:47 and April 25, 2013, WA at 5:14*

3 The Credit Union justifiably relied upon Defendant's false December 2, 2005 pay
4 statement and December 3, 2005 cover letter for the July 2006 HELOC loan because the
5 Defendant's BP West income source had not changed. *Martin Trial Testimony, April 26,*
6 *2013, WA at 2:10 and April 26, 2013, FTR at 9:26.* The Credit Union believed it did not
7 need newer pay stubs because it already had proof of income in the loan file from only
8 eight months earlier. *Id.* It is common for credit unions to look at prior applications and
9 documents when considering a new loan that is eight months later. *Martin Trial*
10 *Testimony, May 20, 2013, WA at 0:53.* This reliance was reasonable due to the short
11 period of time between the two loans and the lack of any information indicating that the
12 documents were false or altered or that Defendant's income had decreased.

13 The Credit Union justifiably relied upon Defendant's loan application that said he
14 made \$10,000.00 per month when it granted the Defendant a non-purchase money
15 HELOC in the amount of \$116,000.00 in July of 2006, because the application was
16 supported by Defendant's false 2003 tax return and the false December pay statement.
17 *Martin Trial Testimony, April 26, 2013, FTR at 9:13.*

18 Had the Defendant not given the Credit Union the altered December 2, 2005 pay
19 statement and his cover letter, the Credit Union would have denied the Defendant's
20 request for the 2006 HELOC. *Martin Trial Testimony, May 20, 2013, WA at 0:50; See*
21 *also Martin Trial Testimony, April 25, 2013, WA at 5:03* (Defendant would not have been
22 granted a HELOC if the Credit Union had received Defendant's 2005 W-2 Form).

23 The Credit Union approved the July 2006 HELOC, paid off Defendant's existing
24 HELOC, and increased his credit limit. *Martin Trial Testimony, April 25, 2013, WA at 5:16;*
25 *Martin Trial Testimony, May 20, 2013, WA at 0:38.*

26 Defendant took new cash advances up to the increased credit limit. *Exhibit 6,*
27 *Loan disbursement record; Exhibit 7, August 2006 through December 2008 loan*
28 *statements.*

1 Defendant was not earning the income he represented to the Credit Union that he was
2 earning on his application. *Exhibit 25, July 2006 loan application; Exhibit 100, Form W-2,*
3 *Wage and Tax Statement issued by BP Products North America, Inc., to Ritchie R.*
4 *Roberts for 2005; Exhibit 101, Form W-2, Wage and Tax Statement issued by BP*
5 *Products North America, Inc., to Ritchie R. Roberts for 2006; Exhibit H, BP Salary &*
6 *bonus printout; Exhibit M, Social Security Administration statement dated December 9,*
7 *2008, at 3; Exhibit FF, Defendant's 2005 federal income tax return; Exhibit GG,*
8 *Defendant's 2006 federal income tax return.*

9 Defendant did not qualify for the 2005 HELOC or the 2006 HELOC based upon his
10 actual income and expenses. *Martin Trial Testimony, April 26, 2013, WA at 1:48.*

11 Defendant would not have qualified on his actual income for any secured or
12 unsecured credit from the Credit Union, other than a secured credit card account. *Martin*
13 *Trial Testimony, April 25, 2013, WA at 4:20.*

14 Defendant knew that he did not qualify for a HELOC, otherwise he would not have
15 given the Credit Union false documents with inflated income to support his request for
16 credit.

17 In providing those false documents to the Credit Union, Defendant intended to
18 defraud the Credit Union by obtaining credit for which he did not otherwise qualify.

19 The Credit Union's reliance on Defendant's false documents was the proximate
20 cause of its damages because it extended credit to Defendant through the July 2006
21 HELOC when Defendant did not have the financial resources to repay that debt.

22 Defendant misrepresented his assets and expenses by failing to disclose two
23 401k loans.

24 Defendant had a loan pledged against his 401k account, which he obtained on
25 August 23, 2005 in the amount of \$4,219.99. *Exhibit N, BP Employee Savings Plan*
26 *statements at 3.* He obtained a different loan pledged against his 401k account on June
27 14, 2006, in the sum of \$3,330.00. *Id.* at 8. His payments on the two loans from January
28 1, 2006 to December 31, 2006 totaled the sum of \$1,501.20. *Id.* Therefore, the

1 payments on the two undisclosed loans averaged \$125.10 per month around the time he
2 applied for the July 2006 HELOC.

3 Defendant obtained the 2005 loan pledged against his 401k before he applied for
4 the \$57,000.00 HELOC on November 19, 2005. *Exhibit N, BP Employee Savings Plan*
5 *statements* at 3. However, he failed to disclose it on his November 19, 2005 HELOC
6 application at 2 in the column under Liabilities and Pledged assets. *Exhibit 50,*
7 *November 2005 loan application.* The form specifically states the following: "List the
8 creditor's name, address, and account number for all outstanding debts, including
9 automobile loans, revolving charge accounts, real estate loans, alimony, child support,
10 stock pledges, etc. Use continuation sheet, if necessary." *Id.*

11 Defendant owed the two loans pledged against his 401k before he applied for the
12 refinanced \$116,000.00 HELOC in July of 2006. *Exhibit N, BP Employee Savings Plan*
13 *statements* at 8. Defendant failed to disclose either 401k loan on his July 2006 HELOC
14 application. *Exhibit 25, July 2006 loan application.* Defendant claimed in the application
15 that his 401k was worth \$50,000.00 without accounting for the amount of either loan. *Id.*

16 Defendant did not disclose the 401k loan payments on his July 2006 HELOC loan
17 application. *Exhibit 25, July 2006 loan application.* These amounts would have affected
18 the Defendant's debt-to-income ratio. *Martin Trial Testimony, April 25, 2013, WA* at 4:57.
19 Defendant's debt-to-income ratio already did not qualify him for the HELOC loan based
20 on his actual income. *Id.* Had Defendant included the 401k loans on his July 2006
21 HELOC loan application, it would further negatively impact his debt-to-income ratio. *Id.*

22 HELOC Conclusion

23 When the Credit Union evaluates an application, it looks at a number of things
24 including the length of employment, stability, debt-to-income ratio, FICO score, credit
25 report, and payment history. *Martin Trial Testimony, April 25, 2013, FTR* at 3:38-39. The
26 Credit Union attempts to determine the applicant's ability to repay the loan. *Id.* at 4:27;
27 *Martin Trial Testimony, May 20, 2013, WA* at 0:40. Based upon the face of the HELOC
28 loan applications, the false December 2, 2005 pay statement given to the Credit Union by

1 Defendant, the hand-written cover letter, which explained that the Debtor had numerous
2 pay raises that explained the jump in income, and the false 2003 tax return with the
3 forged signature of Richard Vasquez (collectively, the “Application Documents”) the
4 Credit Union granted the Defendant’s request for a HELOC loan in July 2006. *Martin Trial*
5 *Testimony, April 25, 2013, FTR* at 4:21-30. In doing so, the Credit Union reasonably
6 relied upon the amount of income and expenses Defendant represented he had in the
7 Application Documents. *Id.*

8 The representations of Defendant’s income and expenses in the Application
9 Documents were false at the time they were provided to the Credit Union.

10 Defendant knew that the representations were false when he provided the
11 Application Documents to the Credit Union.

12 Defendant intended to deceive the Credit Union when he provided the Application
13 Documents because he did not otherwise qualify for the July 2006 HELOC or the original
14 2005 HELOC that was paid off by the July 2006 HELOC.

15 Defendant’s knowledge and fraudulent intent are supported by the fact that the
16 Application Documents contain a false 2003 tax return, a false pay statement, and
17 representations regarding Defendant’s own income that do not correspond with his actual
18 income at the time.

19 Defendant has failed to provide a reasonable explanation for the discrepancies
20 between his actual income and expenses and those represented in the Application
21 Documents.

22 Defendant exhibited a pattern and practice of presenting false financial information
23 and false documentation to the Credit Union in order to obtain credit that he did not
24 qualify for based on his actual financial condition at the time.

25 Finally, the Credit Union was damaged as a result of the false representations in
26 the Application Documents because it extended credit to Defendant when Defendant did
27 not actually have sufficient income and financial resources to repay the amounts loaned,
28 and Defendant defaulted on the loans.

E. Amounts Owed

As of April 26, 2013, Defendant owes the Credit Union on his unsecured VISA credit card account, the following sums:

- a. Principal in the sum of \$5,976.51.
- b. Interest as of April 26, 2013, in the sum of \$3,926.42, with additional interest accruing after April 26, 2013 at the rate of \$0.10 per day.
- c. Late fees in the sum of \$840.00.

Exhibit 91, Calculation Worksheet.

As of April 26, 2013, Defendant owes the Credit Union on his HELOC the following sums:

- a. Principal in the sum of \$117,200.00.
- b. Interest as of April 26, 2013, in the sum of \$33,771.65, with additional interest accruing after April 26, 2013 at the rate of \$1.93 per day.
- c. Late fees in the sum of \$3,828.16.

Id.

The total amount due to the Credit Union as of April 26, 2013, consists of the following sums.

- a. Principal in the sum of \$123,176.51
- b. Interest in the sum of \$37,698.07.
- c. Late fees in the sum of \$4,668.16.

Id.

In the Complaint, the Credit Union seeks an award of reasonable attorneys' fees and costs to enforce its contracts with Defendant for the unsecured credit card account and the July 2006 HELOC. *Complaint* at 7; *see also, e.g., Exhibit 2, Deed of Trust dated December 13, 2005; Exhibit 3, Home Equity Addendum dated August 23, 2006; Exhibit 4, Deed of Trust dated August 23, 2006; Exhibit 11, Visa Card Agreement and Disclosure.* Based on these findings of fact and conclusions of law, the court determines the Credit

1 Union to be the prevailing party for purposes of Fed. R. Bankr. P. 7054 and Local
2 Bankruptcy Rule 7054-1.

3 **CONCLUSIONS OF LAW**

4 In the Complaint, the Credit Union alleged one cause of action, and the prayer for
5 relief sought in part a determination that the debts at issue are non-dischargeable
6 pursuant to 11 U.S.C. § 523. *Complaint* at 7. However, the allegations of the cause of
7 action in the Complaint that Defendant made false representations in his loan
8 applications submitted to the Credit Union and provided a false statement regarding his
9 financial condition encompass two separate theories of liability under 11 U.S.C.
10 §523(a)(2)(A) and (B), although this distinction is not made in the Complaint. The court
11 considers these theories of liability separately to determine whether the Credit Union has
12 proven liability under either theory or both by a preponderance of the evidence.

13 Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C., excepts from discharge
14 debts that are the result of "false pretenses, false representation, or actual fraud," other
15 than a statement respecting the debtor's financial condition. To prevail under §
16 523(a)(2)(A), a plaintiff must prove that:

- 17 (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor;
- 18 (2) knowledge of the falsity or deceptiveness of his statement or conduct;
- 19 (3) an intent to deceive;
- 20 (4) justifiable reliance by the creditor on the debtor's statement or conduct, and
- 21 (5) damage to the creditor proximately caused by its reliance on the debtor's
22 statement or conduct.

23 *Turtle Rock Meadows Homeowners Association v. Slyman (In re Slyman)*, 234 F.3d
24 1081, 1085 (9th Cir. 2000)(citations omitted); *accord, Ghomeshi v. Sabban (In re*
25 *Sabban)*, 600 F.3d 1219, 1222 (9th Cir. 2010). The creditor bears the burden of proving
26 the applicability of 11 U.S.C. § 523(a)(1)(A) by a preponderance of the evidence. *Id.*

27 Section 523(a)(2)(B) of the Bankruptcy Code excepts debts from discharge to the
28 extent they were incurred through "use of a statement in writing--(i) that is materially

1 false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the
2 creditor to whom the debtor is liable for such money, property, services, or credit
3 reasonably relied; and (iv) that the debtor caused to be made or published with intent to
4 deceive" to obtain money, services, or the extension of credit. 11 U.S.C. § 523(a)(2)(B).
5 The phrase "statement respecting the debtor's or an insider's financial condition" is
6 construed narrowly. *Barnes v. Belice (In re Belice)*, 461 B.R. 564, 577-578 (9th Cir. BAP
7 2011)(citations omitted). In the context of 11 U.S.C § 523(a), such statements are limited
8 to "those that purport to present a picture of the debtor's [or insider's] overall financial
9 health." *Id.* Such statements contain information similar to that found in balance sheets
10 or income and loss statements, although need not be formal financial statements. *Id.* at
11 578.

12 Based upon the testimony and evidence received at trial, the court makes the
13 following additional conclusions of law:

14 Defendant is not entitled to discharge his debts owed to the Credit Union on his
15 unsecured credit card account and his July 2006 HELOC pursuant to 11 U.S.C.
16 §523(a)(2)(A) and (a)(2)(B).

17 Based on the facts already determined through summary adjudication on the
18 Credit Union's motion for summary judgment and the above facts determined after trial,
19 the court finds that the Credit Union has proven by a preponderance of the evidence that
20 Defendant sought money, extensions, renewals, and refinancing of credit from the Credit
21 Union when he applied for the unsecured credit card, including credit limit increases, and
22 the July 2006 HELOC.

23 The Credit Union has also shown by a preponderance of the evidence that
24 Defendant obtained the credit and money from the Credit Union through the use of false
25 representations in that he submitted the false December 2, 2005 pay statement and
26 cover letter, as well as a false 2003 tax return and Form W-2 to the Credit Union.

27 The Credit Union has also shown by a preponderance of the evidence that
28 Defendant also obtained credit and money from the Credit Union by providing materially

1 false statements respecting his income and expenses affecting his creditworthiness by
2 submitting the unsecured credit card application, credit limit increase requests and the
3 July 2006 HELOC application to the Credit Union.

4 The Credit Union has also shown by a preponderance of the evidence that
5 Defendant knew at the time that he submitted the false December 2, 2005 pay statement,
6 the false 2003 tax return, the unsecured credit card application, credit limit increase
7 requests, and the July 2006 HELOC application that these documents contained false
8 statements regarding Defendant's income and expenses.

9 The Credit Union has also shown by a preponderance of the evidence that
10 Defendant intended to deceive the Credit Union because he knowingly submitted a false
11 December 2, 2005 pay statement on which the taxable income and gross income were
12 both false.

13 The Credit Union has also shown by a preponderance of the evidence that
14 Defendant intended to deceive the Credit Union because he knowingly submitted the
15 false 2003 tax return with the forged signature of Richard Vasquez.

16 The Credit Union has also shown by a preponderance of the evidence that
17 Defendant intended to deceive the Credit Union because he knowingly submitted the
18 unsecured credit card application and July 2006 HELOC application containing false
19 representations of his income and expenses.

20 The Credit Union has also shown by a preponderance of the evidence that it
21 justifiably relied upon Defendant's false and fraudulent statements in the December 2,
22 2005 pay statement, false 2003 tax return, unsecured credit card application, credit limit
23 increase requests, and the July 2006 HELOC application.

24 The Credit Union has also shown by a preponderance of the evidence that
25 Defendant's false representations in the December 2, 2005 pay statement, false 2003 tax
26 return, unsecured credit card application, credit limit increase requests, and the July 2006
27 HELOC application were material to the Credit Union's decision to extend credit and pay
28

1 money to the Defendant because he would not have otherwise qualified for the
2 unsecured credit card or July 2006 HELOC based on his actual income and expenses.

3 The Credit Union has also shown by a preponderance of the evidence that its
4 damages were proximately caused by Defendant's false representations because
5 Defendant did not in fact have the financial resources to repay the amounts loaned and
6 he defaulted on the unsecured credit card, credit limit increase requests, and the July
7 2006 HELOC.

8 The court has considered and rejects the extensive objections of Defendant to the
9 proposed findings of fact and conclusions of law submitted by the Credit Union and in his
10 alternative proposed findings of fact and conclusions of law. Among other things,
11 Defendant argued that the Credit Union failed to prove any fraud by him or that his
12 representations proximately caused its loss because it made bad business decisions in
13 making "risky" loans to him based on "borderline" income/debt or loan-to-value ratios. As
14 discussed herein, fraud was proven by a preponderance of the evidence. In a sense,
15 Defendant is "blaming the victim" here because he was the one who submitted false
16 information in his loan applications to the Credit Union, including false representations of
17 income supported by false tax returns and pay statements, to induce it to make loans to
18 him, which it would have not done so otherwise in applying its objective and reasonable
19 loan criteria. The loans were "risky" because Defendant gave the Credit Union false
20 information regarding his ability to repay the loans, and the Credit Union assumed a risk
21 that it did not know about in making loans to someone whose credit information was not
22 trustworthy. The court also rejects Defendant's objections to the testimony of, and
23 evidence offered through, Ms. Monteleone as someone authorized to produce records on
24 behalf of BP West, Defendant's former employer, as unreliable. The court finds Ms.
25 Monteleone's testimony and the evidence offered through her as a neutral, third-party
26 witness to have been objective and credible, and with respect to information about
27 Defendant's income, to some extent, substantially corroborated by the testimony of Mr.

1 Vazquez, Defendant's tax return preparer, and the evidence of the tax returns actually
2 prepared by Mr. Vasquez.

3 Therefore, the court concludes that the Credit Union is entitled to a judgment
4 declaring Defendant's debts to the Credit Union under the unsecured credit card and the
5 July 2006 HELOC loans nondischargeable pursuant to Section 523(a)(2)(A) of the
6 Bankruptcy Code, 11 U.S.C., including an award of damages as stated above.

7 The court determines that the appropriate claim against Defendant as alleged in
8 the first cause of action of the Complaint is under Section 523(a)(2)(A) of the Bankruptcy
9 Code rather than Section 523(a)(2)(B) since the false representations made on
10 Defendant's credit applications to the Credit Union were not "those that purport to present
11 a picture of the debtor's overall financial health," but are more items of an isolated nature
12 requested by the Credit Union on Defendant's credit or loan applications to do its own
13 analysis of the debtor's creditworthiness and thus does not fit the narrow interpretation of
14 financial condition referred to in Section 523(a)(2)(B) adopted by the Bankruptcy
15 Appellate Panel in *In re Belice*, 461 B.R. at 573-579 (citations omitted). Thus, the court
16 determines that the false representations at issue in this case fall within the scope of
17 Section 523(a)(2)(A) rather than Section 523(a)(B), and on this basis only, the court
18 denies the Credit Union's first cause of action to the extent it alleges a claim under
19 Section 523(a)(2)(B).

20 The court further determines that the Credit Union as the prevailing party in this
21 adversary proceeding may seek to recover attorneys' fees and costs, and in order to
22 recover such fees and costs, the Credit Union must file a motion for attorneys' fees and a
23 bill of costs pursuant to Local Bankruptcy Rule 7054-1 as well as Rule 7054 of the
24 Federal Rules of Bankruptcy Procedure, Rule 54 of the Federal Rules of Civil Procedure
25 and other applicable law. Since the Credit Union's rights to recover attorneys' fees and
26 costs are based on contracts between it and Defendant, it appears that the Credit Union
27 must furnish sufficient information for the court to determine the reasonableness of the
28 amounts sought. See, e.g., *Exhibit 2, Deed of Trust dated December 13, 2005; Exhibit 3,*

1 *Home Equity Addendum dated August 23, 2006; Exhibit 4, Deed of Trust dated August*
2 *23, 2006; Exhibit 11, Visa Card Agreement and Disclosure.*

3 The Credit Union is ordered to submit a proposed judgment consistent with the
4 court's prior summary judgment order and these findings of fact and conclusions of law
5 within 30 days of entry of these findings of fact and conclusions of law.

6 IT IS SO ORDERED

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Date: March 31, 2014



Robert Kwan
United States Bankruptcy Judge