UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: JANET KAY WEAVER, Debtor.	Bankruptcy Case No. 13-12548 EEB Chapter 13
ASSOCIATED MORTGAGE CORPORATION, Plaintiff, v. JANET KAY WEAVER, Defendant.	Adversary Proceeding No. 13-1292 EEB

ORDER

THIS MATTER comes before the Court following a trial on Plaintiff's Complaint alleging nondischargeability claims under 11 U.S.C. § 523(a)(2) and (a)(4).[1] The issue presented is whether the Debtor, a former employee of the Plaintiff Associated Mortgage Corporation ("AMC"), fraudulently manipulated a loan file to ensure that her brother could obtain a loan from AMC to refinance his mortgage. After her brother closed on the loan, he immediately defaulted, leading to foreclosure and a loss to AMC. For the reasons set forth below, the Court finds and concludes that the Debtor's fraudulent conduct caused AMC to approve a loan that, absent the fraud, it would not have approved. Some, but not all, of the damages alleged by AMC are nondischargeable.

I. BACKGROUND

A. AMC's Denver Branch

AMC's home office is in Tulsa, Oklahoma. In 2007, AMC hired the Debtor along with a group of loan officers or originators to open a branch of AMC in Denver, Colorado (the "Denver Branch"). AMC employed the Debtor as a mortgage underwriter from November 2007 through June 28, 2011. AMC is a "warehouse lender," which means it funds its loans through its

[1] All references to "section" or "§" shall refer to Title 11, United States Code, unless expressly stated otherwise.

warehouse line of credit with First Tennessee Bank. After AMC approves a loan, an employee sends a funding request to First Tennessee Bank, who then transmits funds to the title company handling the loan. AMC does not typically service the loans it makes. Instead, after initial funding, AMC sells the loan to a third party investor.

The Denver Brach was a small office, consisting of three to six loan originators, a loan processor/receptionist and an underwriter. Each employee had specific duties. The loan originators essentially served as salespeople. On a typical loan, they would interview potential borrowers to determine their goals and discuss potential loan options. The originator would usually obtain a loan application from the customer, research and select the appropriate loan program, and ultimately "lock" the loan at a particular interest rate.

The loan processor was responsible for collecting the documents necessary for the loan file, such as an appraisal, title work, insurance, credit reports and verifications of employment. Once the loan processor assembled the file, she would hand it off to the underwriter. The underwriter was then responsible for reviewing the file to ensure the information was accurate and met the applicable federal guidelines set by Fannie Mae. Based on this review, the underwriter then determined whether AMC should close the loan or not. The underwriter also drew up the closing documents and arranged for funding of the loan through the warehouse line of credit. No one in AMC's Tulsa office directly supervised the Denver Branch and no one reviewed the Denver Branch underwriter's recommendations to fund loans.

During the timeframe relevant to this case, the Denver Branch employees used three different computer systems to perform their job duties. First, there was AMC's loan operating system called "PC Lender." PC Lender served as a central electronic repository of information for any given loan file, including the borrower's assets, income and debts, and the details of the loan offered to that borrower, such as the loan amount, interest rate, and the loan-to-value and debt-to-income ratios. AMC employees could either manually enter financial information about the borrower into PC Lender or electronically input it from a credit report. AMC employees could also use PC Lender to print various documents, such as a loan application, which PC Lender would auto-populate with information already entered into the system.

PC Lender generates a log that transcribes the date and time of the transactions that affect a particular loan file (the "Log"). Each AMC employee had a unique logon and password for PC Lender, and the log reflects when an employee interacted with a loan file. For example, a common log entry shows the date and time that a particular AMC employee printed the borrower's loan application. This was a frequent activity at the time because it allowed the employee to review a hardcopy snapshot of a borrower's information. The PC Lender Log, however, did not capture every change made to the loan file. Prior to AMC locking a loan, when the loan is in so-called "lead status," PC Lender did not record when and who made changes to a borrower's income and debts. Thus, a borrower's income might increase or decrease within PC Lender, but there would be no record of who made that change and why. After a loan locked, the Log would capture these details.

The Denver Branch also utilized another important computer program called Desktop Underwriter, also referred to as "DU" or "AUS" (short for Automated Underwriting System). Fannie Mae created and maintains this program to incorporate that agency's underwriting guidelines. A mortgage company like AMC can run a proposed loan through DU to generate a report that makes a recommendation or a "finding" based on that loan's conformity to Fannie Mae's credit and eligibility standards. DU relies on the person requesting the report to provide accurate information about the loan and borrower. If DU gives the proposed loan an "approve/eligible" finding, that means it meets Fannie Mae guidelines and is eligible for purchase by Fannie Mae. AMC would typically run DU findings multiple times during the loan process. DU findings are electronic unless the employee running the program requests a printed report. AMC only kept copies of printed DU reports in its loan files. It was AMC's policy to only make loans that received DU's approve/eligible finding.

The third computer program used by AMC was NYLX. NYLX is a loan-pricing engine that compares pricing with multiple potential investors and determines the appropriate interest rate for a borrower. An originator would usually submit a loan to NYLX multiple times to review the pricing for various loan programs. The loan originator would also use NYLX to lock the loan at a particular interest rate. Only loan originators had passwords for NYLX.

Although these three computer programs were separate, they could interact. An employee logged into PC Lender could interface with either DU or NYLX through PC Lender. For example, an employee could sign on to PC Lender, interface with DU and request a DU report. This request would usually, but not always, be reflected in the PC Lender Log. An employee could also access DU directly, without going through PC Lender, in which case the Log would not record the request. Thus, although the Log provides a helpful history of how AMC locked, processed, underwrote and closed a loan, it does not necessarily record every detail of that process.

Once the Denver Branch closed a loan, AMC would sell the loan to a third party investor. To achieve the sale, the Denver Branch would ship the loan file to AMC's Tulsa office, which would then forward it to the investor. The investor would review the file and, if it had questions about the loan, would submit those questions in the form of a "suspense report" sent to the Tulsa office. If the Tulsa office could not answer the question, it would forward the suspense report to the Denver Branch. If AMC answered the suspense reports to the investor's satisfaction, the investor would purchase the loan.

B. The Wilson Loan

In 2009, the Debtor assisted her brother, Richard Wilson, in refinancing his home mortgage through AMC. Although Debtor officially served only as an underwriter for AMC, she played a much-expanded role on her brother's loan. PC Lender listed an AMC employee by the name of Todd Rego as the originator on the Wilson loan. However, Mr. Rego testified that he never spoke to Mr. Wilson (a fact that Mr. Wilson confirmed), never collected any information from Mr. Wilson, never touched the file, and did nothing as an originator other than "possibly" locking of the interest rate through NYLX. In fact, Mr. Rego assigned his entire loan origination commission of approximately $600 for the Wilson loan to the Debtor. Debtor admits that she was the one that communicated with her brother about the loan—a task that applicable guidelines permit loan originators to perform, but not underwriters. Debtor testified that, at the time, she also had a loan originator's license, which allowed her to communicate directly with borrowers. She also signed her brother's loan application "on behalf of Todd Rego," another task usually reserved for the loan originator. These facts demonstrate that Debtor served as the originator for the Wilson loan.

The Log shows that Mr. Rego did perform some limited tasks related to the loan. He ran NYLX on three different days, set the lock date on the loan for June 23, 2009 and sent a lock request on that date to the Tulsa office. However, the evidence also established that Debtor had Mr. Rego's NYLX password in her desk, and so there was a least the possibility that Debtor ran NYLX on his behalf. The Debtor denies doing so, but could provide no plausible explanation for why she would have Mr. Rego's password. She also admits performing origination functions on other loans on which Mr. Rego was listed as the originator, and that Mr. Rego assigned his commissions to her on those other loans. As for the Wilson loan, Mr. Rego could not remember if he was the one who actually performed the specific tasks reflected in the Log, or if Debtor did them using his password. Either way, his role in the origination of the Wilson loan was very limited.

The Debtor also appears to have performed many of the loan processing functions on the Wilson loan. A former employee by the name of Tai Huttunen was the loan processor and receptionist for the Denver Branch at the time of the Wilson loan. At trial, she could not remember any specifics regarding the Wilson loan and the evidence of her involvement with the loan is very limited. Ms. Huttunen's name is listed as "requestor" for two forms—a verification of employment and one credit report. She also made one handwritten notation on one of Wilson's three credit reports, while Debtor made several handwritten notations on the same report and on several other credit supplements. Ms. Huttunen's name also appears on two entries in the Log. Those entries indicate that on May 29, 2009, she changed the requested closing date on the Wilson loan and printed his loan application once. In comparison, Debtor's name is on 81 of the 134 total Log entries. These entries show that she performed many tasks that fall into the loan-processing category, such as importing credit reports, ordering an appraisal, printing loan applications, and changing Wilson's debts.

Debtor also performed the underwriting on Wilson's loan. Therefore, she was responsible for checking the accuracy of the information on his loan application and assessing whether the Wilson loan was a good credit risk for AMC. Ultimately, Debtor recommended approving the loan and had a DU report with an "approve/eligible" finding to support her recommendation. She then signed the paperwork that allowed AMC to fund the loan through its warehouse line of credit. As will be discussed more fully below, however, the income and debts used to obtain this DU report were inaccurate.

After the loan closed on July 6, 2009, AMC shipped the Wilson file to Bank of America, the investor interested in purchasing the loan. Bank of America noticed some inaccuracies and sent AMC several suspense reports. Debtor then engaged in various activities to satisfy the suspense reports, including pulling another credit report and changing the debts and income listed in PC Lender. Not all of these changes were reflected in DU. The last DU report for the Wilson loan, dated July 30, 2017, had an approve/eligible finding, but was again based on inaccurate debt information. Based on the final (inaccurate) DU report, Bank of America purchased the loan on August 7, 2009.

Wilson made only one payment on the re-financed mortgage loan. He nevertheless stayed in the house for several more months until Bank of America foreclosed on the property in mid-2010 and evicted him. Bank of America demanded that AMC repurchase the loan, based on a provision in its Loan Purchase Agreement with AMC that required AMC to repurchase any loan that had an early payment default. AMC complied with this demand and repurchased the loan. Bank of America transferred title on the house to AMC and AMC later sold it at a loss.

In 2011, AMC reviewed the Wilson loan file during an annual audit. Ms. Macias, AMC's current president, noticed certain irregularities in the file and brought them to the attention of Mr. Allen, the owner of AMC. Mr. Allen did his own investigation and flew to Denver to interview the Debtor and other employees at the Denver Branch about the loan. He ultimately fired Debtor on June 28, 2011. Shortly thereafter, Mr. Rego and other employees of the Denver Branch left to pursue other employment opportunities. AMC then shut down the Denver Branch.

In 2012, AMC sued both Wilson and the Debtor in Arapahoe County District Court, alleging fraud and various other claims. The Debtor's bankruptcy filing on February 26, 2013 stayed all claims against her. AMC then initiated this nondischargeability proceeding. In its Complaint, AMC alleges that Debtor fraudulently altered Wilson's income and debt information in order to close on the loan and to ensure purchase by Bank of America. Absent such fraud, AMC contends it never would have made the loan to Wilson. It alleges Debtor's fraud caused it direct damages in the form of lost principal and interest on the Wilson loan and consequential damages in the form of expenses related to shutting down the Denver Branch. AMC also seeks an award of exemplary damages plus its attorney's fees and costs. It contends all of these damages should be nondischargeable as a debt incurred through fraud under § 523(a)(2)(A) and/or a debt for fraud while acting in a fiduciary capacity under § 523(a)(4).

The Debtor disputes that she committed any fraud or that she acted as a fiduciary for AMC. She also alleges a counterclaim seeking payment of a bonus that AMC refused to pay her when it terminated her employment.

II. DISCUSSION

A. § 523(a)(2)(A) vs. § 523(a)(2)(B)

AMC's complaint alleges a claim under § 523(a)(2)(A), which makes nondischargeable a debt for money, property, or an extension or renewal of credit 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) (emphasis added). AMC's complaint does not allege a claim under § 523(a)(2)(B) and AMC denied in its closing argument that it intended to do so. Nevertheless, the Debtor contends that AMC's claim is really one under § 523(a)(2)(B). That section makes nondischargeable a debt for money, property, or an extension or renewal of credit obtained by use of a false statement in writing respecting the debtor's or an insider's financial condition. Sections 523(a)(2)(A) and 523(a)(2)(B) are "mutually exclusive." *Thul v. Ophaug (In re Ophaug)*, 827 F.2d 340, 343 (8th Cir.1987). The distinction between the subsections turns on the phrase "a statement respecting the debtor's or an insider's financial condition." If an alleged false statement falls within the category of "respecting the debtor's or an insider's financial condition," it is expressly *not* actionable under § 523(a)(2)(A). Instead, such a statement must be pursued under § 523(a)(2)(B), and then must be in writing to form the basis of a nondischargeable debt. *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700, 704-05 (10th Cir. 2005).

Although not alleged in AMC's complaint, the Court nevertheless has the discretion to determine whether AMC has proven a § 523(a)(2)(B) claim. Rule 15(b) of the Federal Rules of Civil Procedure, made applicable by Fed. R. Bankr. P. 7015, provides that "[w]hen an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." Fed. R. Civ. P. 15(b)(2). "The test of consent should be whether the defendant would be prejudiced by the implied amendment, i.e., whether [she] had a fair opportunity to defend and whether [she] could offer any additional evidence if the case were to be retried on a different theory." *Mood v. Futura, Inc.*, 415 F.2d 1170, 1174 (10th Cir. 1969). In this case, both parties offered evidence equally as relevant to a claim under § 523(a)(2)(B) as one under § 523(a)(2)(A). This is due in part to the fact that the elements of §§ 523(a)(2)(A) and (B) are so similar. Neither party objected to the admission of evidence as being only applicable to one of the subsections. The Debtor has not asserted any prejudice in addressing the § 523(a)(2)(B) claim, and is, indeed, the only party to suggest that such a claim is relevant. Accordingly, the Court finds that the evidence presented at trial by both parties served to amend AMC's complaint to include a cause of action under § 523(a)(2)(B). *See Woodcock v. Chemical Bank (In re Woodcock)*, 45 F.3d 363, (10th Cir. 1995) (allowing creditor to amend complaint where debtor raised new issue and presented evidence on it at trial); *Tower Credit, Inc. v. Touchet (In re Touchet)*, 394 B.R. 418, 422 (Bankr. M.D. La. 2008) (concluding that evidence amended the creditor's complaint to add a claim under § 523(a)(2)(B)).

As stated above, the key to determining whether AMC's claim is actionable under § 523(a)(2)(B) rather than an § 523(a)(2)(A) is determining whether the alleged fraud involves written statements respecting the Debtor's or an insider's financial condition. AMC's allegations about Debtor's fraudulent conduct can be boiled down to the following key events: the Debtor allegedly (1) filled out a false verification in employment form that overstated Wilson's income; (2) falsified a credit supplement to show certain debts were not owed by Wilson; (3) eliminated Wilson's Wells Fargo auto debt from PC Lender and therefore from his loan application; (4) lowered the monthly amount of Wilson's Chase debt in PC Lender post-closing; (5) fraudulently altered a letter from Debtor's employer and a telephonic verification of income form post-closing to explain why Wilson's income was lower than originally stated; and (6) omitted Wilson's Bank of America debt from DU post-closing in order to achieve an approve/eligible finding.

All of these allegations concern Wilson's income and debts, rather than those of the Debtor. However, this fact does not prevent the application of § 523(a)(2)(B) because that section specifically includes false statements a debtor makes about the financial condition of an "insider." 11 U.S.C. § 523(a)(2)(B)(ii). The Code defines an "insider" of an individual debtor to include a "relative of the debtor." 11 U.S.C. § 101(31)(A)(i). A "relative" is defined as an "individual related by affinity or consanguinity within the third degree as determined by the common law." 11 U.S.C. § 101(45). A sibling of the debtor is a relationship that falls within the third degree of affinity or consanguinity. *People v. Macrander*, 828 P.2d 234, 246 n.7 (Colo. 1992) (describing a "third degree" relationship to include child or parent; brother, sister, grandchild or grandparent; or niece, nephew, great-grandparent or great-grandchild), *overruled* *on other grounds*, *People v. Macrander*, 828 P.2d 234 (Colo. 1991). Thus, Debtor's alleged statements about her brother's finances fall within § 523(a)(2)(B) rather than § 523(a)(2)(A) if they were written and respected his financial condition.

The Code does not specifically define when a statement is "written"; however, the Tenth Circuit has instructed that a false *oral* statement respecting the financial condition of a debtor or insider does not qualify. *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700, 704 (10th Cir. 2005) (concluding that if a debt is obtained by a false oral statement respecting the debtor's financial condition, the debt is dischargeable). In this case, none of Debtor's alleged statements were oral. Some of them involve written documents that appear in Wilson's loan file—two verification of employment forms, a credit supplement, and an employer letter. The remaining allegations concern electronic data that Debtor entered into one of AMC's computer systems, which Debtor (and other AMC employees) then used to generate other written documents, such as Wilson's loan application and DU findings. Whether entry of the electronic data into a computer system and forms automatically generated from that data qualify as "written" statements is unclear under current case law.

The Tenth Circuit addressed whether a computer generated form was a writing for purposes of § 523(a)(2)(B) in the case of *Bellco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1362 (10th Cir. 1997). In *Kaspar*, the debtors had telephoned the creditor-bank to apply for a line of credit. A representative of the bank asked the debtors a series of questions via telephone about their financial condition. Debtors orally responded to these questions and the representative entered the information into a loan application form on a computer. The Tenth Circuit held that the debtor's oral statements, converted into an electronic format, did not constitute a written statement of financial condition. *Id.* at 1362. The *Kaspar* court concluded that to be "in writing," the statement must either have been written by the debtor, signed by the debtor, or written by someone else but adopted and used by the debtor. Because the debtors in that case never saw nor signed the loan application generated by the bank, it did not constitute their written statement. The *Kaspar* court emphasized that Congress intended § 523(a)(2)(B) to require a document in writing because "giving a statement of financial condition is a solemn part of significant credit transactions; therefore, it is only natural that solemnity be sanctified by a document which the debtor either prepares or sees and adopts." *Id.* at 1361. The Tenth Circuit also acknowledged that technology had changed the banking industry since passage of § 523(a)(2)(B), but concluded that any gaps in the statute would need to be filled in by Congress.

The facts in *Kaspar* are very different from those presented in this case. In *Kaspar*, the debtors made statements about *their own* finances to a potential lender. The issue was whether those debtors adopted the lender's computer summary of those oral statements. In contrast, the Debtor in this case actually worked for the lender (AMC) and allegedly entered the false information about an insider applicant's income and debts into that lender's computer system. There is no issue about Debtor adopting someone else's statement. Rather she allegedly altered income and debt information and entered it into the system herself. Thus, the concerns raised in *Kaspar* are not present here. Of course, the entry of data into a computer system is not a typical written statement like a printed document would be. However, Debtor knew that approval of Wilson's loan depended on the data she entered into the system. Furthermore, Debtor caused PC Lender and DU to generate key documents using the data she entered, including Wilson's loan application and DU findings. These entries were the very essence of how AMC approved loans. Debtor's job as underwriter was to ensure the accuracy of the data she entered—a solemn part of any credit transaction from the lender's perspective. Thus, the Court finds that, in these circumstances, the Debtor's entry of financial information into AMC's computer system and her generation of forms from that data satisfies the requirement of a written statement.

The next question is whether the alleged written statements were respecting Wilson's financial condition. There is a split of authority in the circuits as to how narrowly to read the phrase "respecting the debtor's or an insider's financial condition." *See* Mallory Velten, *Debtors as Predators: The Proper Interpretation of "A Statement Respecting The Debtor's . . . Financial Condition" in 11 U.S.C. § 523(a)(2)(A) and (B),* 30 Emory Bankr. Dev. J. 583 (2014). The Tenth Circuit has adopted what is termed the "narrow" or "strict" approach. Under this approach, only those statements "that purport to present a picture of the debtor's [or insider's] over-all financial health" fall within the scope of § 523(a)(2)(B). *Cadwell v. Joelson (In re Joelson),* 427 F.3d 700, 714 (10th Cir. 2005). As described by the Tenth Circuit in the *Joelson* case:

> We hold that such false statements are those that purport to present a picture of the debtor's [or insider's] overall financial health. Statements that present a picture of a debtor's overall financial health include those analogous to balance sheets, income statements, statements of changes in overall financial position, or income and debt statements that present the debtor or insider's net worth, overall financial health, or equation of assets and liabilities. However, such statements need not carry the formality of a balance sheet, income statement, statement of changes in financial position, or income and debt statement. What is important is not the formality of the statement, but the information contained within it-information as to the debtor's or insider's overall net worth or overall income flow.

Id. The *Joelson* court went on to determine that the particular oral statements at issue in that case did not fall within § 523(a)(2)(B) because they concerned only the debtor's ownership of certain assets or her purported ability to obtain financing. The court emphasized that these statements about a particular asset or one aspect of the debtor's income flow did not reflect the debtor's *overall* financial health and, thus, did not qualify under § 523(a)(2)(B).

In this case, the Debtor's alleged statements all concern either Wilson's income or his debts. Taken separately, one could argue, these statements do not concern Wilson's *overall* financial health. However, it is important to remember the context in which Debtor allegedly made these statements—acting as an underwriter (among other roles) for a lender. Debtor was collecting data on Wilson's income and debts for the very purpose of achieving an overall picture of his financial health. That was her job. Each document she placed in Wilson's file (paper or electronic) served this purpose. Debtor knew that PC Lender would combine and use the individual pieces of information regarding Wilson's income and debts to populate his loan application and that DU would base its findings on the same information. Under these circumstances, the Court concludes that the statements alleged by AMC are all written statements respecting Wilson's financial condition. Accordingly, AMC's allegations are *not* actionable under § 523(a)(2)(A). To be nondischargeable, AMC must then prove all of the elements of a § 523(a)(2)(B) claim.

B. Nondischargeability under § 523(a)(2)(B)

AMC had the burden to establish the following elements of a § 523(a)(2)(B) claim: (1) use of a written statement; (2) that is materially false; (3) respecting the Debtor's or an insider's financial condition; (4) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (5) which the Debtor caused to be made or published with the intent to deceive. *Rural Enter. Of Okla., Inc. v. Watson (In re Watson),* 2013 WL 21241702, at *3 (10th Cir. BAP May 29, 2013). The Court has already determined that all of the Debtor's alleged statements were in writing and concerned an insider's financial condition. The remaining elements are discussed below.

1. Use of a Materially False Statement

a) Verification of Employment Form Dated 6/17/09

The first allegation concerns a verification of employment form ("VOE") that AMC routinely sends to a borrower's employer to verify income. It has a top section filled out by AMC that lists the AMC employee requesting the information and the borrower's name. The employer fills out the bottom section with the borrower's position, current base pay, year-to-date base and overtime pay, as well as base pay and overtime pay for the immediate past two years. At the time of the loan, Wilson worked for Vail Resorts as a maintenance technician. Tai Huttunen signed the top part of Wilson's VOE form, as the requesting party. The bottom section, filled in by hand, lists Wilson's current hourly base pay at $20.10 per hour, his year-to-date base income at $17,688 and year-to-date overtime at $826.74. The signature of the Vail representative who purportedly filled out the bottom section of the VOE is difficult to read, but appears to start with the letter "R" and the title is filled in as "Payroll Coordinator." Ex. 4.

The figures listed on the VOE for Wilson's 2009 income are not accurate. Wilson's actual rate of pay at that time was $17.76 per hour. There was some dispute about the origin and accuracy of the 2009 year-to-date income figure ($17,688), which purports to capture Wilson's income through "5/09." The Debtor's expert, Mr. Cummings, prepared a chart attempting to demonstrate that the year-to-date income figure was accurate. The chart, however, contains multiple assumptions not supported by the evidence.[2] The most rational explanation is that

[2] The chart, Exhibit TT, purports to show there is only a $1,112 difference between the 2009 year-to-date income listed on the VOE and the actual 2009 year-to-date income listed on Wilson's June 24, 2009 paystub. Mr. Cummings speculates that the $1,112 difference is merely the income Wilson earned during the intervening two-week pay period. However, that conclusion depends on the VOE year-to-date figure including income earned through June 10, 2009, the end of the pay period immediately preceding the June 24 paystub. Even assuming that is the case (and there is no evidence to support this presumption), Wilson should have earned $1,420.80 in intervening pay period ($17.76 x 80 hours), not $1,112. Mr. Cummings gave no evidence or explanation why Wilson would not have earned his full salary. Moreover, the VOE itself states that 2009 year-to-date income is through end of May, not the second week of June. This means there would have been at least three and half weeks—or 144 work hours—between the VOE year-to-date number and the paystub's year-to-date number. At $17.76 per hour, Wilson would have earned $2,557 in the intervening period. Subtracting that figure from the paystub's year-to-date regular income means the VOE's year-to-date regular income should have been roughly $16,243, not $17,688.

whoever filled out the VOE multiplied the inflated $20.10 per hourly rate by forty hours per week to obtain a weekly salary of $804. The last week of May is the twenty-second week of the year. Multiplying $804 by twenty-two weeks equals exactly $17,688. Thus, the VOE overstated both Wilson's then current hourly rate as well as his year-to-date base pay.

A payroll coordinator that worked for Vail at the time by the name of Robin Johnson testified that her handwriting does not appear on the form and that she did not sign it. She also verified that Wilson never earned $20.10 per hour while at Vail. Jeff Allen, the owner of AMC, contacted Ms. Johnson in 2011 shortly after he fired Debtor in an attempt to verify the information on the VOE. In a transcript of their phone call, Ms. Johnson states that "So it's interesting this verification. This is my name that they signed, but none of the information on this is my handwriting. Um, so it's like somehow they got a copy of one that I did sign and I can see where they would have printed my name. I see where they signed my name. But even my job title and everything else, none of this is my handwriting."[3] Ex. GG, at 2.

A forensic document examiner and handwriting expert employed by AMC, Mr. Richard Lewis, analyzed the VOE and determined that it was "highly probable" that Debtor's handwriting appears on the bottom half of the form and that Debtor filled out all of the wage information, the phone number and date on the VOE. The Court found Mr. Lewis' testimony to be very credible. He analyzed at least twenty-one known samples of the Debtor's handwriting covering a period of 2007-2011 and compared those samples to the handwriting on the VOE. As explained by Mr. Lewis, having multiple known samples is key because every person's handwriting varies in small ways. For example, a person's handwriting strokes change depending on whether a particular letter is in the first or last part of a word, and what letter precedes and follows. Handwriting can also change over time and varies by context (e.g. formal versus informal) and based on the writing space available. Analyzing multiple samples allowed Mr. Lewis to account for these variations, and reach a "highly probable" conclusion.

The Debtor denied filling out the VOE and offered her own handwriting expert, Ms. Wendy Carlson, who testified that the Debtor did not write the wage information on the VOE. However, Ms. Carlson based her analysis on only one known handwriting sample of the Debtor—a photocopy of the carbon copy register of three checks Debtor wrote in 2009. Ms. Carlson testified that she would have preferred to have more known samples of Debtor's handwriting and that she, in fact, asked for more, but Debtor did not provide them. Although Ms. Carlson stated that the lack of known samples did not prevent her from making her determination, it certainly makes her conclusion much less persuasive. There are very few words on the check carbon copies—only payee names and the spelled-out amount of each check. In addition, the Debtor wrote all of those words in the same context with similar spacing constraints. This limited sample did not allow Ms. Carlson to observe variations in Debtor's

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[3] The Debtor argues the signature on the VOE admitted at trial is cut-off so it is possible some other employee at Vail signed the VOE. Ex. 4. However, the VOE copy Ms. Johnson reviewed in 2011 was obviously clear enough for her to believe someone else signed her name. Since Wilson never earned $20.10 per hour while employed at Vail, it is highly unlikely someone at Vail filled out the form with those numbers.

handwriting. The Court also finds it telling that Debtor, who had access to numerous examples of her own handwriting, refused to provide her own expert with them.

The Court further notes that, during this litigation, Debtor has shown a propensity to obfuscate issues relating to her handwriting. During her pre-trial deposition, opposing counsel asked if her handwriting appeared in various parts of Wilson's loan file and Debtor would only give indirect responses, such as "it could be, but I can't say for sure," or "I'm not saying it is or isn't. I can't tell" or "I don't know that." Ex. 132, at 103:21, 107:22-23, 160:20. After the deposition, the Debtor offered eleven pages of "amendments" to her disposition testimony. These purported "corrections" attempted to change many of her responses on handwriting questions to things like "I can't positively tell" or "it's possible I wrote that." At trial, she admitted to underwriting the Wilson file, yet still equivocated rather than admitting that her handwriting appears throughout Wilson's loan file. For example, when asked about handwritten notes on Wilson's loan application, Debtor said, "I don't know if it is [my handwriting] but I feel that it probably is." Tr. Dec. 6, at 151:18. The Debtor's conduct on this matter undercuts her credibility.

Based on all the evidence presented, the Court concludes that the Debtor filled out the VOE form with false income information. She then used these numbers to justify listing his monthly income in PC Lender at $3,579 per month, which she admitted she based on the overstated hourly rate of pay listed on the VOE. Ex. SS. The income remained at this same amount in PC Lender through approval of the loan on July 6, 2009.

The Debtor argues that the Log does not show which employee actually entered the $3,579 figure into PC Lender, only that it changed sometime in late June. The Log, however, demonstrates that Debtor was responsible for the vast majority of Log entries during this timeframe. The Court has little difficulty concluding that she entered the information or instructed Tai Huttunen to do so based on the fraudulent VOE. Either way, Debtor caused the inflated income number to be entered into PC Lender.

The Debtor further notes that Wilson's income was listed as $3,606 in PC Lender just prior to being changed to $3,579 per month. She argues that anyone wanting to fraudulently alter Wilson's income to ensure approval would have increased his income, not lowered it. The Log does not indicate who entered $3,606 as Wilson's income in PC Lender. However, the Debtor herself testified that there were two ways to calculate Wilson's income from the fraudulent VOE—one based on the Wilson's "actual" 2009 year-to-date income, and one based on his $20.10 hourly rate of pay. Her calculation of "actual" monthly income roughly corresponds with the higher $3,606 number. Ex. SS (listing average actual earnings at $3,633 per month). She testified that she used the lower $3,579 per month number based on hourly wage because it was "more conservative" and that it is a typical underwriting practice to use the most conservative income figure available. Tr. Dec. 6, at 80: 4-8. Thus, both income figures match up with the fraudulent VOE. That Debtor stuck with the typical underwriting practice of choosing the more conservative income figure merely served to add authenticity, albeit undeserved, to the fraudulent figures in the VOE.

She also notes that the year-to-date overtime amount ($876.24) exactly matches the year-to-date overtime amount listed on Wilson's June 24 paystub. In addition, the overtime figures listed for 2007 and 2008 were correct, as was the 2008 gross income figure. She argues that only someone in Vail's payroll department could have provided this information and that the presence of accurate information on the VOE refutes any conclusion that she altered it. A written statement need not be 100% inaccurate to be fraudulent. Wrongdoers often disguise fraud by mixing false information with accurate information. The Debtor could have obtained the accurate information from Vail or from Wilson himself and included it on the VOE. That does not make the inaccurate information any less fraudulent. This is especially true given that the fraudulent information, and not the accurate information, was key to approval of Wilson's loan.

b) Credit Supplement Dated 7/2/09

AMC alleges that Debtor fraudulently altered a "credit supplement" dated July 2, 2009 to show that certain of Wilson's debts were either duplicates or had a $0 balance. An important part of the loan approval process is consideration of a borrower's debts. In order to enter debts into PC Lender, AMC employees would typically order a credit report on the borrower and then electronically import the listed debts into PC Lender. The debts that PC Lender tracks include installment debt (*e.g.* a car loan), revolving credit, mortgage debt, and child support/alimony debts. PC Lender does not track a borrower's monthly living expenses such as a utility bills or food costs.

At the time of the Wilson loan, AMC used a company called LandSafe Credit to provide credit information. LandSafe would pull credit information from the three main credit bureaus, Equifax, Experian and Transunion, and compile the information into one report. LandSafe would also provide credit supplements, which AMC used to update information on a credit report. For example, if a credit report appears to have two duplicate listings of one debt, AMC could order a credit supplement in order to verify the duplication. Someone at LandSafe would investigate that particular line of credit and issue a supplement to indicate whether the borrower owes one or two debts. If the supplement indicated only one debt existed, AMC would remove the duplicate debt from PC Lender and would a keep a copy of the credit supplement in the loan file to substantiate that omission.

The Log indicates that the Debtor first imported Wilson's credit report into PC Lender on April 22, 2009. That credit report was dated January 6, 2009. After import, PC Lender listed Wilson's total monthly (non-mortgage) debt payments at $694. On May 29, 2009, Tai Huttunen[4] ordered a second updated credit report, which, after import, lowered Wilson's total debt payments in PC Lender to $612 per month. On July 2, 2009, the Debtor ordered a credit supplement. Someone at AMC put a hard copy of this two-page supplement into Wilson's file and AMC admitted a copy into evidence as Exhibit 6. The first page of Exhibit 6 is a cover page, listing the date ordered (July 2, 2009), the date completed (July 2, 2009), the requesting party (the Debtor), and the date of the corresponding credit report (May 29, 2009). The second page lists three debts: Bank of America, Westerra Credit Union and Safeway Rocky Mountain Credit Union. For Bank of America, Exhibit 6 indicates that the account belongs to Wilson, but

[4] Ms. Huttenen's name is listed on the credit report as the requesting party. However, she pointed out at trial that her last name is misspelled, thus creating some doubt as to whether she did in fact order the report. The Court's conclusion would be the same regardless of whether Ms. Huttenen was the requesting party or not.

has a $0 balance. This information was wrong—Wilson in fact carried a balance exceeding $8,000 on his Bank of America credit card at that time and owed a monthly payment of $151. Exhibit 6 further indicates that the Westerra line of credit was paid off, and that the Safeway account was transferred or sold to Westerra. At the bottom of page two, in the "General Comments" section, there is a short notation that Wilson is not financially responsible for a debt to DSRM National Bank and that LandSafe has deleted the debt from its files.

During AMC's later audit of the Wilson loan, Ms. Macias noticed that the font used on Exhibit 6 seemed irregular and not consistent with other credit supplements issued by LandSafe. Ms. Macias then ordered a duplicate copy of Exhibit 6 from LandSafe. The copy LandSafe sent to AMC in response to this request is also two pages and was admitted at trial as Exhibit 7.[5] Like Exhibit 6, the first page of Exhibit 7 is a cover page with the same date (July 2, 2009) and the same requesting party (the Debtor). The second page is different. Instead of Bank of America, the first debt listed on Exhibit 7 is Westerra Credit Union and instead of a zero balance, it indicates Wilson owes a balance of $2,400 and a monthly payment of $43. The second and third debts listed are the same as Exhibit 6, with same information about those debts—Westerra line of credit paid off and Safeway debt transferred to Westerra. The net effect of using Exhibit 6 instead of Exhibit 7 is that Exhibit 6 made it look like Wilson owed nothing to Bank of America, Westerra or Safeway. In reality, as correctly reflected in Exhibit 7, Wilson owed a debt to Bank of America and to Westerra, but not Safeway.

Shortly after receipt of Exhibit 6, the Log shows that the Debtor eliminated the Bank of America, Safeway/Westerra and DSRM debts from PC Lender. This lowered Wilson's total monthly (non-mortgage) debt payments from $612 to $368. AMC closed on Wilson's loan the same day.

AMC's expert, Mr. Lewis, reviewed Exhibit 6 and Exhibit 7 and came to the conclusion that it is "highly probable" that Exhibit 6 is an altered version of Exhibit 7. He based his conclusion on the fact that the creditors' names were typed in different fonts on Exhibit 6 than on Exhibit 7, as well as the obvious changes in creditor name and debt amount from Westerra to Bank of America. The Debtor's document expert did not offer an opinion on whether Exhibit 6 had been altered. Nevertheless, the Debtor offers several arguments as to why the evidence does not establish an alteration.

[5] The Debtor speculates that Exhibit 7 and the other "original" documents provided by LandSafe are part of a plot by AMC to coerce money from her in order to stem its losses after closure of the Denver Branch. The Debtor questions the timeline of her firing, noting that Ms. Macias testified that AMC did not begin investigating the Wilson loan until July 2011, yet AMC fired the Debtor one month *earlier* on June 28, 2011. The question posed to Ms. Macias at trial had nothing to do with when AMC fired the Debtor. Ms. Macias merely testified that she "believed" the investigation of the Wilson loan began in July. Mr. Allen gave a more detailed timeline. He remembered that AMC began investigating the loan in June 2011, and that he flew to Denver to confront the Debtor after he received the unaltered copy of Wilson's credit supplement (Exhibit 7). He fired her shortly thereafter. His firsthand knowledge adequately explains the reasoning for his decision to fire the Debtor. The Court finds the Debtor's claim that AMC somehow "reverse engineered" a fraud case against her after her termination to be without basis.

First, Debtor argues that Exhibit 6 and Exhibit 7 might not be the same document because of two minor differences between the documents. In in the "General Comment" section, there is one, two-line sentence referring to Wilson's DSRM debt in both Exhibit 6 and Exhibit 7. The font and text of this sentence is identical on both documents, but the line break is one word later in Exhibit 7. In addition, the cover page of Exhibit 6 lists a different street address for LandSafe than is listed on Exhibit 7.

LandSafe printed Exhibit 6 and Exhibit 7 several years apart. It is plausible that these minor differences could be due to the manner and timeframes in which LandSafe printed out both documents. The address likely auto-populated with whatever LandSafe's current address was at the time. A different printer could alter the line breaks. Whatever the cause, the fact remains that LandSafe provided Exhibit 7 to AMC as an accurate copy of the July 2 credit supplement. The minor differences pointed out by Debtor do not cause the Court to doubt Exhibit 7's authenticity. Mr. Lewis also acknowledged the minor differences between Exhibit 6 and Exhibit 7 in his testimony, but still concluded that Exhibit 6 was an altered version of Exhibit 7. The Court found Mr. Lewis' testimony to be highly credible and adopts his conclusion.

Debtor also argues that the evidence does not support an alteration because a later credit supplement in Wilson's file dated July 30 allegedly uses the same font to list creditor names as Exhibit 6. *See* Ex. 29. The July 30 supplement lists information about Wilson's debt with Chase Bank. According to Debtor, the debt information listed on the July 30 supplement is correct and, therefore, not altered.[6] According to the Debtor, if the July 30 supplement was not altered and it bears the same font as Exhibit 6, this means that Exhibit 6 was not altered either. The problem with this syllogism is that Debtor did not establish one of the underlying premises. Specifically, the Debtor did not offer any expert testimony establishing that the fonts on the July 30 supplement and Exhibit 6 match. At trial, in response to a question by Debtor's counsel, Mr. Allen agreed that the fonts looked the same to him. However, a close inspection of the two documents shows that the letters used to spell "CHASE" on the July 30 supplement are not the same as the letters used for the creditor names that appear on Exhibit 6. Instead, the "CHASE" letters are more similar to the font used to spell creditor names on Exhibit 7. Thus, the July 30 supplement lends further support for the conclusion that Exhibit 6 is altered.

[6] Exhibit 29 is a copy of the July 30 supplement found in Wilson's loan file. LandSafe did not provide AMC with an "original" copy of the July 30 credit supplement and so it is unclear if Exhibit 29 is unaltered. It appears that LandSafe also did not provide "original" copies of the May 29 and July 24 credit reports. Ms. Macias could not explain why LandSafe failed to provide those original copies, but verified that she requested copies of *all* of Landsafe's reports and supplements for Wilson. The Debtor suggests that AMC might have "withheld" some of LandSafe's documents during discovery because they would show that the reports in AMC's file were accurate. The Debtor offers no proof for this allegation, and Ms. Macias testified that AMC provided copies of everything it had to the Debtor. The Court found Ms. Macias' testimony to be very credible in general and on this specific point. In any event, the lack of LandSafe originals for these particular documents does not alter the Court's decision. AMC does not allege that the Debtor altered any of Wilson's credit reports, so it is not necessary to review original copies of those reports. As discussed above, the July 30 supplement, even if accurate, does not support the Debtor's arguments that Exhibit 6 is unaltered.

The Debtor also tried to distance herself from Exhibit 6 at trial by testifying that she believed the second page of Exhibit 6 is not part of a July 2 credit supplement but must have related to a later, post-closing credit report that she ordered. She bases this theory on the fact that the second page is not dated (the date appears only on the cover page) and the account numbers for the Safeway and Westerra debts match the account numbers on a July 24 credit report, but not on the May 29 credit report. According to Debtor, the account numbers on a credit supplement would necessarily have to match the account numbers on the credit report that the supplement seeks to clarify. However, the Debtor's own mortgage expert, Mr. Cummings, testified that when you request a credit supplement, the requesting party typically does not do so by account number. Rather, you "ask for a line item with a particular creditor." Tr. Dec. 5, at 244:14-20. Thus, Debtor would have requested a credit supplement on the Safeway and Westerra debts, not particular account numbers. The fact that LandSafe listed different account numbers does not indicate that Debtor received Exhibit 6 at some later date. Moreover, Exhibit 7, as provided by LandSafe, is undisputedly dated July 2 and it lists the same account numbers for Safeway and Westerra as those that appear on Exhibit 6.

Furthermore, Debtor's actions indicate she used Exhibit 6 before closing the loan to eliminate the Bank of America, Safeway, and Westerra debts from PC Lender. If she did not have Exhibit 6 prior to closing on July 6, she would have no justification for eliminating those debts. Debtor testified that she must have been relying on some other credit supplement that AMC failed to preserve in its file. She points to a notation in the files of Bank of America (the purchaser of the loan) referencing a "credit supplement in file" showing that the Bank of America and Safeway debts were not Wilson's. Ex. AA, at 13. Debtor argues this must be the missing credit supplement on which she relied. However, the Debtor subpoenaed Bank of America's file on the Wilson loan and the only credit supplement dated July 2 in that file was a copy of Exhibit 6. There is no evidence that some other credit supplement existed.

The Court concludes, therefore, that the Debtor fraudulently altered Exhibit 6 to eliminate debts and then used that information to fraudulently eliminate Wilson's Bank of America and Westerra debts from PC Lender.

c) Omission of the Wells Fargo Truck Loan

AMC next argues that the Debtor fraudulently eliminated Wilson's debt for an auto loan from PC Lender. When the Debtor first imported Wilson's January 6, 2009 credit report into PC Lender, it accurately listed Wilson's auto loan with Wells Fargo with a balance of $7,621 and a monthly payment of $170. The first loan application that Wilson signed on May 20, listed this debt. On May 28, Ms. Huttunen ordered an updated credit report. This credit report omitted the Wells Fargo auto loan, as did a later credit report dated July 24. After importing the May 28 credit report, PC Lender automatically eliminated the auto loan debt from Wilson's file. The second loan application Wilson signed on the day of closing does not list the auto loan debt and the loan closed without consideration of this debt.

AMC does not claim that the Debtor altered the May 28 credit report or any other document to delete the Wells Fargo debt. Mr. Allen acknowledged that either the credit bureaus or LandSafe were responsible for erroneously deleting the debt. Because import of the credit report caused elimination of the Wells Fargo debt, rather than a written statement by the Debtor, its omission cannot serve as the basis for a § 523(a)(2)(B) claim.

AMC argues that the Debtor was aware of the Wells Fargo loan prior to closing because she signed Wilson's first loan application in April 2009, and that application listed the debt. Even though the May 28 credit report deleted the debt, AMC contends the Debtor should have followed up with Wilson to confirm he no longer owed the debt. Mr. Allen admitted, however, that there were no red flags on the credit report that indicated a problem with the Wells Fargo loan and that underwriters do not have a duty to review a borrower's monthly statements to confirm information on a credit report. At best, this evidence suggests that the Debtor may have been negligent in failing to ask Wilson about the auto loan when it did not show up on the second loan application. Negligence, however, cannot serve as the basis for nondischargeability under either subsection of 523(a)(2).

d) Post-Closing Fraud

After the Wilson loan closed on July 6, 2009, AMC alleges that the Debtor handled the suspense inquiries made by the purchaser of the loan, Bank of America. During this time frame, AMC alleges that the Debtor fraudulently lowered of the monthly amount of Wilson's Chase debt in PC Lender, falsified a letter from Debtor's employer and a telephonic verification of income form, and omitted Wilson's Bank of America debt from DU. Because all of these events happened *after* AMC closed on the loan, AMC could not have relied on them in making the loan to Wilson. As such, they cannot serve as a separate basis for AMC's § 523(a)(2)(B) claim. However, because these events reflect on the Debtor's intent, the Court discusses them in more detail below.

2. Intent to Deceive

A creditor may prove intent to deceive through direct evidence or a court may infer intent from the totality of the circumstances. *Driggs v. Black (In re Black)*, 787 F.2d 503, 505-506 (10th Cir.1986) ("requisite intent may be inferred from a sufficiently reckless disregard of the accuracy of the facts"), *abrogated on other grounds by Grogan v. Garner*, 498 U.S. 279 (1991). An intent to deceive does not mean that a debtor acted with a "malignant heart." Rather, "a statement need only be made with reckless disregard for the truth." *Cent. Nat'l Bank & Trust Co. v. Liming (In re Liming)*, 797 F.2d 895, 897 (10th Cir.1986). The totality of the circumstances in this case demonstrate the Debtor acted with an intent to deceive.

a) Pre-Closing circumstances

The Debtor denies that she acted with fraudulent intent and contends that the timing of the two fraudulent documents disproves any showing of intent. Specifically, she notes that on the date of the VOE and the fraudulent credit supplement (Exhibit 6), Wilson's loan was already in "approve/eligible" status. As such, she contends she would have no reason to fraudulently alter those documents. This argument ignores the broader circumstances of the VOE and credit supplement.

When Debtor first started working on Wilson's file in PC Lender in April 2009, Wilson's income was listed at $3,206 per month. This figure reflects an hourly rate of $18.50 per hour[7]—Wilson's actual salary until he received a pay decrease to $17.76 per hour on April 2, 2009. His monthly non-mortgage debts at that time totaled $694 per month, a figure that roughly equals Wilson's actual debt level when the loan closed. The first six times someone at AMC, most likely the Debtor, ran DU at this income and debt level, the result was "refer/eligible," which means "not approved."[8] Ex. 130, at 00002. In other words, DU would not approve Wilson's loan based on his actual income and debt levels.

It was not until June 8, 2009 that DU returned an "approve/eligible" result. *Id.* At that point, PC Lender listed Wilson's income $300 higher at $3,606 per month—a figure that aligns with the fraudulent $20.10 per hour pay rate. On that same date, PC Lender listed debts at $612. Both PC Lender and DU listed Wilson's debt-to-income ratio or "DTI" at 53.42%. DTI is a figure used by lenders to help judge the risk in loaning to a potential borrower. The higher the DTI, the more difficult it is to qualify a borrower for a loan. Thus, by June 8, it would have been clear to the Debtor that a higher income would allow for approval of the loan, even if Wilson's debts remained at the current level. About one week later, Debtor used the VOE to change Wilson's income from $3,606 to $3,579, but, even though she selected the lower of the two income figures on the VOE, she was selecting from two fraudulent figures. Even at the slightly lower amount, Wilson's income still exceed his actual income by almost $500 per month.[9]

The next Log entries all happen on June 23, the date the loan locked.[10] On that date, PC Lender listed Wilson's income at the lower $3,579 figure and debts at $612. As a result, Wilson's DTI increased from 53.42% to 56.40% (indicating a risker loan). An unprinted DU finding nevertheless gave an "approve/eligible" finding at this higher DTI. The Debtor received and altered the credit supplement (Exhibit 6) about one week later on July 2. On the date of closing, July 6, the Log records the Debtor eliminating two of Wilson's debts based on the fraudulent credit supplement. This results in PC Lender listing income at $3,579, his debts at $368 and lowering his DTI to 50.98%. The July 6 DU finding based on these figures is, not surprisingly, also "approve/eligible." If you focus only on the June 23 and July 6 DU findings, it would seem there was no need to lower Wilson's debts since it was not absolutely necessary for loan approval. Yet Debtor was aware of the earlier DU denials of Wilson's loan, in which

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[7] $18.50 x 40 hours = $740 x 52 weeks = $38,480 ÷ 12 months = $3,206.67 per month.

[8] Three of these six findings are applicable to an FHA loan program, which has special requirements. Ex. 130, at 00001 (listing the FHA program findings as "GUS 3.0"). Wilson did not qualify for an FHA loan and, therefore, AMC approved his refinancing under a conventional, non-FHA loan.

[9] Wilson's actual income at the time was somewhere in the range of $3,146 per month. *See* Ex. 125.

[10] The Debtor attempts to focus solely on the June 23 lock date and equates AMC "locking" the loan with approving the loan. Mr. Cummings testified, however, that locking a loan is merely a lender's agreement to use its best efforts to close on a loan at a particular interest rate, and that "[n]othing is ever guaranteed until the loan closes." Tr. Oct. 11, at 212:22-23. It is undisputed that Wilson and AMC signed the loan documents, thereby creating a legal obligation under the loan, on the July 6 closing date, not the lock date.

Wilson's DTI varied between 57.21% and 63.44%. By lowering Wilson's debts further, she decreased his DTI by 6 percentage points from 56.40% to 50.98%. This provided a comfortable buffer that assured a positive DU finding and made Wilson's loan look more attractive to potential investors.

The Debtor takes pains to point out that neither PC Lender nor DU specifically indicate which employee ran each DU report and that the Log reflects that other AMC employees worked on the Wilson loan. Her attempts to distance herself from involvement with the Wilson loan are not credible. The circumstances establish that the Debtor acted as loan officer, loan processor, and underwriter on this loan. Her name appears on a majority of the Log entries. The Log recorded only eight out of the twenty times someone at AMC ran DU on the Wilson loan. The Debtor made seven of those eight logged requests. She was doing a majority of the work on Wilson's file. Even if she did not physically run every DU report, she would have known about the results of those reports.

The Debtor also points to the expert testimony of her mortgage fraud expert, Mr. Cummings, that the "three sides of a triangle required to demonstrate fraud" are not present. According to Mr. Cummings, the three sides of the "fraud triangle" are: (i) opportunity, (ii) pressure and (iii) rationalization (fraud for profit or property). Mr. Cummings believed the Debtor lacked opportunity to commit fraud due to other checks and balances in the approval process. He believed the Debtor lacked pressure to commit fraud because Wilson's loan was merely a refinance and there was no evidence Wilson needed to close on the loan by a certain date. Finally, Mr. Cummings testified that rationalization was not a factor because there was no significant financial motive for the Debtor to ensure AMC approved Wilson's loan. Rather, all she received was a commission of $686.

It goes without saying that the "triangle of fraud" referenced by Mr. Cummings is not the applicable test for intent to deceive under § 523(a)(2)(B). Moreover, even the factors that Mr. Cummings relied on demonstrate that Debtor acted with at least a reckless disregard for the truth. The Debtor had the "opportunity" to commit fraud because she sidestepped the normal checks and balances of loan approval. She played multiple roles in the loan process—loan officer, processor, and underwriter. She falsified what should have been independent sources of information about Wilson, such as the VOE. Even Mr. Cummings admitted that, if there was evidence that the Debtor altered income or debt information in the file, that could suggest fraud. Tr. Dec. 5, at 232:19-233:3. Further, the Debtor was motivated to obtain approval of this particular loan because it was for the benefit of her brother. Both Debtor and Wilson testified that they were not particularly close siblings. Yet they were close enough that Wilson's wife worked as an assistant for the Debtor in the AMC office, and Wilson stopped by the office on several occasions. They were also close enough that Wilson asked for, and the Debtor provided, her assistance in refinancing not only the loan with AMC but also one of Wilson's prior home mortgages. Although the sales commission that the Debtor earned was relatively small, she was motivated to provide this benefit to her brother.

b) Post-Closing Circumstances

The Debtor's post-closing activities also shed light on her intent to deceive. After the loan closed, AMC shipped the file to Bank of America. Bank of America then submitted suspense inquiries about the loan to AMC. Both Ms. Macias and Mr. Allen testified that the Debtor was responsible for responding to these inquiries. The Debtor disputes she had an active role with the loan post-closing, arguing that some other AMC employee's handwriting appears on the suspension reports. However, the Debtor undisputedly made all of the substantive notes on the suspension reports. The only handwriting which might not be hers is the name "Wilson," an account number, and possibly some asterisks and checkmarks. In addition, with one exception, the Log shows that she made all of the post-closing changes in PC Lender during this timeframe. She also requested all of the additional supporting documents relating to Wilson's income and debts, such as credit reports, credit supplements and information from Vail. Although the DU does not record which employee requested the seven post-closing DU reports for Wilson's loan, the Debtor was the most likely candidate. She was the most involved and the most motivated to ensure that Bank of America purchased the loan that she underwrote and approved with inaccurate information.

Bank of America's first suspense inquiry noted the discrepancy in Wilson's income based on the paycheck copy he provided at closing. The Bank required AMC to provide "clarification" from the employer. Ex. 16, at 062. In response, the Debtor provided Bank of America with a letter from Vail Resorts and a verbal verification of income for Wilson. AMC presented evidence that the Debtor fraudulently altered these documents.

The letter from Vail resorts preserved in AMC's files has two paragraphs. Ex. 24. The first paragraph sets forth Wilson's 2008 gross and taxable income. The second paragraph indicates that Vail Resorts implemented a company-wide pay decrease in 2009, which lowered Wilson's income to $17.76. AMC admits that all the information in this letter is accurate. Nevertheless, as AMC's forensic document expert testified, the second paragraph of the letter is in a different font and has a different alignment than the first paragraph, thereby indicating an alteration. The author of the letter, Mr. Scott Miller, testified that he would not have drafted a letter in this fashion and agreed that it appeared that someone altered the letter after he signed it. Neither AMC nor Mr. Miller could provide an un-altered version of the letter, thus it is impossible to tell what, if any information, was changed or deleted. Notably absent from the letter, however, is the specific date Vail lowered Wilson's salary to $17.76 and his 2009 year-to-date salary. One would expect this information in order to actually "clarify" Wilson's current income.

The other form is a "VOE Verbal for Salaried Borrower." The Debtor admits she signed and filled out this form. In it, she indicates that she spoke to Robin Johnson at Vail Resorts over the phone. Debtor's handwritten note states: "Employer confirmed other changes in pay were April 2, 2009 .74/hr and August 2008 .63/hr. Borrower's position is full time, not seasonal. Overtime likely to continue." Ex. 21. Robin Johnson testified that she does not recall speaking to Debtor and that she would not have given out this information over the phone because Vail Resorts' policy prohibited verbal verifications.[11] She also testified that she would not have known if Wilson's overtime was "likely to continue" and so she could not have given that

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[11] The Debtor argues this testimony is disingenuous because Ms. Johnson verbally verified Wilson's income to Mr. Allen in 2011. As Ms. Johnson testified, however, that instance was a unique circumstance because they "were discussing a document that had been filled out by someone claiming to be me and it wasn't my signature." Tr. Oct. 7, at 20:14-16.

information. Thus, the Debtor had no actual source at Vail for the information she listed on the form. While some of the information on the form is accurate,[12] it is notable for what it does not contain—Wilson's actual rate of pay on specific dates. Nor do the noted changes in pay explain or clarify the difference between the $20.10 per hour rate that the Debtor used to approve Wilson's loan and his actual pay of $17.76 per hour. The difference between $20.10 per hour and $17.76 per hour is $2.34. The pay rate changes listed on the verbal verification add up to $1.10.

These two forms indicate that the Debtor continued her deceptive behavior post-closing to ensure that Bank of America purchased the loan. Although the forms, like the forms the Debtor altered pre-closing, contained some accurate information, they also lacked key information that would demonstrate (and expose) that the Debtor had approved Wilson's loan with an inaccurate, inflated income.

Bank of America's suspense inquiries also required AMC to obtain another DU finding of approve/eligible for Wilson's loan using accurate income information. The evidence shows that Debtor was instrumental in changing Wilson's information both in PC Lender and in DU to satisfy this inquiry. The Debtor manipulated that data in both systems so that each continued to rely on inaccurate information. Usually, the borrower's data in PC Lender matches the data in DU. This is because, in the typical scenario, an AMC employee would enter a borrower's information in PC Lender and then send that data through PC Lender to DU. DU would then use PC Lender's data to make a finding. This was the case when Wilson's loan closed. The income, debt, and DTI figures listed in the Log on July 6 and in the July 6 DU finding match. There was no such cohesiveness post-closing.

The Log shows that the Debtor first made post-closing changes to Wilson's file on July 22, when she lowered and then raised Wilson's income to $3,278, lowered the amount of his Chase debt, and added back in Wilson's Bank of America debt so that PC Lender listed his total debts at $447.[13] An unprinted DU finding that same day returned a recommendation of "EA-II/eligible," essentially a denial.[14] There are no further Log entries that week but a few days later, on July 27, AMC received a another suspension inquiry from Bank of America that still questioned Wilson's income. A printed DU finding from July 27 returned recommendation of

[12] Wilson's rate of pay did change by seventy-four cents on April 2, 2009. However, Wilson received a merit increase in pay in October 2008, not August. Whether the amount of that increase was sixty-three cents is unknown.

[13] The Debtor ordered a new credit report for Wilson on July 22. LandSafe completed the credit report on July 24 and it listed the Bank of America and Westerra debts. Debtor also ordered a credit supplement on the Chase debt on July 30 that showed a lower monthly payment. The Log shows that the Debtor added back Wilson's Bank of America debt on July 22, two days *prior to* receipt of the July 24 credit report. She also lowered the Chase debt on July 22, eight days prior to receipt of the credit supplement. This means that the Debtor already knew, from some other source, the true status of these debts on July 22.

[14] Mr. Allen testified that the findings listing "EA-II" and "EA-I" meant that Fannie Mae would apply an alternate or "expanded" guideline at a higher interest rate, akin to a sub-prime loan. This meant the loan would not qualify under the DU Re-Fi Plus program under which AMC approved the loan. Tr. Dec. 5, at 124:9-15, 137:10-12.

"approve/eligible." However, DU based that recommendation on a still-inflated income of $3,552 and a total monthly debt payment figure of $512. These figures do not match the last income and debt figures listed in PC Lender.

The next Log entries are on July 29 and show Debtor making more changes in PC Lender, including adding back the Westerra debt, changing the amounts owed to Bank of America and Chase, and raising Wilson's income. These changes allowed the Debtor to print a loan application from PC Lender in which Wilson's income ($3,552) and debts ($512) matched the previous July 27 DU findings. The only DU finding from July 29 is unprinted and returned a recommendation of "EA-I/eligible," essentially a denial.

On July 30, AMC received another suspense inquiry from Bank of America specifically directing it to correct Wilson's base income in DU to $3,078 base and $68.90 overtime, for a total monthly income of $3,146.90. There are no Log entries from July 30, so PC Lender continued to list Wilson's income at $3,552. The DU finding from that day reflects a different picture. The first July 30 DU finding had a recommendation of "EA-I/eligible," essentially a denial. Because this finding was not printed, it is impossible to know the underlying income and debt figures associated with it, but the finding did list Wilson's DTI at 59.34%. Thirty minutes later, the final DU report shows Wilson's income lowered to $3,146 and his debts at $339, with a corresponding DTI of 57.06%. The recommendation was "approve/eligible," but the findings note that the Bank of America debt was not considered. *See* Ex. 125. In other words, even this final DU report did not consider all of Wilson's debts. One week later, Bank of America purchased the Wilson loan, presumably based on this (inaccurate) July 30 DU finding. The next Log entry on August 7 records Bank of America's purchase of the loan, and still lists Wilson's income at $3,552 and his debts at $512, despite the changes made in DU.

The Debtor denies manipulating the data or accessing DU outside of PC Lender. Her expert, Mr. Cummings testified that while it was technically possible to access DU outside of PC Lender, it was highly unlikely because the person running DU would have to type in the information manually. Tr. Oct 11, 185:7-17. However, neither Mr. Cummings nor the Debtor could provide a plausible explanation for why the data in DU was so different from PC Lender. Both Mr. Allen and Ms. Macias testified that they believed the Debtor separately accessed DU so that she could make changes to Wilson's file in PC Lender without those changes flowing to DU.[15] This explanation conforms with the written evidence and the Court concludes that the Debtor continued to fraudulently manipulate Wilson's data post-closing in order to achieve a post-closing DU finding acceptable to Bank of America and to ensure that AMC did not discover her earlier manipulations. These circumstances provide further evidence that Debtor acted with intent to deceive.

c) Other Alterations

Although the above circumstances are sufficient to find that Debtor acted with intent to deceive, the Court also finds probative evidence that the Debtor altered forms on at least two

[15] The Debtor argues Mr. Allen's testimony at trial conflicts with a statement in his earlier expert report. Ex. WW. However, the Debtor fails to identify, and the Court does not find, a specific statement within the report that contradicts his trial testimony.

other occasions.[16] First, AMC presented evidence that the Debtor altered health care reimbursement requests she submitted to AMC. While she worked at AMC, the Debtor had a health saving account that allowed her to use pre-tax earnings to pay unreimbursed health care expenses. To obtain payment from that health savings account, she would submit a form to AMC that listed her unreimbursed medical expenses, along with copies of supporting invoices or receipts. After AMC fired the Debtor, Ms. Macias found copies of three invoices, a check written by Debtor, and other receipts in her desk. When Ms. Macias compared these documents to the reimbursement request Debtor had submitted to AMC, she noticed several differences. Each of the doctor invoices had been altered to increase the amount of the expense. For example, an invoice for Eyecare Consultants found in the Debtor's desk listed a total charge of $400.40, paid by credit card. Ex. 58, at AMC 325. A copy of the same invoice submitted to AMC listed the charge at $900.40, paid by check. There was also a copy of the check the Debtor purportedly wrote to Eyecare Consultants for $900.40. *Id*. at AMC 326. Ms. Macias found this uncashed check in Debtor's desk. The Debtor admits that, although she submitted the check to AMC as proof of her payment of a medical expense, her bank never processed the check. Ex. 67. AMC's forensic document expert testified that the Eyecare Consultants invoice copy in AMC's files was an altered copy of the one found in the Debtor's desk.

The other two invoices found in Debtor's desk also contained alterations. On both, the total charge amount written in black ink is $20 and the number "1" has been inserted in blue ink so that the charge reads $120. In addition, the name of the Debtor's insurance company and account number has been visibly covered in white-out. Ms. Macias found photocopies of the altered versions in AMC's file copy. AMC's expert testified that these documents were also obviously altered.

At trial, the Debtor denied that she altered any invoices. However, she admitted to making the alterations in her Answer to AMC's Complaint. A comparison of the invoice copies

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[16] At trial, the Debtor objected to this evidence, arguing it is inadmissible evidence of prior bad acts. Under Federal Rule of Evidence 404(b), evidence of prior bad acts "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," but such evidence may be introduced to establish motive, intent, preparation, plan, identity, and absence of mistake or accident. Fed. R. Evid. 404(b). In the Tenth Circuit, courts consider four factors in weighing the admissibility of evidence under Rule 404(b): (1) whether the evidence is offered for a proper purpose, (2) its relevancy, (3) that the probative value of the evidence is not substantially outweighed by its prejudicial effect, and (4) a limiting jury instruction is given if the defendant so requests. *United States v. Zamora*, 222 F.3d 756, 762 (10th Cir. 2000). Here, the permissible purpose for which the Court admitted the evidence is to establish the Debtor's intent. The evidence meets the second factor, relevancy, because, as discussed above, there was sufficient evidence from which the Court could reasonably conclude that the acts occurred and that Debtor was the actor. *Huddleston v. United States*, 485 U.S. 681, 689 (1988). Furthermore, the prior acts are sufficiently similar to the acts alleged in AMC's Complaint—they all involve Debtor's fraudulent alteration of specific financial information on printed documents at AMC. *See United States v. Hudson*, 556 Fed. App'x 688 (10th Cir. 1989) (affirming admission of prior bad acts with similar mens rea as the charged acts). The prior acts also either occurred close in time to the Wilson loan or during Debtor's employment at AMC. *See United. States v. Cuch*, 842 F.2d 1173, 1178 (10th Cir. 1988) (noting there is no absolute rule regarding the number of years that can separate offenses). Finally, the Court finds the probative value outweighs any prejudicial effect, especially given that this was a trial to the bench, not a jury.

in Debtor's desk and those she submitted to AMC make it obvious that someone altered the invoices. No one would have a reason or the ability to alter these documents other than the Debtor.

AMC also presented evidence that the Debtor altered a verification of deposit form ("VOD") for a different borrower. In 2010, the Debtor underwrote a loan for a borrower by the name of Michelle Mask. Later, AMC attempted to refinance the loan because it had been unable to sell it to an investor. As part of that process, Ms. Macias asked the Debtor to send her a VOD for the borrower's bank accounts. In order to approve the refinance, the VOD needed to reflect that the borrower had a sufficient level of cash reserves. The Debtor admits she sent the VOD, Exhibit 38, to Ms. Macias in June 2011. That form listed the borrower's deposit account balance at $5,699.76. Ms. Macias later obtained a copy of the VOD directly from the borrower's bank. The bank's copy is identical to Exhibit 38, except that the balance of the borrower's account is $2,669.76. Ex. 37. AMC's forensic document expert testified that the VOD had been altered by someone who had deleted the "2" and overwritten it with a "5." Mr. Lewis could not reach a conclusion on who made the alteration.

The Debtor denies altering the VOD, as she denies altering any other document in this case. However, Mr. Allen testified that the Debtor acted "extremely flustered" in trying to get the Mask refinance closed, and that this was because he had withheld payment of all bonuses to the Denver Branch employees until AMC completed the Mask refinance. Thus, even though Debtor did not personally receive a bonus on the Mask loan, she nevertheless was motivated to ensure that the refinance closed as soon as possible. It is undisputed that the Debtor signed the altered VOD and sent it to Ms. Macias. These circumstances demonstrate that she likely altered the VOD in order to ensure AMC closed on the Mask refinance.

These other alterations demonstrate to the Court that the Debtor was willing to fraudulently alter documents even when she received little or no direct financial gain from doing so. With the health care reimbursement forms, her alterations allowed her access to roughly $600 more of her own pre-tax income. The VOD change ensured that other employees in the Denver office received their bonuses for that quarter. Yet the Debtor still went to the trouble of fraudulently altering forms to achieve the ends she desired. This adds further support to the Court's conclusion that the Debtor acted with the same fraudulent intent when she altered Wilson's VOE and credit supplement. She did not gain much financially from her fraud, but she achieved approval for her brother's loan.

3. Reasonable Reliance

The reliance component of § 523(a)(2)(B) is a two-step analysis: (1) the creditor must first show that it actually relied on the financial statement and (2) that reliance must be reasonable. *Rural Enters. of Okla., Inc. v. Watson (In re Watson)*, 2003 WL 21241702, at *3 (10th Cir. BAP May 29, 2003). To establish actual reliance, the creditor must show its reliance on the false financial statement was "'a contributory cause of the extension of credit' and 'that credit would not have been granted if the lender had received accurate information.'" *Armstrong Rubber Co. v. Anzman (In re Anzman)*, 73 B.R. 156, 164 (Bankr. D. Colo. 1986) (quoting *In re Coughlin*, 27 B.R. 632, 637 (1st Cir. BAP 1983)). Although actual reliance must be demonstrated, a creditor does not have to show that it relied exclusively on the false financial statement. *Cent. Nat'l Bank & Trust Co. v. Liming (In re Liming)*, 797 F.2d 895, 897-98 (10th Cir. 1986). It is sufficient if the creditor establishes that it partially relied on the false statement. *Id.*

In this case, the evidence shows that AMC approved the loan based on Debtor's false statements that Wilson earned $3,570 per month and had debts of $368 per month. Her entry of false income and debt figures in PC Lender and DU allowed the Debtor to achieve an "approve/eligible" finding and thereby approve the loan on AMC's behalf. Mr. Allen testified that AMC would not have made the loan to Wilson if the Debtor had entered his accurate income and debt numbers. If Debtor had used those numbers, Wilson's monthly income of $3,146 per month and non-mortgage debts of $735 would result in a DTI of 69.94%. Even if you leave out Wilson's auto loan debt, which LandSafe mistakenly deleted, Wilson's DTI would have been 64.24%. Both Mr. Allen and Ms. Macias testified that AMC would not have approved the loan at this high DTI ratio.

The Debtor disputed this testimony. Her expert, Mr. Cummings, testified that in his career, he had seen DU approve a loan with a DTI as high as 77%, but conceded that the borrower on that loan had substantial cash reserves, which Wilson did not.[17] Mr. Cummings also testified that AMC approved Wilson's loan under a loan program called "DU Re-fi Plus." He argued that a Fannie Mae guideline in place at the time did not set a maximum DTI parameter and did not even require a lender to calculate a borrower's DTI so long as the borrower's new mortgage payment was not more than 20% more than the current payment. Wilson's mortgage payment went down after the refinance, leading Mr. Cummings to conclude that, while DU considered DTI, it did not primarily rely on that figure in approving Wilson's loan. Rather, other factors, such the fact that the refinance would reduce Wilson's mortgage payment and that Wilson had good credit scores and few late payments, were more important.

Mr. Allen offered a different interpretation of Fannie Mae guidelines and argued that DTI is always an important factor in approving a loan. Mr. Allen did, however, concede that DTI is only one of several factors that DU takes into consideration. He also admitted that it is impossible to know if DU would have disapproved the loan at any particular DTI without a written finding. Nevertheless, Mr. Allen testified that he had never seen DU approve a loan with a DTI higher than 58%. The DU records for Wilson's loan bear this out. Of the fourteen times DU made findings for the Wilson loan and recorded Wilson's DTI, half were denials. With those denials, Wilson's DTI ranged from 59.34% to 76%. The seven approvals had DTIs ranging from 50.97% (the DTI at closing) to 57.06% (the DTI at time of loan purchase). Granted, some of these findings are dated before the loan locked and likely involved different loan programs. However, four of the denials occurred post-closing, when Wilson's loan program had already been set. All of the other factors mentioned by Mr. Cummings (credit history, lower

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[17] At trial, Mr. Cummings suggested that Wilson could have used $1,700 he had in savings plus the $2,000 he received at closing to pay off one of his credit card debts and thereby lower his DTI. Wilson's loan application indicates that, on the day of closing, he had $0 in his savings account and $1,672 in his checking account. There is no evidence that Mr. Wilson could afford to use all of his remaining cash to pay off one credit card in order to qualify for the loan. Even if he could have, speculation on the ways in which Wilson *might* have honestly qualified for the loan does not defeat a finding of AMC's actual reliance of the Debtor's fraudulent statements about his debts.

monthly payment, etc.) would have remained constant. The only data the Debtor was changing at that time was Wilson's income and debts. The resulting DTIs had obvious and significant impact on whether DU approved the loan. One of the last DU findings on July 30 returned an ineligible finding for Wilson's loan at a DTI of 59.34%. Wilson's actual DTI of 64% far exceeded this number. Thus, the Court concludes that AMC actually relied on Wilson's income and debt figures in granting the loan.

The question then becomes whether AMC's reliance was reasonable. The Debtor argues AMC's reliance was not reasonable because it failed to perform an independent review of Wilson's information prior to closing. Although other employees in AMC's home office may have performed some limited tasks, such as locking the interest rate, no one oversaw the Debtor's underwriting or decision to approve the loan. Debtor contends this "blind" reliance on her was unreasonable.

Reasonableness depends on the particular facts and circumstances of the case. *Leadership Bank v. Watson (In re Watson)*, 958 F.2d 977, 978 (10th Cir.1992). "The standard of reasonableness places a measure of responsibility upon a creditor to ensure that there exists some basis for relying upon debtor's representations." *Id.* (internal citation omitted). In many cases, this means a creditor must take reasonable steps to verify the provided information. *Id.* at 979. A creditor, however, does not always have an affirmative duty to independently verify the debtor's or insider's information. A creditor's reliance may be reasonable without additional verifying steps where: (1) there is an "ongoing relationship" between the debtor and creditor; (2) if the debtor's financial statements "contained no information indicating that further investigation was required;" (3) there is "no indication that further investigation would have uncovered the falsity of the representations;" or (4) where "the asserted failure to verify occurred after the loan had been made." *Rural Enters. of Okla., Inc. v. Watson (In re Watson)*, 2003 WL 21241702, at *4 (10th Cir. BAP May 29, 2003) (internal quotations omitted).

The typical scenario in which a duty to investigate arises is where a debtor seeking a loan submits a financial statement to a lender that contains "red flags" indicating possible problems or inaccuracies. If the lender fails to investigate those red flags prior to lending money, then its reliance on the financial statement is likely not reasonable. The circumstances of this case are very different. The Debtor was not a borrower seeking a loan, but rather the actual underwriter of the loan in question. It was the Debtor's duty to review and verify Wilson's income and debt information on AMC's behalf. AMC had every reason to, and did place its trust in Debtor to perform her job duties. She had worked for AMC for nearly two years by the time she approved Wilson's loan and had approved numerous other loans without issue. AMC had no reason to believe that she would fraudulently alter data on this particular loan. Given these circumstances, the Court concludes AMC did not have a duty independently verify Wilson's information. *See Selfreliance Fed. Credit Union v. Harasymiw (In re Harasymiw)*, 895 F.2d 1170, 1173-74 (7th Cir. 1990) (concluding that credit union reasonably relied on and had no duty to independently verify financial statement of long-time employee).

4. Causation

There is some dispute in the case law whether § 523(a)(2)(B) contains a causation element. Several circuit courts have held that there is no requirement in § 523(a)(2)(B) for a creditor to prove detriment or damages. *Shawmut Bank v. Goodrich (In re Goodrich)*, 999 F.2d 22, 25-26 (1st Cir.1993); *Wolf v. Campbell (In re Campbell)*, 159 F.3d 963, 966-67 (6th Cir.1998); *In re McFarland*, 84 F.3d 943, 947 (7th Cir.1996); *Norris v. First Nat'l Bank in Luling (In re Norris)*, 70 F.3d 27, 30 (5th Cir.1995). Other courts have imposed such a requirement. *Siriani v. Nw. Nat'l Ins. Co. (In re Siriani)*, 967 F.2d 302, 305 (9th Cir.1992); *Collins v. Palm Beach Savings & Loan (In re Collins)*, 946 F.2d 815, 816 (11th Cir.1991). The vast majority of these cases involve a debtor that has given a false financial statement in renewing or refinancing an earlier loan. Causation is harder to see in such cases because, rather than giving the debtor a new loan, the lender is merely agreeing to forgo collecting on an already-outstanding and honestly incurred loan. *See In re Goodrich*, 999 F.2d at 25 ("Damage is easily shown where the bank lends money after receiving a false statement and in reliance upon it. But in the case of a renewal of an earlier untainted loan, it is possible that the bank would have called the loan if accurate information had been furnished on renewal and yet been unable to collect a penny before bankruptcy."). In this specific context, a majority of cases hold that a lender need only show that the renewal or extension was "obtained by" fraud. It is not necessary to show a detriment or actual pecuniary loss in order to recover the full amount of the unpaid loan. *See id.* at 27 (allowing creditor to recover full amount of unpaid loan). These cases rely on the "plain language" of § 523(a)(2), which specifically excepts from discharge debts for the "extension, renewal, or refinancing of credit." 11 U.S.C. § 523(a)(2); *see In re Goodrich*, 999 F.2d at 25 ("Had Congress wished to add "damage" as an element, it could easily have done so.").

The Tenth Circuit, in the context of a § 523(a)(2)(A) claim, aligned itself with the majority position by holding that a creditor who extended the term of existing credit based on the debtor's fraud need not demonstrate damages by showing the "reduction in [its] ultimate recovery on the debt caused by forbearance." *John Deere Co. v. Gerlach (In re Gerlach)*, 897 F.2d 1048, 1051 (10th Cir. 1990) Rather, "[s]ection 523(a)(2), by its terms, only requires an objecting creditor to prove an extension of credit was 'obtained by' fraud for the debt to be excepted from discharge." *Id.* Thus, "not only is a new debt procured through fraud excepted from discharge, but old debt which is extended, renewed, or refinanced through fraud is also nondischargeable." *Id.* at 1050.

While the Court must follow Tenth Circuit precedent, this case presents a very different set of circumstances. Although the loan AMC made to Wilson was a refinance, a different lender made Wilson's initial mortgage. By paying off this earlier mortgage, AMC extended "new" money to Wilson. Another distinguishing factor is that Debtor did not receive the loaned funds, Wilson did. This adds complexities to the causation analysis not present in the typical § 523(a)(2)(B) scenario. In addition, AMC is seeking damages beyond the amount of its loan. It claims the Debtor's actions caused consequential damages due to the shutdown of the Denver Branch. Under these very different circumstances, the Court holds that AMC must prove causation to recover the damages it seeks. *See Hurston v. Anzo (In re Anzo)*, 547 B.R. 454, 474 (Bankr. N.D. Ga. 2016) (noting causation requirement might be appropriate outside the context of renewal or extension of a loan).

There is a dearth of published decisions analyzing the causation element of a § 523(a)(2)(B) claim outside of the typical loan renewal/extension context. In the context of a § 523(a)(2)(A) claim, the Tenth Circuit suggested that the requirement to establish that a debt is "obtained by" fraud is met if the fraud is a "substantial factor" in the creditor's decision. *In re Gerlach*, 897 F.2d at 1052. Other courts have concluded that § 523(a)(2)(B) has the same proximate cause requirement as applied under § 523(a)(2)(A). *In re Collins*, 946 F.2d at 817; *In re Siriani*, 967 F.2d at 304. This is in accord with Colorado law, which requires proof of proximate cause to establish a claim of fraudulent inducement to make a loan. *Trimble v. City & Cty. of Denver*, 697 P.2d 716, 724 (Colo. 1985); *Black v. First Fed. Sav. and Loan Ass'n of Fargo, N. D.*, 830 P.2d 1103, 1113 (Colo. App. 1993).

a) Inducement of the Loan

In this case, the evidence established that the Debtor's conduct proximately caused AMC to make the loan to Wilson. As discussed above in the section on actual reliance, Debtor's entry of false income and debt figures in PC Lender and DU allowed the Debtor to achieve an "approve/eligible" finding that enabled AMC to approve the loan. The income and debt figures, in the form of DTI, had a significant impact on loan approval. AMC would not have approved the loan on July 6, 2009 based Wilson's accurate income and debts. As such, the Debtor's fraudulent alteration of the income and debt figures proximately caused AMC to make the loan to Wilson.

The Court acknowledges that Wilson also played a role in the losses to AMC. After all, it was his income and debt figures that mattered. He signed the loan application on the closing date affirming that the income and debt figures listed were accurate, when in fact they were not. He testified at trial that he did not closely review the documents he signed at closing and relied on AMC to ensure that the information was correct. He also defaulted on the loan, thereby leading to the foreclosure and AMC's repurchase of the loan. Wilson's liability, if any, for fraud against AMC is not at issue in this proceeding. Assuming without deciding that Wilson is also at fault for AMC's damages, that does not absolve the Debtor of her liability. "[T]he proximate cause need not be the sole cause of the plaintiff's harm." *Kelly v. J.A.W. Land & Trading, LLC (In re Kelly)*, 499 B.R. 844, 861 (S.D. Calif. 2013), *aff'd*, 633 Fed. App'x 652 (9th Cir. 2016). So long as the Debtor's conduct is a proximate cause of AMC's damages, she can be held liable for those damages, despite the fact that other factors or concurrent causes contributed to that injury. *Id.* (holding debtors could not discharge debt for fraudulently obtained loans even though conduct of real estate agent was a concurrent cause of injury to lender); *United States v. Spicer*, 57 F.3d 1152, 1159-60 (D.C. Cir. 1995) (concluding that debtor-relator proximately caused damages to HUD by misrepresenting down payment amounts in borrowers' loan applications, even though loss was also caused by the borrowers' loan defaults). Thus, Wilson's conduct does not change the Court's finding that Debtor's false financial statements proximately caused AMC to make the loan to Wilson.

b) Closure of the Denver Branch

In addition to recovering the amount it lost on Wilson's loan, AMC also seeks to recover damages it incurred in closing the Denver Branch shortly after AMC fired the Debtor. AMC contends that Debtor's departure destroyed the team at the Denver Branch and accelerated the departure of the key loan originators. One of those originators was Todd Rego. He testified that he had been planning to leave AMC for several months prior to Debtor's termination in order to pursue other employment opportunities, and that he left because he did not feel he was getting the resources he needed from AMC to expand his business. Mr. Rego told both the Debtor and Bud Biggers, the other key loan originator, of his plans to leave. Mr. Rego knew that Mr. Biggers was also in negotiations with other potential employers prior to Debtor's termination. The Debtor testified that, at the time AMC fired her, she had been pursuing other job opportunities and had already accepted another job with a different company. Based on this evidence, the Court cannot conclude that the Debtor's fraud in connection with the Wilson loan proximately caused closure of the Denver Branch. Other employees left for their own personal reasons, not because of the Debtor's actions or her termination. AMC chose to close the Denver Branch, rather than replacing the Debtor and the other employees who voluntarily left AMC.

5. Existence of a Debt/Receipt of a Benefit

The Debtor's final argument is that AMC cannot establish a § 523(a)(2)(B) claim because she did not borrow money from AMC. She points to language in subsection (iii) of § 523(a)(2)(B), which requires proof of reasonable reliance by the "creditor *to whom the debtor is liable* for such money, property, services, or credit." 11 U.S.C. § 523(a)(2)(B)(iii) (emphasis added). Since AMC loaned the money to her brother rather than to her, the Debtor argues AMC cannot demonstrate that it is a "creditor to whom [she] is liable."

Subsection (iii) is a restatement of language found in the introductory paragraph of § 523(a)(2). That paragraph states that a discharge under the Code "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 . . ." either a false misrepresentation/fraud under § 523(a)(2)(A) or a false written financial statement under § 523(a)(2)(B). 11 U.S.C. § 523(a)(2). The Supreme Court weighed in on the meaning of this language in the case of *Cohen v. De La Cruz*, 523 U.S. 213 (1998). There, the Supreme Court described the existence of a debt as a "threshold condition" to whether § 523(a) applies. *Id.* at 218. The Court pointed to the Code's definition of "debt" as "liability on a claim" and the definition of "claim" as a "right to payment" *Id.* (citing 11 U.S.C. § 101(12), (5). A "right to payment," in turn, "is nothing more nor less than an enforceable obligation." *Id.* (citing *Pa. Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 559 (1990)).

The Tenth Circuit has held that a dischargeability action requires a two-step analysis: first, the bankruptcy court must determine the validity of the debt; and second, the court must determine the dischargeability of that debt under § 523. *Resolution Tr. Corp. v. McKendry (In re McKendry)*, 40 F.3d 331, 336 (10th Cir.1994); *Hatfield v. Thompson (In re Thompson)*, 555 B.R. 1, 8 (10th Cir. BAP 2013). Whether a debt exists is determined by applicable non-bankruptcy law, usually state law. *In re Thompson*, 555 B.R. at 8. In the case of § 523(a)(2) claims, the underlying claim is typically a state-law fraud claim, although that is not a requirement. *Id.* at 9 ("Claims established under state law on grounds other than fraud are not automatically precluded from qualifying for the exception to discharge under § 523(a)(2)(A).").

In this case, AMC does not have a state court fraud judgment against the Debtor because the filing of the bankruptcy case stayed its state court action before it went to trial. As is frequently the case in nondischargeability actions, AMC did not allege a separate claim for state law fraud in its Complaint. However, because the elements and evidence necessary to prove fraud under state law are substantially similar to those under § 523(a)(2)(A) & (B), the Court can separately analyze whether AMC has an enforceable state law fraud claim against the Debtor without prejudice to the parties. *See Gronewoller v. DM Capital, Inc. (In re Mascio)*, 2007 WL 3407516, at *3-4 (D. Colo. Nov. 13, 2007) (concluding that bankruptcy court's findings on the plaintiff's § 523(a)(2) claim were equivalent to a ruling that the debtor was liable to the plaintiff under Colorado law for false representation and qualified as a "debt" for purposes of § 523(a)).

The elements of a fraud and/or fraudulent inducement claim under Colorado law are: (1) a false representation of a material existing fact; (2) knowledge on the part of the one making the representation that it is false; (3) ignorance on the part of the one to whom the representation is made of the falsity; (4) representation made with intention that it be acted upon; (5) representation resulting in damage. *Kinsey v. Preeson*, 746 P.2d 542, 550 (Colo. 1987); *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382 (Colo. 1994). Colorado courts apply the same elements to a claim alleging that the defendant fraudulently induced the plaintiff to make a loan. *Black v. First Fed. Sav. & Loan Ass'n of Fargo, N. D.*, 830 P.2d 1103, 1114 (Colo. App. 1993). These state-law fraud elements are substantially similar to those addressed above for the § 523(a)(2)(B) claim. The Debtor's knowing and intentional alteration of the VOE and credit supplement are false representations of material facts. Although ignorance of falsity is not an element of § 523(a)(2)(B), the parties do not dispute that AMC's home office did not directly supervise the Debtor's activities in Denver. Both Ms. Macias and Mr. Allen testified that they first became aware of the Debtor's fraud during a later audit of the Wilson loan. The Debtor's fraud proximately caused AMC damages. These damages are a valid debt, under state law, owed by Debtor to AMC.

The Court acknowledges that Wilson, and not the Debtor, is the obligor on the underlying mortgage; but AMC does not claim the Debtor is liable on the mortgage. It alleges that the Debtor caused it damages by inducing it, through fraud, to make the loan to Wilson. AMC seeks damages for money it lost because of Debtor's personal fraud—harm which is compensable under state law. As noted by the Supreme Court, "[o]nce it is established that specific money or property has been obtained by fraud, ... 'any debt' arising therefrom is excepted from discharge." *Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998). Damages caused by a debtor fraudulently inducing another to make a loan to a third party is such a debt "arising from fraud." *See In re Mascio*, 2007 WL 3407516, at *7 (concluding damages from fraudulently induced loan to corporation were nondischargeable under § 523(a)(2)(A)); *Immel v. Tani (In re Tani)*, 2012 WL 2071766, at *3-4 (Bankr. D. Colo. June 8, 2012) (concluding debtor financial advisor could be held liable for damages caused by loans and investments he fraudulently advised plaintiff to make to third parties); *Newman et al. v. Donnell (In re Donnell)*, 2011 WL 2294186, *3 (Bankr. D. Colo. June 8, 2011) (finding plaintiff could seek exception from discharge for the damages debtor financial advisor allegedly caused by fraudulently advising plaintiff to make loan to third party), *aff'd*, 479 B.R. 592 (D. Colo. 2012).. In other words, the Debtor owes a debt to AMC for monies she obtained through her use of false financial statements. Under subsection (iii) of 523(a)(2)(B), therefore, AMC is a "creditor *to whom the debtor is liable* for such money, property, services, or credit." 11 U.S.C. § 523(a)(2)(B)(iii) (emphasis added).

To the extent Debtor is arguing AMC was required to prove that she received a benefit from her fraudulent conduct, the Court disagrees. Courts have reached differing conclusions on whether the introductory language of § 523(a)(2), and in particular the phrase "obtained by," imposes a requirement that the debtor personally receive the money, property, services or credit before the debt can be declared nondischargeable. There are three lines of authority on this issue. Under the first and narrowest view, a debtor must himself or herself obtain the money, property, services or credit by fraud for the debt to be nondischargeable. *E.g.*, *In re Dougherty*, 179 B.R. 316, 322 (Bankr. M.D. Fla. 1995) ("[T]he debtor himself must have obtained the money or property and he must have received it from the claimant."). The second view, sometimes called the "receipt of benefits" view, is that the debtor need not actually procure the money or property for himself or herself, but must obtain some direct or indirect benefit from the money or property obtained through fraud. *E.g.*, *HSSM #7 Ltd. P'ship v. Blizerian (In re Blizerian)*, 100 F.3d 886, (11th Cir. 1996) (concluding debtor received indirect benefit from fraudulently obtained investment in companies in which he held an interest). The third line of cases holds that it is not necessary that the debtor personally benefit from the transaction. *E.g.*, *Muegler v. Bening*, 413 F.3d 980, 984 (9th Cir. 2005); *Deodati v. M.M. Winkler & Assoc. (In re M.M. Winkler & Assoc.)*, 239 F.3d 746, 751-52 (5th Cir. 2001).

The Tenth Circuit has not directly addressed the issue. However, several other circuits have forgone the receipt of benefits test following the Supreme Court's decision in *Cohen v. de la Cruz*. *See Muegler v. Bening*, 413 F.3d 980, 984 (9th Cir. 2005); *Deodati v. M.M. Winkler & Assoc. (Isoc.)*, 239 F.3d 746, 751-52(5th Cir. 2001). These decisions emphasize that the *Cohen* court concluded that the phrase "obtained by" does not impose any limitation on the extent to which "any debt" arising from fraud is excepted from discharge. *Cohen*, 523 U.S. 213, 218. Instead, the "obtained by" refers to causation. *Id.* "In other words, the phrase asks 'how' the money or property was obtained. If it was obtained by fraud, then the statute is applicable." *Nat'l Dev. Serv., Inc. v. Denbleyker (In re Denbleyker)*, 251 B.R. 891, 897 (Bankr. D. Colo. 2000). As noted by the Fifth Circuit, "*Cohen* indicates that whether the debt arises from fraud is the only consideration material to nondischargeability. It also indicates that we should not read requirements like receipt of benefits into § 523(a)(2)(A) and that the discharge exceptions protect fraud victims rather than debtors." *Winkler*, 239 F.3d at 749.

This Court finds the reasoning of the Fifth and Ninth Circuits persuasive and concludes that the language of § 523(a)(2) does not impose a "receipt of benefits" test.[18] Thus, AMC was not required to prove the Debtor herself received the Wilson loan or somehow benefited from that loan. Even if proof of some indirect benefit were required, the evidence shows that the Debtor received a commission on the Wilson loan. This is a sufficient benefit to invoke the statute, even though the damages sought by AMC far exceed this $600 commission. "The value of the money, property, services, or credit obtained by fraud does not limit the amount of the nondischargeable debt." *Hatfield v. Thompson (In re Thompson)*, 555 B.R. 1, 13 (10th Cir. BAP 2013) (citing *Cohen v. de la Cruz*, 523 U.S. 213, 222-23 (1998)).

Based on the totality of the facts, circumstances, and applicable law, the Court concludes that AMC reasonably relied, to its detriment, on the Debtor's materially false written financial statement, which the Debtor published with an intent to deceive. Because AMC has carried its

[18] This Court has previously concluded that there is no "receipt of benefit" requirement in the context of a § 523(a)(4) claim. *Chenaille v. Palilla (In re Palilla)*, 493 B.R. 248, 256 (Bankr. D. Colo. 2013).

burden of proof on every element of its § 523(a)(2)(B) claim, the Court finds that Debtor's debt to AMC should be excepted from the Debtor's discharge.

C. Amount of the Debt

1. The Amount Loaned

In nondischargeability actions, state law or other relevant non-bankruptcy law determines the amount of the underlying debt. *Grogan v. Garner*, 498 U.S. 279, 283, 284 n.9 (1991); *Knaub v. Rollison (In re Rollison)*, 2013 WL 5797861, at *3 (10th Cir. BAP Oct. 29, 2013). Colorado courts apply the Restatement (Second) of Torts with respect to damages for fraud claims. *See Ballow v. PHICO Ins. Co*., 878 P.2d 672, 677 (Colo. 1994) (citing Restatement (Second) of Torts § 549). The Restatement section on damages sets forth two different measures for damages for fraud: the "out-of-pocket" rule in § 549(1)(a) and the "benefit-of-the-bargain" rule in § 549(2). Restatement (Second) of Torts § 549 cmts. b, g. Colorado applies the benefit of the bargain rule to most fraud claims, "i.e., the difference between the value of the property as represented and the actual value of the property as received." *Western Cities Broadcasting, Inc. v. Schueller*, 849 P.2d 44, 48 (Colo. 1993) (adopting benefit of the bargain rule for fraud in the conveyance of property).

There are some situations, however, where a plaintiff may not recover benefit-of-the-bargain damages. *Elliott v. Aspen Brokers, Ltd.*, 811 F. Supp. 586, 591 (D. Colo. 1993) (construing Colorado law). Where a plaintiff "does not actually complete the transaction or if he seeks damages for misrepresentation from a defendant not a party to the transaction, the plaintiff may recover only his pecuniary loss." *Id.* As explained in the comments to the Restatement, a plaintiff is limited to out-of-pocket damages "[w]hen the plaintiff has not entered into any transaction with the defendant but has suffered his pecuniary loss through reliance upon the misrepresentation in dealing with a third person." Restatement (Second) of Torts § 549 cmt. g. The "rationale for the benefit of the bargain rule is less persuasive" when the defendant was never a party to the bargain or contract. *Scholz Homes, Inc. v. Wallace*, 590 F.2d 860, 864 (10th Cir. 1979) (applying similar Kansas law).

The Restatement discusses further the out-of-pocket measure of damages where a defendant fraudulently induces the plaintiff to extend credit to a third party:

> [W]hen the financial position of a third person is misrepresented for the purpose of inducing the recipient to extend credit to him . . . the loss for which the plaintiff can recover is that suffered because of the third person's inability to meet the credit extended to him. If the third person pays nothing, the loss recoverable is the entire amount of the credit extended. If the third person pays in part, the loss recoverable is the residue remaining unpaid by him.

Restatement (Second) of Torts § 549 cmt. a. In applying this measure of damages, courts have awarded the amount loaned to the third party, minus any payments received on the loan, but refused to award interest at the rate provided in the loan. Awarding the contractual rate of interest would give the lender the benefit of its bargain rather than its out-of-pocket loss. *First Nat'l Bank of Durant v. Trans Terra Corp. Int'l*, 142 F.3d 802, 811 n.28 (5th Cir. 1999); *Citizens*

State Bank v. Shearson Lehman Bros., Inc., 874 F. Supp. 307, 309 (D. Kan. 1994). However, courts sometimes award statutory prejudgment interest, presumably to compensate the plaintiff for the interest it could have earned from an alternative use of the funds. *First Nat'l Bank of Durant*, 142 F.3d at 811 n.28 (allowing plaintiff to recover pre- and post-judgment interest at the statutory rate); *Robert J. Siragusa M.D. Emp. Trust v. Collazo*, 549 B.R. 693, 702 (N.D. Ill. 2015) ("[I]n a case in which the plaintiff was fraudulently induced to make a loan, damages for the out-of-pocket loss may be increased by the amount of interest that the plaintiff may have been able to earn from an 'alternative use' of the money."), *rev'd in part on other grounds*, 817 F.3d 1047 (7th Cir. 2016). Other courts decline to award any interest at all under the out-of-pocket measure of damages. *Citizens State Bank*, 874 F. Supp. at 309 (finding award of interest to lender based on other possible use of funds would be purely speculative); *IPFS v. Cont'l Cas. Co.*, 2013 WL 11541918, at *28 (W.D. Mo. Aug. 15, 2013) (finding lender could not recover interest it hoped to recover on fraudulently induced insurance premium financing deals).

This Court could locate only one Colorado court dealing specifically with the proper measure of damages for a fraudulently induced loan. In the case of *Black v. First Fed. Sav. & Loan Ass'n of Fargo, N. D.*, 830 P.2d 1103 (Colo. App. 1993), the plaintiff had loaned money to a limited partnership based on the general partners' representations about the collateral. After the limited partnership defaulted on the loan, the lender sued for breach of the note and for fraud. The trial court held that both the general partners and the limited partnership were liable on the note and awarded damages in the amount of the outstanding principal and interest due on the loan. The trial court entered judgment for fraud in the same amount. On appeal, the limited partnership and its general partners argued that the trial court applied the wrong measure of damages on the fraud claim. The Colorado Court of Appeals affirmed, holding that "in cases concerning fraudulent inducement in procuring a loan, the proper measure of damages is the total amount of money loaned, plus interest." *Id.* at 1114. Although the *Black* court did not label this measure of damages as either benefit-of-the-bargain or out-of-pocket loss, it has the characteristics of a benefit-of-the-bargain award. The *Black* court awarded the lender the same amount for breach of the note as it did for fraud, including interest at the note rate. However, both the limited partnership and the general partners were liable on the note under Colorado partnership law. This contractual liability between the lender and the defendants allowed the lender to recover the benefit of its bargain from all of the defendants. In other words, the case did not involve a defendant who had fraudulently inducing a loan to a third party, as described in the comments to the Restatement. The perpetrators of the fraud were liable on the underlying loan, thereby entitling the plaintiff to recover the benefit of its bargain from those defendants, rather than just its out-of-pocket losses.[19]

[19] The cases cited by the *Black* court support this conclusion. In *Horne v. Walton*, 7 N.E. 100 (Ill. 1886), the defendant fraudulently induced the plaintiff to make a loan to him, not a third party. In that situation, the Illinois Supreme Court held that the plaintiff was entitled to "the money he parted with, and interest thereon while he was kept out of the possession of it." *Id.* at 101. In *Hutchings v. Sternberg (In re Busse)*, 464 N.E.2d 651 (Ill. App. 1984), the purchaser of property fraudulently induced the seller to make a loan to him and the court held that the proper measure of damages was the "benefit-of-the-bargain formula," or the amount loaned plus interest. *Id.* at 656, 658. The case of *Gilbraltar Escrow Co. v. Thomas J. Grosso Inv, Inc.*, 421 P.2d 923 (Ariz. App. 1966) involved a defendant fraudulently inducing the plaintiff to extend credit to third parties. The court held that the plaintiff could not get the benefit of the bargain damages, including the $2,000 in interest provided for in the loan contract. Rather, the court

It is unclear from the *Black* case if Colorado courts would apply a different measure of damages for fraudulent inducement of a loan to a third party where the perpetrator of the fraud is not liable on the underlying loan.[20] Given this lack of precedent, the Court will apply the measure of damages set forth in the commentary to the Restatement—the amount loaned to the third party, less any amounts paid by the third party. Restatement (Second) of Torts § 549 cmt. a. Awarding interest at the note rate would give a lender the benefit of his bargain rather than his out-of-pocket losses and is, therefore, not appropriate. As discussed more fully below, an award of prejudgment interest at the statutory rate may be appropriate to adequately compensate a lender under particular circumstances.

In this case, the Debtor's fraudulent statements induced AMC to make a loan to a third party—Wilson. Therefore, AMC is entitled to its out-of-pocket loss measured as the amount loaned less any amounts paid on that debt. The principal amount of the Wilson loan was $224,800. Bank of America foreclosed on its collateral in June 2010. Mr. Allen testified that AMC paid $243,670.93 to repurchase the loan from Bank of America in August 2010 and that this purchase price included unpaid principal plus interest on the loan. The Debtor contends there is insufficient evidence of the price paid by AMC because AMC did not offer a copy of the check or wire transfer it made to Bank of America. However, it is undisputed that Mr. Allen has first-hand knowledge of these figures and the Court has no reason to doubt the veracity of his testimony. After foreclosure, Bank of America transferred title to Wilson's house to AMC. AMC subsequently sold the house to a third party for $135,000 in December 2012. Subtracting this amount from the repurchase price would have left a balance of $108,670.93. However, Mr. Allen testified that AMC's net out-of-pocket loss totaled $123,643.89. The Debtor offered nothing to contradict this. It also seems reasonable to assume that AMC incurred expenses related to the sale and taxes associated with the property while they were holding it for resale. Absent any contradictory evidence, and based on Mr. Allen's overall credibility, the Court finds that AMC is entitled to recover this amount from the Debtor.

The Debtor argues AMC should not recover this amount because Bank of America credit-bid the full amount owed on the mortgage at the foreclosure sale and, therefore, the sale

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awarded the plaintiff $20,000 in principal he loaned to the third parties "to bear interest at the rate of 6% Per annum." *Id.* at 929. The court did not indicate the source of the 6% interest rate, but it seems highly likely that it was the Arizona statutory prejudgment rate, as the note rate appears to have been 10%. *See Betz v. Goff*, 427 P.2d 538, 540 (Ariz. App. 1967) (referencing the Arizona statutory prejudgment interest rate at 6% in 1967).

[20] In the case of *Gronewoller v. DM Capital, Inc. (In re Mascio)*, 2007 WL 3407516 (D. Colo. Nov. 13, 2007) , the debtor was an investment advisor who had fraudulently induced a client to make investments and loans to third parties. In affirming the bankruptcy court's award of damages for fraudulent inducement of the loan, the District Court, quoting the *Black* case, held that the proper measure of damages was the "total amount of the money loaned plus interest." *Id.* at *7 (quoting *Black v. First Fed. Sav. and Loan Ass'n of Fargo, N. D.*, 830 P.2d 1103, 1114 (Colo. App. 1993)). It then affirmed the award of prejudgment interest at the note rate. The District Court, however, provided no analysis of the facts of *Black*, nor the differences between the out-of-pocket and benefit-of-the-bargain measure of damages for fraudulent inducement of a loan to a third party. It is not clear that the parties even raised those issues in the appeal. Moreover, the *Mascio* case is unpublished and of limited precedential value. Accordingly, the Court declines to adopt its holding on the proper measure of damages.

extinguished any deficiency on the loan. Generally speaking, a debt will be deemed satisfied to the extent of the bid made in a foreclosure proceeding. *See Centennial Square, Ltd. v. Resolution Trust Corp.*, 815 P.2d 1002, 1005-06 (Colo. App. 1991). Even if Bank of America's foreclosure extinguished Wilson's liability on the mortgage (an issue this Court need not decide), AMC still had to repurchase the outstanding loan from Bank of America, resulting in a loss to AMC. It is this out-of-pocket loss that AMC seeks to recover from the Debtor.

The Debtor also contends the amount of damages should be reduced because Mr. Allen delayed too long in reselling the house and did not accept a higher offer of $149,000. In essence, the Debtor contends AMC failed to mitigate its damages. The Debtor bears the burden of proof to establish this affirmative defense. *Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997). A failure to mitigate occurs when the injured party "fails to take reasonable steps to minimize the resulting damages." *Id.* "A plaintiff's failure to mitigate damages is excused, however, if mitigation would require inordinate or unreasonable measures or if there were reasonable grounds for the failure to mitigate." *Id.*

The Court will address first the Debtor's contention that AMC should have accepted a higher offer of $149,000 to purchase the house. In fact, the other "offer" Mr. Allen received was merely an inquiry that the potential buyer withdrew of her own accord. Mr. Allen testified that he hoped to get a higher price for the home to stem his losses, but ultimately had to sell it to the only party who made an actual offer on the house. This home was in a remote location in the mountains at an altitude over 10,000 feet. The real estate broker indicated he could only market the property effectively during the summer months due to its high elevation and remoteness. In addition, the home was outdated and in need of repairs.

It is true that almost three and one-half years elapsed between the closing of Wilson's loan and the resale of the collateral. The evidence established the following timetable of events:

- January, 2010 Mr. Allen began negotiating with the Bank to repurchase the loan
- February, 2010 The Bank began the foreclosure proceeding
- June, 2010 The Bank received its certificate of purchase
- July, 2010 The Bank received a Public Trustee's deed
- August, 2010 AMC repurchased the loan from the Bank
- March, 2011 The Bank delivered a quit claim deed to AMC
- December, 2012 AMC sold the house to a third party

While the Debtor takes issue with the fact that AMC could have conducted its own foreclosure sale, its doing so would not have sped up the process appreciably. The delay was not attributable to the foreclosure. The significant delay occurred after the Bank obtained the Public Trustee's deed and before it transferred its title to AMC. The Court has no idea why the Bank delayed so long in completing the transfer of title, but this delay was outside of AMC's control.

Since AMC had repurchased the loan in August, 2010, it was motivated to accomplish a sale as soon as possible. Stated another way, it stood to gain nothing from delaying the sale once it had repurchased the loan.

In addition, AMC engaged a realtor and began the marketing process long before it actually received title. Despite the length of time this house was on the market, AMC was unable to resell the home until it closed in December, 2012. Perhaps this was due to the recession, the property's remote location, its condition, or a host of other factors. The Debtor provided no evidence that other comparable properties sold at a higher amount during this time frame or that AMC failed to adequately market the property. Thus, the Court concludes that the Debtor failed to carry the burden on her defense of failure to mitigate.

2. Interest

AMC seeks to recover interest on the debt at the note rate of 5.5%. However, as discussed above, AMC is not entitled to recover interest at the note rate because to do so would employ the benefit-of-its-bargain measure of damages and the Debtor was not a party to that bargain. Alternatively, AMC seeks an award of prejudgment interest at the applicable statutory rate. In a nondischargeability case, federal law determines whether it is appropriate to award prejudgment interest. *Diamond v. Bakay (In re Bakay)*, 454 Fed. App'x 652, 654 (10th Cir. 2011) (unpublished) (applying federal law in nondischargeability case); *Kim v. Sun (In re Sun)*, 535 B.R. 358, 370 (10th Cir. BAP 2015). Under federal law, the decision to award it depends on considerations of fundamental fairness, not the provisions of any contract. *In re Bakay*, 454 Fed. App'x at 654. A court may award prejudgment interest if "1) the award of prejudgment interest would serve to compensate the injured party, and 2) the award of prejudgment interest is otherwise equitable." *Id.* at 654 (citing *In re Inv. Bankers, Inc.*, 4 F.3d 1556, 1566 (10th Cir.1993)). "Thus under federal law prejudgment interest is ordinarily awarded, absent some justification for withholding it." *Id.* (citing *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1256 (10th Cir.1988)). However, it is not recoverable as a matter of right. Any award must be governed by considerations of fundamental fairness. *Id.* Therefore, the decision to award prejudgment interest is a matter left to the sound discretion of the trial court. *In re Sun*, 535 B.R. at 370. In this case, there does not appear to be any equitable reason or justification for withholding prejudgment interest. Such an award will compensate AMC for the alternative uses it could have made of the funds it was forced to expend to repurchase this loan.

The Bankruptcy Code does not set a specific federal prejudgment interest rate. In the absence of a federal rate, the court is "free to choose any interest rate which will fairly compensate the plaintiff for the delay in the receipt of payment." *In re Sun*, 535 B.R. at 372 (quoting *U.S. ex rel. C.J.C., Inc. v. W. States Mech. Contractors, Inc.*, 834 F.2d 1533 (10th Cir. 1987)). As a matter of "convenience and practicality," it is appropriate to look to state law for the applicable interest rate." *Id.* (internal quotation omitted).

In Colorado, the relevant statute provides that:

> (1) Except as provided in section 13-21-101, C.R.S., when there is no agreement as to the rate thereof, creditors shall receive interest as follows:

> [. . .]
>
> (b) Interest shall be at the rate of eight percent per annum compounded annually for all moneys or the value of all property after they are wrongfully withheld or after they become due to the date of payment or to the date judgment is entered, whichever first occurs.

Colo. Rev. Stat. § 5-12-102(1)(b). Colorado courts liberally construe this statute "to permit recovery of prejudgment interest on money or property wrongfully withheld." *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 684 (Colo. 1994). The phrase "wrongfully withheld" is read broadly "to cover all types of cases, even where the withholding is merely a refusal to pay over damages which are theoretically due at the time the claim arises." *Mesa Sand & Gravel Co. v. Landfill, Inc.*, 776 P.2d 362, 365 (Colo. 1989) (quoting Cairns & Tredennick, *Collecting Pre and Post–Judgment Interest in Colorado: A Primer*, 15 Colo. Law. 753, 756 (1986)); *The Pers. Dept., Inc. v. Prof'l Staff Leasing Corp.*, 297 Fed. App'x 773, 789 (10th Cir. 2008). Courts applying this statute have awarded prejudgment interest "on tort judgments in general." *The Pers. Dept., Inc.*, 297 Fed. App'x at 789. This is true even if the amount is unliquidated at the time of wrongful withholding or at the time when the debt is due. *Karg v. Mitchek*, 983 P.2d 21, 26 (Colo.App.1998); Colo. Rev Stat. § 5-12-102(3).

Given this broad reading of Colo. Rev. Stat. § 5-12-102(1)(b), the Court concludes AMC is entitled to prejudgment interest under Colorado law on the damages caused by the Debtor's fraudulent conduct. The Debtor "wrongfully withheld" these damages from AMC for purposes of the statute. Thus, AMC is entitled to prejudgment interest at the rate of eight percent. The Court realizes this is a relatively high rate of interest, and higher than the rate of interest in the Wilson promissory note. However, the Court does not consider that award to be excessive given that, as discussed below, the Court is exercising its discretion to not award exemplary damages.

To determine the date from which prejudgment interest began to accrue, the Court again turns to state law for guidance. The Colorado Supreme Court has instructed that there are two dates to consider when measuring prejudgment interest—the date a plaintiff is "wronged" and the time at which the "wrongful withholding" occurs. *Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 826 (Colo. 2008). The plaintiff is "wronged" when he suffers an injury caused by the defendant, while the "wrongful withholding" occurs when the plaintiff's injury is measured under applicable law. *Id.* Prejudgment interest accrues on the date the "wrongful withholding" occurred.

In many cases, the date the plaintiff is wronged will be the same date his money is wrongfully withheld. For instance, in a contract action, "the 'wrongful withholding' of the plaintiff's money or property occurs at the time of the breach, which is the same time when the plaintiff is 'wronged' by the defendant's breach." *Id.* However, if damages are measured on a date subsequent to the date of the injury, then the wrongful withholding will occur sometime *after* the plaintiff was wronged. For example, in a suit involving injury to property by a defective product, the plaintiff is "wronged" at the time the product injures his property. If the plaintiff elects to recover repair and replacement costs to compensate that injury, his damages are measured at the time he spends money to repair or replace his property. Assuming the repair date occurs sometime after the date of injury, then the "wrongful withholding" happens on the later date. Since prejudgment interest is designed to compensate a plaintiff for the loss of use of his money during the period between the wrongful withholding and the court's entry of judgment, interest begins to accrue on the later wrongful withholding date.

In this case, the Debtor fraudulently induced AMC to close on the Wilson loan in July 2009. Arguably, the Debtor "wronged" AMC on that date. However, AMC immediately sold the loan to Bank of America, thereby forestalling any actual loss on the Wilson loan. It was only when Bank of America required AMC to repurchase the loan that AMC suffered a loss. This Court's award of damages measures AMC's out-of-pocket loss based on that repurchase price. Thus, the "wrongful withholding" occurred on the date AMC repurchased the loan. *Cf. Tian v. Newmont Int'l Serv. Ltd.*, 2016 WL 660110, at * (D. Colo. Feb. 18, 2016) (holding prejudgment interest on award of lost wages for employer's fraudulent misrepresentation should be measured on date of the "wrongful withholding," i.e. periodically over time period plaintiff would have earned the wages). Mr. Allen testified that he wired funds to Bank of America to repurchase the loan on August 27, 2010. AMC is therefore entitled to prejudgment interest at a rate of 8% on the $243,670.93 repurchase price from August 27, 2010 until AMC sold the house on December 21, 2012. Following application of the sale proceeds, AMC's out-of-pocket loss decreased to $123,643.89. AMC is then entitled to prejudgment interest at a rate of 8% on the $123,643.89 balance from December 22, 2012 through the date of this order. *See Kim v. Sun (In re Sun)*, 535 B.R. 358, 373 (10th Cir. BAP 2015) (holding prejudgment interest should only accrue on debt balance adjusted over time to reflect each payment received by the plaintiff). According to the Colorado statute, prejudgment interest is to be compounded annually.

The parties have not addressed this authority on prejudgment interest, nor the proper calculation of it. Accordingly, the Court will set a deadline below for the parties to submit a proposed calculation of prejudgment interest along with any contrary authority to support that calculation.

3. Attorney's Fees

AMC seeks to recover the attorney's fees it incurred in litigating against the Debtor in state court and in this proceeding, citing the attorney's fees provision in the Wilson loan. As this Court previously held in in its March 17, 2016 Order Denying Motion for Partial Summary Judgment, which is incorporated by reference herein, any analysis of a party's entitlement to recover attorney fees begins with the "American Rule" that applies in federal litigation, including dischargeability actions. *Busch v. Hancock (In re Busch)*, 369 B.R. 614, 625 (10th Cir. BAP 2007). Under the American Rule, a prevailing party is not ordinarily entitled to collect attorney fees from his or her opponent. *Id.* at 624. There are, however, two important exceptions to this rule. Fees may be shifted to the other side where an applicable statute provides for fee-shifting or where fees have been shifted by a contract between the parties. *Id.* at 625-26. These same exceptions apply in nondischargeability actions. *See id.*

The Supreme Court's decision in *Cohen v. de la Cruz*, 523 U.S. 213 (1998) does not change these basic principles. In *Cohen,* the debtor had been found liable to the plaintiff for fraud under the New Jersey Consumer Fraud Act. The court awarded the plaintiff compensatory and treble damages, as well as attorney fees, all of which were specifically permitted under the state statute. The Supreme Court considered whether all of those damages, including punitive damages and attorney fees, were nondischargeable under § 523(a)(2). The *Cohen* Court concluded they were, holding that a debt incurred by fraud for purposes of § 523(a)(2) "encompasses any liability arising from money, property, etc., that is fraudulently obtained, including treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor." *Id.* at 223.

While it is clear that *Cohen* permits a bankruptcy court to include attorney fees as part of a nondischargeable judgment in certain circumstances, this case does not create an independent right to attorney fees. Rather, it merely clarifies that when attorney fees are allowed by relevant law as an exception to the American Rule—in that case, the New Jersey Consumer Fraud Act—those fees may be included in the nondischargeable debt. "In other words, if a party has an independent right to recover attorney's fees or costs under applicable law in connection with a particular nondischargeable debt, the party is entitled to an award of such attorney's fees or costs as part of the non-dischargeable judgment under § 523(a)." *Roshan Hospitality, LLC v. Patel (In re Patel)*, 536 B.R. 1, 23 (Bankr. D.N.M. 2015). Thus, even after *Cohen*, a party seeking an award of attorney fees in a dischargeability action or in connection with any litigation must still establish that one of the exceptions to the American Rule applies—fee shifting by contract or by statute.

In this case, AMC does not point to a fee shifting statute or any provision in a contract between itself and Debtor that requires Debtor to pay AMC's attorney fees. The only contractual attorney's fees provision is in the loan between AMC and Wilson. The Debtor was not a party to that contract and is not bound by those contractual provisions. As discussed above, AMC is not entitled to recover the "benefit of the bargain" from the Debtor on its fraudulent inducement claim and cannot rely on that measure of damages to recover fees. Because AMC has failed to present a valid basis for recovery of its attorney's fees, the Court declines to award them in this case.[21]

4. Exemplary Damages

Finally, AMC seeks an award of exemplary damages under Colo. Rev. Stat. § 13-21-102. That statute provides that a jury may award exemplary damages in a civil action where the injury complained of is attended by "circumstances of fraud, malice, or willful and wanton conduct." Colo. Rev. Stat. § 13-21-102(1). The statute does not define the phrase "circumstances of fraud," but Colorado courts apply the common definition of fraud, or "a false representation of a material existing fact, made with knowledge or utter disregard of its falsity, with the intent to

[21] Colorado courts do recognize the "wrong-of-another doctrine," which provides that reasonable attorney fees may be recovered from a wrongdoer where "the natural and probable consequence of a wrongful act has been to involve plaintiff in litigation with others." *Elijah v. Fender*, 674 P.2d 946, 951 (Colo. 1984). Recovery is permitted "only where the party seeking the costs had to defend his rights *against third parties* in separate litigation." *McNeill v. Allen*, 534 P.2d 813, 819 (Colo. App. 1975) (emphasis added). Here, AMC is not seeking to collect fees related to litigation with third parties. Rather, it is seeking to recover fees from its litigation *against the Debtor.* Thus, the wrong-of-another doctrine does not apply.

induce another to rely upon the representation and to take detrimental action thereon." *Palmer v. A.H. Robins Co., Inc*., 684 P.2d 187, 214-215 (Colo. 1984).

Proof of circumstances of fraud, malice, or willful and wanton conduct must be beyond a reasonable doubt. Colo. Rev. Stat. § 13-25-127. The question of whether to award exemplary damages and in what amount is left to the discretion of the trier of fact. *Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.*, 232 P.3d 277, 285-86 (Colo. App. 2010). Thus, "even where the evidence might irrefutably establish a basis for exemplary damages, the decision to award such damages is an exclusive function of the [fact finder]." *Mince v. Butters*, 616 P.2d 127, 130 (Colo. 1980). The purpose of awarding exemplary damages under § 13-21-105 is to "punish the defendant and deter others from similar conduct in the future, not to compensate an injured plaintiff." *Bonidy*, 232 P.3d at 285.

In this case, although there is sufficient evidence of fraud, the Court exercises its discretion and declines to award exemplary damages. Entry of a nondischargeable judgment in the amount of AMC's actual damages plus prejudgment interest will provide sufficient deterrence and punishment to the Debtor for her conduct.

D. § 523(a)(4)

AMC also alleges a claim for nondischargeability under § 523(a)(4), based on the Debtor's alleged fraud or defalcation while acting if a fiduciary capacity. The parties hotly contest whether the Debtor acted if a fiduciary capacity under the narrow definition of that term applied by the Tenth Circuit. *See Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1371-72 (10th Cir. 1996). The Court need not address this issue because AMC relies on the same conduct to support both claims. Any damages AMC might recover for the Debtor's "fraud" while acting in a fiduciary capacity would be the same as her "fraud" under § 523(a)(2). Because that debt is nondischargeable under § 523(a)(2)(B), the Court declines to consider its nondischargeability under § 523(a)(4).[22]

[22] There is one possible way in which AMC's damages for breach of fiduciary duty might be different. With a breach of fiduciary duty claim, AMC might have argued for recovery of its attorney's fees under a limited common-law exception to the American Rule in cases involving claims for breach of trust. Colorado courts have recognized this exception, but narrowly applied it to instances where the breaching fiduciary is a custodian of funds and wrongfully invests or otherwise mismanages those custodial funds on behalf of a beneficiary. *Delluomo v. Cedarblade*, 328 P.3d 291, 296 (Colo. App. 2014). Noting the "narrow interpretation of the exception" in Colorado, the *Delluomo* court declined to apply the exception where the fiduciary's duty arose from a confidential relationship rather than a written trust agreement, and the fiduciary had no control over the funds at issue. *Delluomo v. Cedarblade*, 328 P.3d 291, 295-96 (Colo. App. 2014). As noted by the *Delluomo* court, there has been no Colorado decision in the last two decades that has awarded attorney fees for breach of fiduciary duty where the facts did not involve a breach of an express trust by mismanagement of custodial funds. *Id.* at 295; *see also* Restatement (Third) of Trusts § 100 cmt. b(2) (noting that the award of fees is "not a routine part of trustee liability for breach of trust."). The decision to allow fees under this exception is left to the discretion of the trial court. *Heller v. First Nat'l Bank of Denver, N.A.*, 657 P.2d 992, 999 (Colo. App. 1982). In this case, there is no written trust agreement, let alone a custodial trust agreement. Although AMC contends Debtor had signatory authority over its warehouse line of credit, it did not allege or prove that Debtor managed those funds for AMC's benefit. Thus, even if the Court considered AMC's

E. Debtor's Counterclaim

The Debtor alleged a counterclaim against AMC for a year-end bonus that AMC did not pay her after terminating her employment. If she had been paid the bonus, it would have been based on the Denver Branch's profitability. She alleges that it was improper for AMC to charge the Denver Branch with the loss it incurred on the Wilson loan when determining its profitability. The Debtor argues AMC operated the Denver Branch as a "net branch." The significance of being a "net branch" in this context is that Fannie Mae guidelines prohibited AMC from requiring a "net branch," or any employee at that branch, to pay back the corporate office for damages related to a failed loan. The Debtor admits, however, that an exception to this rule exists if the corporate office proves fraud on the part of the "net branch" or its employees. Since AMC has proven the Debtor engaged in fraudulent behavior in connection with the Wilson loan, there can be no violation of these Fannie Mae guidelines. The Debtor's counterclaim, therefore, fails.

III. CONCLUSION

For the reasons stated above, the Court concludes that AMC demonstrated all elements to show that Debtor owes it a debt for $123,643.89 and that this debt, plus pre- and post-judgment interest, is nondischargeable under § 523(a)(2)(B).

In order to assist the Court in making the correct calculation of interest, AMC shall, on or before **October 13, 2017**, file a calculation of pre-judgment interest with a description of its calculation, and any contrary legal authority to support its calculation. The Debtor shall then have an opportunity to file a response on or before **October 27, 2017**. The Court will not enter a final judgment until it has ruled on the interest component.

Dated this 29th day of September 2017.

BY THE COURT:

Elizabeth E. Brown, Bankruptcy Judge

§ 523(a)(4) claim, it would exercise its discretion and not award AMC its attorney's fees under this narrow doctrine as well. Consequently, there is no need to render a decision on the § 523(a)(4) claim.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: JANET KAY WEAVER, Debtor.	Bankruptcy Case No. 13-12548 EEB Chapter 13
ASSOCIATED MORTGAGE CORPORATION, Plaintiff, v. JANET KAY WEAVER, Defendant.	Adversary Proceeding No. 13-1292 EEB

ORDER ON PREJUDGMENT INTEREST

THIS MATTER comes before the Court following trial on Plaintiff's Complaint and the entry of the Court's September 29, 2017 trial order ("Trial Order"), finding that Debtor owes Plaintiff a debt in the amount of $123,643.89 and that this debt, plus pre- and post-judgment interest, is nondischargeable under 11 U.S.C. § 523(a)(2)(B). The Trial Order made a tentative ruling as to the proper rate of prejudgment interest and the date on which prejudgment interest began to accrue. However, because the parties had not previously addressed the proper calculation of prejudgment interest and the law on the accrual date is far from clear, the Trial Order instructed the parties to provide additional briefing on this narrow issue.

I. BRIEF BACKGROUND

The relevant facts and law are more fully set forth in the Trial Order, which is incorporated herein by reference. In summary, Plaintiff is a mortgage company that originates and funds residential mortgage loans and then sells them to investors in the secondary market. It formerly employed Debtor as a mortgage underwriter in its Denver branch office. During her employment, Debtor's brother, Richard Wilson, applied for a loan to refinance his mortgage. The Debtor handled all aspects of this loan, including the underwriting tasks. Plaintiff funded Wilson's loan and then sold it to Bank of America. Shortly thereafter, Wilson defaulted. Bank of America required Plaintiff to repurchase the loan. Plaintiff later discovered the Debtor's manipulation of its electronic underwriting system and the processing of this loan, including her forgery of credit reports and employment verification forms. Her actions defrauded the Plaintiff into extending the loan.

Bank of America conducted the foreclosure process itself and once it obtained a deed to the home, it executed a quit claim deed to Plaintiff. There was a significant unexplained delay between the date when Bank of America obtained a deed and when it issued the quit claim deed, but Plaintiff acted diligently to market the home for resale. Nevertheless, due to the recession and the remote location of Wilson's mountain property, a fair amount of time passed before Plaintiff was able to resell the home to a third party. While Plaintiff held the home for resale, it incurred significant expenses for taxes, insurance, maintenance, and the like. When it eventually sold the home, it had to sell at a significant loss. While it repurchased the loan for $243,670.93, it netted only $120,027.04 from the sale of the home, leaving it with remaining damages of $123,643.89.

II. DISCUSSION

In their briefs, neither party disputed that the appropriate rate of prejudgment interest is 8%. The Plaintiff's brief sets forth an interest calculation in line with the Court's preliminary calculation, which has prejudgment interest accruing on the full repurchase price of the loan ($243,670.93) from the date of repurchase, August 27, 2010, until Plaintiff sold the house on December 21, 2012. Prejudgment interest would then accrue on the $123,643.89 balance from December 22, 2012 through the date of the Trial Order.

The Defendant argues that no interest should accrue until December 22, 2012, the day after Plaintiff sold the house. Defendant argues that the Court cannot award prejudgment interest prior to that date because Plaintiff's out-of-pocket loss was unknown until that time. According to the Defendant, Plaintiff's damages could only be accurately determined once Plaintiff sold the house for an amount that did not cover the loan repurchase price, *i.e.* when it sold it at a loss. While Plaintiff held title to the house, Debtor argues Plaintiff was holding the "equivalent" of funds equal to the fair market value of the house and, therefore, it had no loss.

The Debtor does not cite to, and the Court could not locate, any case law directly addressing this issue of how to account for the sale of collateral in calculating prejudgment interest. Nevertheless, there are several Colorado court decisions from other contexts that provide guidance. As stated in the Trial Order, the Colorado Supreme Court has instructed that there are two dates to consider when determining the accrual date for prejudgment interest—the date a plaintiff is "wronged" and the time at which the "wrongful withholding" occurs. *Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 826 (Colo. 2008). The plaintiff is "wronged" when he suffers an injury caused by the defendant, while the "wrongful withholding" occurs when the plaintiff's injury is measured under applicable law. *Id.* Prejudgment interest begins to accrue on the date the "wrongful withholding" occurred. In this manner, prejudgment interest compensates the plaintiff for the time period between when the loss is measured and the entry of judgment, during which the Plaintiff is deprived of the use of the money that would constitute the award.

Injury from fraudulent or tortious conduct is typically measured from the date of the defendant's tortious conduct. *E.g.*, *Arguelles v. Ridgeway*, 827 P.2d 553, 558 (Colo. App. 1992) (holding prejudgment interest accrued from date defendant fraudulently induced plaintiff to sign a real estate contract); *Frontier Exploration, Inc. v. Am. Nat'l Fire Ins. Co.*, 849 P.2d 887, 894 (Colo. App. 1992) (holding prejudgment interest began to accrue on date insured's fraudulent repair estimates caused insurance company to pay benefits); *Personnel Dept., Inc. v. Prof. Staff Leasing Corp.*, 297 Fed. App'x 773, 791 (10th Cir. 2008) (concluding prejudgment interest began to accrue on date defendant tortiously interfered with Plaintiff's prospective business relationship). In this case, Debtor initially caused injury to Plaintiff when she fraudulently induced it to loan money to Wilson. As this Court has previously determined, damages for such fraudulent conduct are measured by the amount loaned to the third party, minus any payments received on the loan. *See* Restatement (Second) of Torts § 549 cmt. a. Since the making of the loan is the injury, prejudgment interest should begin to accrue on the date of the fraudulently induced loan. In this case, however, Plaintiff immediately sold the Wilson loan to Bank of America. In so doing, Plaintiff was able to temporarily forestall the loss caused by Debtor's conduct. This reprieve ended on August 27, 2010, when Bank of America required Plaintiff to repurchase the loan at the price of $243,670.93. Thus, the repurchase date was the date on which the "wrongful withholding" occurred and the date prejudgment interest began to accrue because that is the date applicable law measures Plaintiff's injury.

The wrongful withholding or accrual date should not be confused with the date of the later offset or partial recovery that Plaintiff realized when it sold the home on December 21, 2012. How and when to account for this offset when calculating prejudgment interest presents a much more difficult issue.

A majority of the cases that discuss offsets in the calculation of prejudgment interest involve the assertion of an unliquidated counterclaim against the plaintiff's damages. There are two primary approaches to dealing with such offsets. *See Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc*., 416 F.2d 207, 211-12 (8th Cir. 1969) (discussing approaches); *York Plumbing & Heating Co. v. Groussman Inv. Co*., 443 P.2d 986, 987 (Colo. 1968); Aric Jarrett, Comment, *Full Compensation, Not Overcompensation: Rethinking Prejudgment Interest Offsets in Washington*, 30 Seattle Univ. L. Rev. 703, 704-05 (2007). The first approach, sometimes called the "**interest on the whole rule**," calculates prejudgment interest on the plaintiff's entire liquidated claim *prior to* deducting the unliquidated counterclaim or offset. Jarrett, *supra*, at 705. Under the second approach, called the "**interest on the balance rule**," the liquidated claim is first offset by the unliquidated claim and then prejudgment interest is awarded only on the balance from the time the unliquidated claim became due. *Id.*

As between these two approaches, the Colorado Supreme Court has adopted the interest on the balance rule, at least in some circumstances. In *York Plumbing & Heating Co. v. Groussman Inv. Co*., 443 P.2d 986 (Colo. 1968), the plaintiff was a contractor who had performed plumbing work on the defendants' property. Plaintiff sued defendants for the unpaid invoices and placed a mechanic's lien on the property. The defendants asserted a counterclaim for breach of warranty on the pumps plaintiff installed. The amount plaintiff owed defendants on the counterclaim remained unliquidated until the time of trial. The court rejected the defendants' argument that the unliquidated nature of their counterclaim meant that plaintiff's original claim against them was also unliquidated and, therefore, not entitled to any prejudgment interest. It concluded, "a debtor cannot defeat the running of interest against him for the part of a debt which he admits that he owes, and which would otherwise draw interest, by simply making a claim of an unliquidated set-off against the whole debt." *Id.* at 987 (citing *Henrylyn Co. v. Meneray Co.*, 135 P. 980 (Colo. 1913). Having concluded that the accrual of interest could not be completely avoided, the court went on to consider how the offset affected the calculation of prejudgment interest, holding that "[w]here a claim under an agreement is certain and liquidated, but is reduced because of the allowance of an unliquidated off-set or counterclaim, interest may be allowed only on the balance due." *Id.* at 988. The court then subtracted the offset from the plaintiff's damages and calculated prejudgment interest on the balance due, accruing from the date plaintiff's original claim became due and owing. *Id.*

Although the court in *York Plumbing* did not provide much reasoning for its choice of the interest on the balance rule, other courts and commentators have reasoned that it best promotes the goal of prejudgment interest:

> The simple premise underlying the interest on the balance rule is that the defendant owed the plaintiff a liquidated amount as of a certain time, but as of that same time, the plaintiff owed the defendant for its own breach. Thus, the plaintiff was only deprived of the use of the difference between the two claims. As a result, awarding prejudgment interest on Plaintiff's entire claim effectively confers a windfall to the plaintiff—a windfall to which the plaintiff is not entitled.

Jareet, *supra*, at 731; *see also Ralston Purina Co.*, 416 F.2d at 212-13 (noting that the plaintiff was deprived of the use of its money only to the extent of the difference between the amount of its claim and the amount of defendant's counterclaim). As the above quote implies, courts apply the interest on the balance rule in situations where the counterclaim or setoff arose from the same facts or transaction as the original liquidated claim and was due and owing at the same time as the original claim. *See* Jareet, *supra*, at 731 ("The simple premise underlying the interest on the balance rule is that the defendant owed the plaintiff a liquidated amount as of a certain time, but as of that same time, the plaintiff owed the defendant for its own breach."); Dan B. 1 Dobbs, Law of Remedies (2d. ed. 1993) § 3.6(2), at 338 (noting interest on the balance rule applied where "the defendant's counterclaim or set-off is successful and reduces his liability for reasons arising out of the same fact that gave rise to the Plaintiff's claim."). In the *York Plumbing* case, for example, both the plaintiff's claim and the defendant's counterclaim arose out of contracted work the plaintiff performed on the defendants' home. The defendants' breach of warranty counterclaim accrued at some point prior to the plaintiff's breach of contract claim. As a result, during the entire time period that the defendants owed the plaintiff money for breach of contract, the plaintiff also owed the defendants for breach of warranty. Thus, the plaintiff was really only deprived of the use of the balance between the two claims, beginning on the date its claim against the defendant accrued.

Courts apply the interest on the balance rule somewhat differently if, unlike the *York Plumbing* case, the offsetting counterclaim accrued at some point in time *after* accrual of the plaintiff's original claim. In that scenario, courts calculate interest essentially in two stages. *See Hollon v. McComb*, 636 P.2d 513, 515-17 (Wyo. 1981). During the first stage—from the date of accrual of the plaintiff's claim through the date the offset accrues, interest will accrue on the full amount of the plaintiff's damages. Once the offsetting claim accrues, a court will then subtract out the offsetting damages and calculate interest on the remaining balance from the date of offset to the date of judgment.

In the *Hollon v. McComb*, 636 P.2d 513 (Wyo. 1981) case, for example, the McCombs purchased a newly constructed home from the Hollons and borrowed a portion of the purchase price from them. The Hollons failed to complete construction on the home by the promised finish date and the McCombs refused to make payments on the loan. Approximately one year after purchase of the house, the McCombs spent additional funds to complete the roof. The Hollons sued the McCombs for breach of the loan and the McCombs asserted an unliquidated claim against the Hollons for breach of warranty. The court awarded the Hollons $9,000 for breach of the loan, plus interest, and awarded the McCombs approximately $7,000 for breach of warranty. In calculating prejudgment interest, the trial court determined that the Hollons were entitled to interest on the full $9,000 loan amount from the date of the note until the date that the McCombs spent funds to complete the roof, i.e. the date their breach of warranty claim accrued. The court then subtracted the $7,000 breach of warranty damages and calculated interest on the remaining balance from the date the McCombs paid for the roof until the date of judgment. The Hollons objected to this offset, but the appellate court affirmed, concluding that the trial court had properly applied the interest on the balance rule. *Id*. at 517 (citing *York Plumbing & Heating Co. v. Groussman Inv. Co*., 443 P.2d 986 (Colo. 1968)). The appellate court reasoned that it was proper to "deny [the Hollons] prejudgment interest on that portion of their award that they should have expended on constructing [the McCombs'] roof, a proper credit on the note as of the date of payment for the roof." *Id*. In other words, prejudgment interest should be allowed "only on the net amount due following [the McCombs'] payment for the construction necessary to finish their roof. It simply would not make good sense to charge [the McCombs] interest on money they do not owe." *Id.*

Thus, if this Court were to adopt the interest on the balance rule set forth by the Colorado Supreme Court in the *York Plumbing* case, application of that rule might vary depending on the date the offset is deemed to have accrued. The other approach courts apply in calculating prejudgment interest—the "interest on the whole" rule—typically comes into play only when the counterclaim or offset does not directly concern the plaintiff's claim or arises out of a collateral matter. *Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc*., 416 F.2d 207, 211 (8th Cir. 1969); Jareet, *supra*, at 741 (noting that many jurisdictions apply interest on the whole rule where the claims do not arise from the same transaction, contract, or operative facts). This reasoning was echoed by the court in *York Plumbing*, when it stated that interest on the balance is the better rule "at least in situations in which the two claims arise out of the same general transaction." *York Plumbing*, 443 P.2d at 988.

Outside the realm of unliquidated counterclaims, there appear to be few standard methodologies in dealing with offsets and prejudgment interest. Courts appear to adopt whatever calculation best fits the particular facts of the case. For example, in the case of *Kim v. Sun (In re Sun)*, 535 B.R. 358 (10th Cir. BAP 2015), the court considered how to calculate prejudgment interest when the plaintiffs received offsetting payments after the initial injury. In that case, the debtor made numerous fraudulent misrepresentations to induce the plaintiffs to invest $900,000 in various investment schemes. In partial exchange for their investment, the plaintiffs received promissory notes from a third party. The court first determined that plaintiffs were entitled to recover the $900,000 they had invested with the debtor plus prejudgment interest, less any payments they received on the promissory notes. The court then approved of the lower court's application of Colorado's statutory prejudgment rate of 8%. However, it disagreed with the lower court's award of prejudgment interest on the entire $900,000 investment without consideration of the payments received on the promissory notes. Their injury decreased with each note payment. Thus, the court concluded that "prejudgment interest should be calculated on the $900,000 until the first payment was received by the [plaintiffs], and thereafter on the appropriate debt balance adjusted for each successive payment received by them, subject to annual compounding of interest." *Id.* at 373.

Each of the approaches outlined above could result in very different calculation of interest. The *In re Sun* approach is similar to the calculation the Court set forth in the Trial Order—interest on the $243,670.93 from the date of repurchase of the loan through date Plaintiff received sale proceeds, and then interest on the remaining balance after application of the offset. Application of the interest on the whole rule would calculate 8% interest on the entire $243,670.93 from the date of repurchase through the date of judgment and then subtract out the sale proceeds at the very end.

Application of the interest on the balance rule depends on the date the offset is deemed to have accrued. That date could be one of several different dates, such as the date Plaintiff sold the house, the date it received title to the house, or even the date it repurchased the loan and gained the contractual right to sell the house. Each of these dates would lead to a very different calculation of interest.

The easiest approach to eliminate is the interest on the whole rule. This calculation would give Plaintiff a windfall because it did not lose use of $243,670.93 for the full time period between loan repurchase and entry of judgment and it should therefore not receive interest on that full amount. The approach of *In re Sun* has appeal because it seems to compensate Plaintiff for its actual out-of-pocket injury. In other words, Plaintiff lost use of the $243,670.93 when it repurchased the loan and then that injury decreased when it actually received the net sale proceeds. Interest would then accrue on the balance from that point forward. The same calculation would result if the Court were to apply the interest on the balance rule and deem that the offset accrued on the date Plaintiff sold the house.

However, one could argue that awarding interest on the full $243,670.93 repurchase price from the date of repurchase to the time the house sold would also result in a windfall to Plaintiff. As of the repurchase date, Plaintiff had at least the contractual right to offset its damages by applying the value of the collateral to the outstanding loan amount. One could argue that the offset therefore "accrued" on that date. Under the interest on the balance rule, this would entitle Plaintiff to interest only on the $123,643.89 balance from the date of loan repurchase forward. This argument is undercut, however, by the fact that Plaintiff did not actually own the house at the time of repurchase and, therefore, had no legal right to sell it. Ownership only transferred when Bank of America issued a quit claim deed to Plaintiff some seven months later on March 16, 2011. This could also arguably be the date the offset accrued. However, Plaintiff's receipt of a deed did not truly restore its use of funds. All Plaintiff had when it received the deed was an illiquid asset that was, in fact, causing Plaintiff to *incur* additional holding costs. It was not until Plaintiff sold the house and received the net sale proceeds that it was truly restored to its use of these funds.

Although it is a close call, the Court believes that the better approach is to apply the interest on the balance rule using the date of sale of the house as the offset accrual date. This is the same calculation used by the court in the *In re Sun* case. This means Plaintiff is entitled to prejudgment interest on the full repurchase price of the loan ($243,670.93) from the date of repurchase, August 27, 2010, until Plaintiff sold the house on December 21, 2012. After subtracting out the net sale proceeds, prejudgment interest then accrues on the remaining balance from December 22, 2012 through the date of judgment.

The Debtor's arguments that interest should only begin to accrue after sale of the house are unavailing. First, Debtor argues that Plaintiff's damages could only be accurately determined, or liquidated, when Plaintiff sold the house and so interest should not be awarded prior to that time. This argument is contrary to Colorado's prejudgment interest statute, which specifically provides that prejudgment interest is allowed on wrongfully withheld funds "even if the amount is unliquidated at the time of wrongful withholding or at the time when due." Colo. Rev. Stat. § 5-12-102(3). Colorado courts have also held that a defendant may not avoid imposition of prejudgment interest by arguing that the debt owed is unliquidated or that an unliquidated counterclaim exists. *Karg v. Mitchek*, 983 P.2d 21, 26 (Colo. App. 1998) ("[W]e reject their assertion that a debt must be liquidated to entitle the creditor to prejudgment interest."); *York Plumbing & Heating Co. v. Groussman Inv. Co.*, 443 P.2d 986, 987 (Colo. 1968) (holding that existence of defendant's unliquidated counterclaim did not render Plaintiff's claim unliquidated so as to prevent imposition of prejudgment interest). Thus, the fact that the offset was unliquidated during the time frame between Plaintiff's repurchase of the loan and sale of the house does not defeat Plaintiff's right to prejudgment interest.

The Debtor also argues Plaintiff is not entitled to prejudgment interest prior to sale of the house because, during that time, Plaintiff held title to the house, which Debtor contends is equal to holding the "fair market value" of the house. The premise of this argument is that holding title to the house somehow lessened Plaintiff's damages. This also presents a tough call. If the Plaintiff had received payment in the form of a more liquid asset, for example, marketable securities, then the Debtor's argument would be very persuasive. If the Plaintiff received securities subject to restrictions on transfer, then should the payment date be determined to be the date when the securities become freely transferrable or the original date of receipt? The present case not only involves a significant delay in liquidating the form of payment (the house) but in addition the Plaintiff incurred substantial costs in holding the house before its resale, such as insurance, taxes, and the like. Neither party nor this Court have located any precedents that address this specific question.

However, this Court is reminded that an award of pre-judgment interest is a matter committed to the discretion of the trial court. *Kim v. Sun (In re Sun)*, 535 B.R. 358, 370 (10th Cir. BAP 2015). In exercising its discretion in this case, the Court holds that the policies behind an award of prejudgment interest are best effectuated in this case by an award based on the "interest on the balance rule." Prejudgment interest is awarded to compensate a plaintiff who has been deprived of the use of its money. Payment in the form of a liquid asset, such as cash, cash equivalents, and other assets that are easily and freely exchanged for cash should be deemed to occur on the date of the plaintiff's receipt of the asset. Conversely, payment by means of an illiquid asset and especially an asset that has costs associated with holding it, should not be deemed to occur until the plaintiff has liquidated the asset and applied the proceeds to the balance owed. It is only at this point that the form of payment has restored the plaintiff's use of funds. Thus, in the absence of a binding precedent to the contrary, this Court holds that the proper accrual date for this award should be from the date of Plaintiff's repurchase of the loan, with an offset applied only on the date Plaintiff sold the house.

To the extent that Debtor's reference to the "fair market value" of the home is alluding to her earlier argument that Bank of America's credit bid for the full amount of its debt at foreclosure somehow extinguished Plaintiff's claim for fraud damages against Debtor, the Court rejects that argument for the reasons more fully stated in the Trial Order. In essence, Bank of America's full credit bid during foreclosure affected its ability (and Plaintiff's ability after repurchase) to seek a deficiency claim *against Wilson* under the loan. It did not affect or extinguish Plaintiff's right to seek damages for fraud against Debtor. *See Bank of America, NA v. First Am. Title Ins. Co.*, 878 NW.2d 816, 828-29 (Mich. 2016) (concluding bank's full credit bid during foreclosure did not bar later claim for fraud against third party closing agent and title insurer); *Tretheway v. Miracle Mortgage, Inc.*, 995 P.2d 599, 601 (Utah 2000) (concluding plaintiff's full credit bid during foreclosure did not bar later claim for fraudulent inducement against third party loan broker).

III. CALCULATION OF INTEREST

For the reasons stated above, the Court awards Plaintiff prejudgment interest on the $243,670.93 loss from the date of loan repurchase to December 21, 2012 and then, after deducting the net sale proceeds, interest on the remaining balance from the date of sale of the house through the date of entry of judgment, compounded annually. In the Trial Order, this Court described this calculation as "AMC is therefore entitled to prejudgment interest at a rate of 8% on the $243,670.93 repurchase price from August 27, 2010 until AMC sold the house on December 21, 2012 . . . AMC is then entitled to prejudgment interest at a rate of 8% on the $123,643.89 *balance* from December 22, 2012 through the date of this order." Trial Order at 37 (emphasis added). This statement failed to account for the fact that, by the time Plaintiff sold the house, prejudgment interest that had already accrued on the outstanding damage amount. Thus, the real "balance" after subtracting out the net sale proceeds would not be just the $123,643.89 damage amount. Rather the balance would include already accrued and compounded interest. Thus, the Court calculates prejudgment interest as follows:

Dates	Damage Amount	Interest Rate	Interest & Damages
8/27/10-8/26/10	$243,670.93	1.08	$263,164.60
8/27/11-8/26/12	$263,164.60	1.08	$284,217.77
8/27/12-12/21/12 (116 days)	$284,217.77 x .08/365 = $62.29 per diem interest 116 days x $53.41 = $7,226.14		
Subtotal damages and accumulated interest as of 12/21/12 ($284,217.77 + $7,226.14)			$291,443.91
Less net sale proceeds from sale of the house			-$120,027.04
Balance of damages and interest as of 12/21/12			=$171,416.87
12/21/12-12/20/13	$171,416.87	1.08	$185,130.22
12/21/13-12/20/14	$185,130.22	1.08	$199,940.64
12/21/14-12/20/15	$199,940.64	1.08	$215,935.89
12/21/15-12/20/16	$215,935.89	1.08	$233,210.76

12/21/16-12/20/17	$233,210.76	1.08	$251,867.62
12/21/17-1/5/18 (15 days)	$251,867.62 x .08/365 = $55.20 per diem interest 15 days x $55.20 = $828.06		
Total of damages and interest as of 1/5/18 ($251,867.62 + $828.06)			$252,695.68
Less amount of damages			-$123,643.89
Total Prejudgment Interest			**=$129,051.79**

The Trial Order originally suggested that prejudgment interest should be calculated through the date of that order—September 29, 2017. However, no final judgment entered on that date. Accordingly, prejudgment interest continued to accrue and the above calculation includes prejudgment interest through the date of this order and accompanying judgments.

IV. CONCLUSION

Accordingly, the Court orders that Plaintiff is entitled to a damages in the amount of $123,643.89 and pre-judgment interest in the amount of $129,051.79 for a total judgment of **$252,695.68**, plus applicable post-judgment interest, and less any other amounts collected postpetition, and that this debt is nondischargeable in Debtor's case pursuant to 11 U.S.C. § 523(a)(2)(B).

Dated this 5th day of January 2018.

BY THE COURT:

Elizabeth E. Brown, Bankruptcy Judge