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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re: Case No. 97-50321-ASW
Chapter 7

TONY B. NGUYEN,
Debtor.

AT&T UNIVERSAL CARD
SERVICES, INC.,

Adv. Pro. No. 97-5185

Plaintiff,

vs.

TONY B. NGUYEN,
Defendant.

**MEMORANDUM DECISION HOLDING DEBT DISCHARGEABLE AND
AWARDING ATTORNEY'S FEES TO DEFENDANT**

INTRODUCTION

This matter came before the Court on the complaint filed by AT&T Universal Card Services, Inc. ("Plaintiff") against Debtor Tony B. Nguyen ("Defendant"), pursuant to 11 U.S.C. §523(a)(2)(A), seeking to hold non-dischargeable the sum of \$9,419.72, including interest, plus costs and attorney fees.

1 The case was tried before the Court. Plaintiff was represented
2 by Edmund J. Sherman, Esq. Defendant was represented by Tan N. Duong,
3 Esq. ("Duong"). Plaintiff called as witnesses, Ms. Bobbie Holly
4 ("Holly"), an employee of Plaintiff, and Defendant. Defendant called
5 himself as a witness. Following the trial, the Court announced its
6 intention to rule in favor of the Defendant and explained that it
7 would issue its findings of fact and conclusions of law at a later
8 date. The Court requested that the parties attempt to resolve among
9 themselves the issue of whether Defendant is entitled to recover his
10 reasonable attorney's fees under 11 U.S.C. §523(d), with the knowledge
11 that the Court intended to rule for Defendant on the merits of the
12 lawsuit. Counsel filed a "Joint Statement Regarding Attorney Fees
13 Issue," explaining that they were unable to resolve that issue.

14 The Court then issued a Memorandum Decision finding the charges
15 at issue in this case are not excepted from discharge under 11 U.S.C.
16 §523(a)(2)(A), but reserving the issue as to whether Defendant was
17 entitled to his attorney's fees for defending this action. The Court
18 stated that it would issue a judgment on the liability issue after the
19 attorney fee issue was resolved.¹

20 This "Memorandum Decision Holding Debt Dischargeable and Awarding
21 Attorney's Fees to Defendant" supersedes and replaces the Court's
22 previously issued Memorandum Decision. It deals with both the merits
23 of the action and Defendant's request for attorney's fees.

24
25 **I. FACTS**

26 Debtor is an elderly man (75 years old as of the date of trial),
27 formerly of Vietnam. He speaks and understands English with some

1 difficulty.² He is retired and has not worked since 1991. Defendant
2 testified that he has memory failures and that, as an example, he
3 sometimes does not remember the key to the room where he lives. He
4 also testified that he has a heart condition and a very high
5 cholesterol level.³ He rents a room in a house which he shares with
6 a friend; his share of the room rental is \$200 per month. He is not
7 married and has no family in the United States.

8
9 A. Defendant's Income and Expenses

10 Defendant testified that he receives a retirement benefit of \$440
11 per month plus Social Security benefits (SSI) of \$220, for a total
12 monthly income of \$640 per month. This testimony was not contested
13 by Plaintiff. Defendant's Bankruptcy Schedule I reflects a total
14 monthly income of \$633 per month and his Bankruptcy Schedule J
15 reflects total monthly expenses of \$600. Trial Exhibit 1.

16
17 B. The AT&T Card

18 Plaintiff "pre-approved" Defendant for an AT&T Universal Gold
19 MasterCard ("AT&T Card") with an \$8,000 credit limit shortly before
20 January 1996. Plaintiff solicited Defendant by sending him written
21 notification of such pre-approval. Defendant accepted the pre-
22 approved card by filling out a brief form that asked for his income
23 and signature. It was unclear whether the form, which was not entered
24 into evidence, asked for any other information from Defendant.
25 Although the completed form was not made part of the trial record, it
26 was certainly available to Plaintiff, and the Court finds, based on
27 the evidence before it, that Defendant reported his income to

1 Plaintiff as \$640 per month.⁴

2
3 1. AT&T's Approval Process

4 Holly, Plaintiff's second witness, had worked for Plaintiff for
5 32 years as of the trial date. Her position is that of
6 "Investigations Manager." She has worked in the credit card section
7 of Plaintiff since that section's inception in 1990. She is familiar
8 with the section's books and records, including storage of
9 information. She has been trained in Plaintiff's credit granting
10 procedures. She testified that she was familiar with the criteria
11 used by AT&T to offer a particular credit card, and to establish a
12 credit limit, for a particular customer.

13 Holly stated that before offering potential customers a credit
14 card, Plaintiff checks their credit rating through a "credit scoring
15 mechanism" prepared by the Fair Isaacs Company ("FICO"). FICO is in
16 the business of analyzing credit factors electronically for the credit
17 industry in general, including banks and credit card companies, not
18 just for Plaintiff. FICO compiles this credit information from the
19 Credit Bureau and provides such information to its clients. The top
20 FICO score is 800.

21
22 2. AT&T's Basis for An \$8,000 Credit Line

23 Defendant's FICO score was 776 in January 1996 or just before.⁵
24 Holly testified that a FICO score of 776 meant that Defendant was
25 handling credit properly and had no negative credit history.
26 Plaintiff's decision to offer Defendant "pre-approved" credit was
27 based on this score and an additional check Plaintiff performs -- to

1 make sure someone is not in Plaintiff's "fraudulent file." These two
2 checks are done by Plaintiff on every candidate for credit.

3 Holly acknowledged that Plaintiff's normal practice was to
4 provide \$8,000 in credit if a person had a high FICO score and was not
5 in Plaintiff's "fraudulent file," even if his/her income was very
6 low.⁶

7 Plaintiff did not know Defendant's income when it pre-approved
8 him for a credit card with an \$8,000 limit. However, Plaintiff did
9 know that Defendant's income was only \$640 per month when Defendant
10 returned the completed pre-solicitation form. Thus, Plaintiff knew
11 Defendant had an income of only \$640 per month before Plaintiff
12 actually provided any credit to him, yet still issued a card with a
13 credit limit of \$8,000.

14 Holly's testimony was unclear and somewhat inconsistent as to
15 what additional information Plaintiff had before granting credit to
16 Defendant. At one point she stated that Plaintiff did not know what
17 Defendant's assets were; whether he owned a home, or what his debts
18 were for example. At another point, she indicated that Plaintiff
19 would have had access to at least some of this information from the
20 Credit Bureau (e.g., what Defendant's experience with credit cards had
21 been and what his credit limits were on his other credit cards). When
22 Plaintiff decided whether to offer Defendant credit and what his
23 credit limit should be, it also reviewed, or had access to, his Credit
24 Bureau report.

25 Plaintiff also knew that Defendant was unemployed before sending
26 Defendant the AT&T card; Holly stated that such information came back
27 on his pre-solicitation form.⁷ She also conceded that if someone's
28

1 income was \$640 per month and he was 75 years old, it would be safe
2 to assume that he was unemployed. Plaintiff did not know how long
3 Defendant had been unemployed. Holly admitted that, as far as
4 Plaintiff knew, Defendant might have just retired and might have
5 earned considerably more money in the years prior to Plaintiff's
6 solicitation of him. (Although Holly was not sure what the poverty
7 line was, she thought Defendant's income was below that line).

8 Holly further explained that FICO does not score for a particular
9 amount of debt. A FICO score would not tell Plaintiff, for example,
10 the amount of debt that someone had handled in the past -- whether
11 such debt was \$100, \$1,000, \$10,000, \$50,000, or more. It only would
12 tell Plaintiff how well a person handled the amount of debt that
13 he/she had. For that reason, a person might be rated with a very high
14 FICO score even though he/she had only ever borrowed very small
15 amounts of money, like \$50 or \$75.⁸

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18
19 3. AT&T's Procedure for Handling Charges

20 Exceeding a Customer's Credit Limit

21 Holly testified that when Plaintiff's "good" customers reach, and
22 then seek to exceed, their credit limits, Plaintiff's policy is to
23 allow them to exceed such limits so as not to embarrass them, and then
24 "deal with them later," if the amount sought is not significantly over
25 their limits. Here, Plaintiff allowed Defendant to exceed his credit
26 limit by over \$1,175 on an \$8,000 line of credit, which Holly
27 testified was significant. Holly's explanation as to why Plaintiff

1 allowed Defendant to exceed his limit was simply that Plaintiff did
2 not want to "embarrass" its customers.

3
4 C. Defendant's Use of the AT&T Card:

5 The Charges at Issue

6 Defendant used the AT&T card beginning in January 1996. Trial
7 Exhibit 2 consists of some of Plaintiff's records of Defendant's AT&T
8 credit card bills for the period from January 1996 through December
9 1996. The documents Plaintiff submitted at trial indicate that
10 Defendant apparently used the card through July 1996, without a
11 problem. For example, he used it for five transactions totaling
12 \$110.19 from January 31 through February 16, 1996. He timely paid
13 that bill in full on March 4, 1996. On February 23, 1996, he used
14 the card for one \$77.58 transaction. Trial Exhibit 2 does not include
15 Plaintiff's records for the period March 26, 1996, through July 25,
16 1996. Defendant's statement for the period July 26, 1996, through
17 August 25, 1996, reflects a zero "previous balance" (which means that
18 Defendant paid the earlier \$77.58 charge), but Trial Exhibit 2 is
19 silent as to when that payment was paid or whether other charges were
20 incurred or payments were made in the intervening period.

21 The statement for the period July 26, 1996 through August 25,
22 1996, reveals charges for purchases and cash advances totaling \$9,000,
23 plus finance charges of \$105.32. Those charges and finance charges
24 placed Defendant \$1,175.84 over his credit limit, according to this
25 statement.

26
27 D. Defendant's Payments to AT&T

1 Defendant made a payment of \$68.84 on his account on September
2 11, 1996, and another payment of \$224.16 on October 7, 1996. Trial
3 Exhibit 2. He made no further payments on the account.

4 Defendant filed his Petition and Schedules under Chapter 7 of the
5 Bankruptcy Code on January 14, 1997, about five months after the
6 August charges were made. His Petition reflects that he was
7 represented at that time by Peter D. Manning, Esq., a San Jose
8 attorney.

9
10 E. Defendant's Use of Other Credit Cards

11 Defendant also used three other credit cards during 1996. He
12 used each of them responsibly during the first few months of 1996,
13 making modest charges and expenses, until July 1996. For example, his
14 NationsBank statement, with a March 17, 1996 closing date, showed a
15 zero "previous balance" and charges of \$162.33. Trial Exhibit 6. He
16 timely paid the \$162.33 in full on March 26, 1996, and made additional
17 charges in March and early April totaling \$111.52. In July 1996, he
18 charged \$1,730 on that card for some purpose in Ho Chi Minh City,
19 Vietnam, and made a \$130 payment on the card on July 29, 1996.⁹ In
20 August 1996, he took a series of cash advances on that card totaling
21 \$8,500, bringing his balance to \$10,843.26. Trial Exhibit 7.

22 His Shell Oil credit card statements showed modest charges and
23 regular payments from January through July 1996. Then on August 11,
24 1996, he took a \$4,000 cash advance on that card. Trial Exhibit 7.

25 His First Card statements showed limited activity (small or no
26 charges and regular payments) in the first part of 1996. Then, in
27 August 1996, he took cash advances totaling nearly \$9,600 and made

1 payments of \$134.97. Trial Exhibit 8.

2 No evidence was presented by Plaintiff or Defendant of
3 Defendant's use of any specific credit cards before 1996. The record
4 does not reveal, therefore, the extent to which he used credit before
5 that time. One cannot tell whether he used very small amounts of
6 credit (e.g., charging from zero up to a total of \$50 or \$100) or
7 whether he charged larger amounts. However, as explained later in
8 this Decision, and based on Holly's testimony, Defendant apparently
9 used some credit satisfactorily before January 1996, although he may
10 have used credit very infrequently and the amounts borrowed or charged
11 may have been very small.

12 Consistent with the foregoing explanation of Defendant's use of
13 his four credit cards, Debtor's Bankruptcy Schedule F (Trial Exhibit
14 1) reflects the following unsecured claims totaling \$34,441.58:

15

16	AT&T Universal Gold MasterCard	\$ 9,270.61
17	First Card	\$10,057.23
18	NationsBank of Delaware	\$10,910.28
19	Shell MasterCard	\$ 4,203.46

20

21 F. Defendant's Gambling

22 Defendant testified that he lost the money that he borrowed on
23 these credit cards through gambling. Defendant's Statement of
24 Financial Affairs (Trial Exhibit 1) reflects that he lost \$30,000
25 during the period December 1995 through December 1996 due to gambling.
26 He explained that he had gambled since he was a small child in
27 Vietnam. He gambled throughout his life, gambling regularly as an

28

1 adult. Before 1996 he had gambled in Las Vegas and in Reno, Nevada,
2 and at Bay 101 in California. He liked to play the game "21." In the
3 past, he would take small amounts of money, sometimes from credit
4 cards, play and win, and pay back what he had borrowed.

5 Then, in 1996, he gambled and lost a lot of money. He began to
6 gamble larger amounts of money with both the hope and the expectation
7 of winning and paying the monies back, as he had done before. He
8 explained that he had to gamble large amounts of money so he could pay
9 back the large sum of money he owed. In August 1996, he gambled
10 "big," to recoup his losses. He insisted over and over again that he
11 always intended to repay Plaintiff. He was very emotional at trial,
12 crying intermittently.

13 Defendant also explained that he tried to find work to pay
14 Plaintiff back. He testified that, after he lost the money he took
15 from his AT&T card, he sought work in gas stations and as a dishwasher
16 in Vietnamese restaurants, but that no one would hire him because he
17 was too old.

18
19 **II. APPLICABLE LAW**

20 **A. The Elements of Fraud**

21 Plaintiff requests that the credit card debt owed by Defendant
22 to Plaintiff be declared non-dischargeable in bankruptcy because the
23 extension of credit from Plaintiff to Defendant allegedly was obtained
24 through Defendant's actual fraud. 11 U.S.C. §523(a)(2)(A) provides
25 as follows:

26 (a) A discharge under section 727, 1141, 1228(a),
27 1228(b), or 1328(b) of this title does not discharge an
individual from any debt -- . . . (2) for money,

1 property, services, or an extension, renewal, or
2 refinancing of credit to the extent obtained by -- (A)
3 false pretenses, a false representation, or actual fraud,
other than a statement respecting the debtor's or an
insider's financial condition.

4 11 U.S.C. §523(a)(2)(A)

5 In the Ninth Circuit, to prove actual fraud, a creditor must
6 demonstrate each of the following elements:

- 7 (1) The debtor made the representations;
8 (2) at the time he knew they were false;
9 (3) he made them with the intention and purpose of deceiving the
10 creditor;
11 (4) the creditor relied on such representations; and
12 (5) the creditor sustained the alleged loss and damage as the
13 proximate result of the representations having been made.

14 See Citibank (South Dakota), N.A. v. Eashai (In re Eashai), 87 F.3d
15 1082, 1086 (9th Cir. 1995) ("Eashai") and cases referenced therein.
16 "The Creditor must prove each element of fraud by a preponderance of
17 evidence." Id., citing Grogan v. Garner, 498 U.S. 279, 290, 111 S.Ct.
18 654, 661, 112 L.Ed.2d 775 (1991) ("Grogan").

19 As explained by the Ninth Circuit in Eashai:

20 Recently, in Field v. Mans, --- U.S. ---, 116 S.Ct. 437,
21 133 L.Ed.2d 351 (1995), the Supreme Court determined that
22 when Congress used the term "actual fraud" in
23 §523(a)(2)(A), Congress was referring to the general common
24 law of torts. [FN3] Id. at ---- n. 9, 116 S.Ct. at 443 n.9.
25 Thus, the Supreme Court's interpretation of the term
"actual fraud" reaffirms the Ninth Circuit's practice of
using the common law elements of fraud in exception to
discharge cases.

26 Eashai, 87 F.3d at 1086-87.

27 Fraud cases based upon credit card debts are different from some

1 other types of fraud cases, in that credit card transactions "involve
2 three parties: (1) the debtor/card holder; (2) the creditor/card
3 issuer; and (3) the merchant who honors the credit card." Id. at
4 1087. The difficulty in credit card cases is for the creditor/card
5 issuer "to prove the elements of misrepresentation and reliance", even
6 though the issuer does not normally deal face to face with the debtor
7 -- at least at the time the credit card purchases at issue are made.
8 Id.

9 In Anastas v. American Savings Bank, 94 F.3d 1280 (9th Cir. 1996)
10 ("Anastas"), the Ninth Circuit clarified that in applying the common
11 law elements of fraud to the situation of credit card debt, the Court
12 must make three essential inquiries:

- 13 (1) Did the card holder fraudulently fail to disclose his
14 intent not to repay the credit card debt;
- 15 (2) did the card issuer justifiably rely on a representation by
16 the debtor; and
- 17 (3) was the debt sought to be discharged proximately caused by
18 the first two elements?

19 Anastas, 94 F.3d at 1283, citing Eashai, 87 F.3d at 1088.

20 With regard to the first issue, i.e., whether the debtor
21 fraudulently failed to disclose his intent not to repay the credit
22 card debt, the Ninth Circuit, in Eashai, analyzed three different
23 legal theories, rejected two of them, and adopted the third. 87 F.3d
24 at 1087-88.

25 The Court of Appeals rejected the majority "implied
26 representation" approach, according to which a credit card holder
27 impliedly represents upon using the credit card that he has the

1 ability and intention to pay for the goods or services. Id. at 1088.
2 The Ninth Circuit also rejected the "assumption of the risk" theory,
3 according to which a card holder makes a false representation to the
4 issuer only when the card holder continues to use the card after the
5 card has been revoked and that revocation has been communicated to
6 him. Id. Under that theory, only those charges made after the
7 cardholder has been notified that his/her card has been revoked are
8 non-dischargeable under §523(a)(2)(A). Id.

9 The Ninth Circuit adopted the third approach, sometimes referred
10 to as the "totality of the circumstances" theory. Eashai at 1087.
11 That theory was established in In re Faulk, 69 B.R. 743, 757 (Bankr.
12 N.D. Ind. 1986) and adopted by the Ninth Circuit Bankruptcy Appellate
13 Panel in In re Dougherty, 84 B.R. 653 (9th Cir. BAP 1988). Id. Under
14 this theory, the trial court may consider twelve non-exclusive factors
15 (referred to as the "Dougherty factors") in determining the debtor's
16 intent, i.e., whether or not the debt was incurred through actual
17 fraud (where the debtor made the charges with no intention of paying
18 for the goods or services). Id. at 1087-88.

19 The Ninth Circuit emphasized in Eashai that the Dougherty factors
20 go to the issue of whether or not there was an intent on the part of
21 the debtor to deceive, and that the creditor must also prove the other
22 elements of common law fraud, including a false representation,
23 justifiable reliance, and damages.

24 We incorporate the twelve factors of Dougherty into an
25 approach which gives consideration to all of the elements
26 of common law fraud. We adopt the twelve factors of
27 Dougherty to establish the element of intent to deceive.
28 However, a creditor in a credit card kiting case must also
prove the other elements of common law fraud, including a
false representation, justifiable reliance, and damages.

1 Eashai, 87 F.3d at 1088.

2 The Ninth Circuit then reiterated in Anastas that the finder of
3 fact may refer to the Dougherty factors "in determining whether there
4 was a lack of intent to repay", Anastas, 94 F.3d at 1284, but that the
5 additional elements of fraud normally required in §523(A)(2)(a) cases
6 also apply in the case of credit card debt. Id. at 1286, citing
7 Eashai, 87 F.3d at 1088.

8
9 B. The Element of Defendant's Fraudulent Intent

10 The twelve non-exclusive Dougherty factors, which are used to
11 analyze the debtor's intent, are as follows:

- 12 1. The length of time between the charges made
13 and the filing of bankruptcy;
- 14 2. whether or not an attorney has been consulted
concerning the filing of bankruptcy before the
charges were made;
- 15 3. the number of charges made;
- 16 4. the amount of the charges;
- 17 5. the financial condition of the debtor at the
time the charges were made;
- 18 6. whether the charges were above the credit
limit of the account;
- 19 7. whether the debtor made multiple charges on the
same day;
- 20 8. whether or not the debtor was employed;
- 21 9. the debtor's prospects for employment;
- 22 10. financial sophistication of the debtor;
11. whether there was a sudden change in the debtor's
buying habits; and
12. whether the purchases were made for luxuries or
necessities.

23 See Eashai, 87 F.3d at 1087-88.

24 In Anastas, 94 F.3d at 1285-86, the Ninth Circuit highlighted the
25 important difference between an ability to repay and an intention to
26 repay, explaining that the trial court's duty is to decide whether
27 there was an intention to repay.

1 We emphasize that the representation made by the card
2 holder in a credit card transaction is not that he has an ability
3 to repay the debt; it is that he has an intention
4 to repay. Indeed, section 523(a)(2) expressly prohibits
5 using a non-written representation of a debtor's financial
6 condition as a basis for fraud.

7 Thus the focus should not be on whether the debtor was
8 hopelessly insolvent at the time he made the credit card
9 charges. A person on the verge of bankruptcy may have been
10 brought to that point by a series of unwise financial
11 choices, such as spending beyond his means, and if ability
12 to repay were the focus of the fraud inquiry, too often
13 would there be an unfounded judgment of non-
14 dischargeability of credit card debt. Rather, the express
15 focus must be solely on whether the debtor maliciously and
16 in bad faith incurred credit card debt with the intention
17 of petitioning for bankruptcy and avoiding the debt.

18 The Court of Appeals explained further as follows:

19 While we recognize that a view to the debtor's overall
20 financial condition is a necessary part of inferring
21 whether or not the debtor incurred the debt maliciously and
22 in bad faith, and that the twelve factors that were set out
23 in [In re Eashai, 87 F.3d 1082 (9th Cir. 1996)] are useful
24 for arriving at a finding of bad faith, the hopeless state
25 of a debtor's financial condition should never become a
26 substitute for an actual finding of bad faith.

27 We have previously held that reckless disregard for
28 the truth of a representation satisfies the element that
the debtor has made an intentionally false representation
in obtaining credit. Houtmann v. Mann (In re Houtmann),
568 F.2d 651, 656 (9th Cir. 1978). However, in applying
the concept of reckless disregard for the truth of a
representation in the case of credit card debt, we must be
careful to keep in mind that the representation being made
by the card holder is solely as to intent to repay, not as
to the debtor's ability to repay. Thus, courts faced with
the issues of dischargeability of credit card debt must
take care to avoid forming the inquiry under section
523(a)(2)(A) as to whether the debtor recklessly
represented his financial condition. The correct inquiry
is whether the debtor either intentionally or with
recklessness as to its truth or falsity, made the
representation that he intended to repay the debt.

29 Anastas, 94 F.3d at 1286 (emphasis added).

30 C. The Element of Justifiable Reliance

1 The correct standard of reliance to be applied in a §532(a)(2)(A)
2 action is a question of federal law. See Grogan, 498 U.S. at 284; In
3 re Apte, 180 B.R. 223, 227 (9th Cir. BAP 1995) ("Apte"). The Ninth
4 Circuit has held that "justifiable reliance" is the proper standard
5 to be applied in §523(a)(2)(A) actions. See In re Kirsh, 973 F.2d
6 1454, 1457 (9th Cir. 1992) ("Kirsh"). In considering whether reliance
7 is justifiable, the Court must consider "the knowledge and
8 relationship of the parties." Id. at 1458; Apte, 180 B.R. at 229.

9 With respect to the required element of justifiable reliance, the
10 Ninth Circuit stated in Anastas:

11 As we explained in Eashai, the credit card issuer
12 justifiably relies on a representation of intent to repay
13 as long as the account is not in default and any initial
14 investigations into a credit report do not raise red flags
15 that would make reliance unjustifiable. Eashai, 87 F.3d at
16 1091.

17 Anastas, 94 F.3d at 1286.

18 D. The Statutory Presumption of Non-Dischargeability

19 The Statute provides for a rebuttable presumption of non-
20 dischargeability in certain circumstances. Section 523(a)(2)(C)
21 provides that:

22 for purposes of subparagraph (A) of this paragraph,
23 consumer debts owed to a single creditor and aggregating
24 more than \$1,000 for ?luxury goods or services? incurred by
25 an individual debtor on or within 60 days before the order
26 for relief under this title, or cash advances aggregating
27 more than \$1,000 that are extensions of consumer credit
28 under an open end credit plan obtained by an individual
debtor on or within 60 days before the order for relief
under this title, are presumed to be nondischargeable;
?luxury goods or services? do not include goods or services
reasonably acquired for the support or maintenance of the
debtor or a dependent of the debtor; an extension of
consumer credit under an open end credit plan is to be

1 defined for purposes of this subparagraph as it is defined
2 in the Consumer Credit Protection Act.

3 11 U.S.C. §523(a)(2)(C). As none of the charges involved in this case
4 were incurred within sixty days of January 14, 1997, the date
5 Defendant filed for bankruptcy protection, the statutory presumptions
6 contained in section 523(a)(2)(C) are inapplicable.

7
8 E. Recovery of Defendant's Attorney Fees

9 The Code also provides that a Debtor may recover reasonable
10 attorneys fees incurred in defending certain non-dischargeability
11 actions. Section 523(d) provides:

12 If a creditor requests a determination of
13 dischargeability of a consumer debt under subsection (a)(2)
14 of this section, and such debt is discharged, the court
15 shall grant judgment in favor of the debtor for the costs
16 of, and a reasonable attorney's fee for, the proceeding if
17 the court finds that the position of the creditor was not
18 substantially justified, except that the court shall not
19 award such costs and fees if special circumstances would
20 make the award unjust.

21 11 U.S.C. §523(d).

22 III. ANALYSIS

23 A. Defendant's Intent to Repay

24 Plaintiff has not met its burden of proof with respect to the
25 elements of the claim for relief alleged: Plaintiff has not
26 demonstrated that, when Defendant used his AT&T card in August 1996,
27 he did not intend to repay the sums he borrowed. Plaintiff has also
28 failed to prove that it justifiably relied upon a representation by
29 Defendant.

30 1. The Dougherty Factors

1 The first issue before the Court is whether Defendant intended
2 to pay the AT&T charges back when he incurred them. In this regard,
3 the Court's analysis of the Dougherty factors is as follows.

4 The charges at issue in this case were made in August 1996, about
5 five months prior to the date Defendant filed for bankruptcy. Thus,
6 Plaintiff does not have the benefit of a statutory presumption of non-
7 dischargeability. Because five months is a relatively long time,
8 this factor favors the Defendant or is neutral. It does not assist
9 the Plaintiff in its attempt to show that Defendant incurred the
10 charges at issue here with no intention of paying them back.

11 The record is unclear as to whether Defendant consulted an
12 attorney prior to August 1996, when the charges at issue were made.
13 Defendant explained that he did talk to a secretary, named Miss Romie,
14 who apparently worked for an attorney, but testified that he never
15 met, or even spoke with the attorney for whom she worked. No evidence
16 was presented as to the date Defendant spoke with Miss Romie or
17 whether they spoke before or after August 1996. Defendant's Statement
18 of Financial Affairs, Form 7, states that Defendant paid Geoffrey
19 Rawlings, Esq. the sum of \$550 for advice regarding debt counseling
20 or bankruptcy within a year of filing his Petition, but the record is
21 silent as to when Defendant spoke with him (and whether they spoke
22 before or after August 1996). It is possible that Ms. Romie may have
23 worked for Mr. Rawlings, in which case Defendant may never have met
24 Mr. Rawlings personally.

25 Peter D. Manning, Esq., a San Jose attorney, represented
26 Defendant in filing his Bankruptcy Petition in January 1997, but there
27 was no evidence that Defendant consulted with him prior to August
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1 1996. This factor does not assist the Plaintiff as the record is
2 incomplete.

3 Defendant made four charges for purchases and took twelve cash
4 advances from his AT&T card in August 1996, for a total of \$9,070.32.
5 These two factors (the number and amount of the charges) favor
6 Plaintiff.

7 Defendant's financial condition when the charges were made was
8 extremely limited given his very low income, as explained above. This
9 factor favors Plaintiff on the issue of Defendant's intent (but, as
10 explained below, goes against Plaintiff on the issue of justifiable
11 reliance).

12 Defendant exceeded his credit limit on the AT&T card in August
13 1996 by about \$1,175.84.¹⁰ The Court notes, in this connection, that
14 plaintiff voluntarily chose to allow Defendant to exceed his credit
15 limit, as conceded by Holly. Plaintiff did not allege, or prove, that
16 Defendant engaged in a "kiting" or similar scheme in order to defraud
17 Plaintiff into allowing him to exceed his limit. This factor is
18 neutral or favors Plaintiff somewhat.

19 Defendant took cash advances of \$7,000 on August 13, 1996 and
20 \$200 on August 14, 1996, two cash advances of \$200 on August 15, 1996
21 and \$200 on August 16, 1996, \$100 on August 17, 1996, \$200 on August
22 18, 1996, two cash advances of \$200 each on August 20, 1996 and August
23 21, 1996, and a cash advance of \$100 on August 22, 1996. This factor
24 of multiple cash advances in a short period of time, along with the
25 Defendant's general use of the card during August 1996, favors
26 Plaintiff.

27 Debtor was unemployed when he used the card in August 1996. This
28

1 factor favors Plaintiff on the issue of Debtor's intent.

2 Debtor sought employment to repay his debt to Plaintiff, but was
3 unable to find work because of his age. The fact that Defendant
4 sought employment in order to repay Plaintiff weighs in his favor.
5 Although he thought he could find some kind of work, Defendant's
6 objective prospects for significant employment were not good. Also,
7 his chances of repaying all four credit card companies, from which he
8 took cash advances of over \$30,000, through work as a dishwasher or
9 helper in a gas station, were very poor.

10 The record was not clear as to the level of Defendant's financial
11 sophistication. He was not questioned about his education, his
12 employment history, his ownership of property, and/or his business
13 experience in the past. His income (since at least 1996) and life
14 style (sharing a rented room with another person) did not provide much
15 opportunity for learning about financial matters. The Court finds
16 that he was below average in financial sophistication. This factor
17 favors Defendant.

18 There was a sudden change in Defendant's use of credit. He took
19 cash advances totaling over \$30,000 from his various credit cards in
20 August 1996, including the sums taken from his AT&T card. This factor
21 favors Plaintiff.

22 Defendant used the money obtained from the cash advances
23 primarily for gambling. Gambling is certainly not a necessity
24 (although it can be an addiction), but it was Defendant's method of
25 trying to pay back sums that he had borrowed and lost at gambling.

26 The Court found credible and plausible Defendant's testimony that
27 he had used the cash advances from his AT&T card for gambling and had

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1 lost the money. This was consistent with Defendant's testimony about
2 his lifelong history of gambling.

3 Plaintiff's counsel questioned Defendant about whether Defendant
4 had really gambled the money he had obtained from advances on his
5 credit cards in August 1996, or had used it for some other purpose.
6 Plaintiff's counsel also argued to the Court that Defendant might have
7 "drawn down" his credit cards and secreted the money away in Vietnam
8 or in the United States. While that scenario is conceivable,
9 Plaintiff provided no evidence in support of it. Based on the record
10 before the Court, it is certainly more likely that Defendant gambled
11 and lost, as he testified, than that he is holding tens of thousands
12 of dollars somewhere. Plaintiff did not show that Defendant was
13 living at a level above his income. Defendant was still sharing one
14 room in a house as of the trial date. Plaintiff did not demonstrate
15 that Defendant had, or had transferred, any significant assets or that
16 he had used credit card advances from his AT&T card or any other card
17 for a purpose other than gambling. In this regard, Plaintiff could
18 have sought and obtained bank statements and other financial records
19 from Defendant in discovery. It did not. Plaintiff did endeavor to
20 depose Defendant, but did not file a motion to compel when Defendant's
21 counsel advised Plaintiff's counsel, in advance of the deposition,
22 that Defendant would not appear at his scheduled deposition.
23 Defendant testified at trial that he did not appear at his scheduled
24 deposition because of a pre-existing dental appointment. Plaintiff's
25 counsel apparently tried unsuccessfully to reschedule the deposition.
26 Plaintiff did not seek the Court's assistance -- either to order a
27 deposition or to continue the trial pending completion of discovery.

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1 Plaintiff's counsel also attempted to show that Defendant did not
2 have a history of borrowing for gambling purposes and then paying
3 monies back. In this connection, counsel for Plaintiff pointed out
4 that the credit card statements in evidence before the Court did not
5 show cash advances prior to July or August, 1996.¹¹ However,
6 Plaintiff only introduced statements for 1996, and those were
7 incomplete. As noted above, no statements were introduced for the
8 years prior to 1996. No other financial records of Defendant such as
9 bank statements, records of loans, etc. were introduced.

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13 2. Defendant Intended to Repay AT&T.

14 Defendant insisted over and over again at trial that he intended
15 to pay back the advances he took from his AT&T card. The Court
16 accepts Defendant's testimony that he intended to win back the monies
17 he had borrowed from his AT&T card to be able to repay Plaintiff.
18 Defendant's efforts to find a job in order to pay Plaintiff support
19 his position that he did not incur the AT&T charges with the intention
20 of discharging them in bankruptcy.

21 Defendant's payments on the AT&T card -- \$68.84 in September and
22 \$224.16 in October, 1996 -- also support his position that he used his
23 AT&T card with the intention of repaying Plaintiff. Defendant
24 testified that he filed bankruptcy because he realized that could not
25 pay back his credit card debt. He owed too much to be able to repay
26 it. That was certainly a realistic assessment of his financial
27 situation.

1 seventies, with no assets, who speaks English with difficulty, who
2 shares a room as his residence, and has a total income of \$640 per
3 month.

4 It is also important to note that in this case, unlike the
5 situation in Eashai and certain other cases, Debtor did not engage in
6 a kiting or similar scheme in an effort to fool the Plaintiff into
7 lending him more money, or giving him more credit, than Plaintiff
8 otherwise would have done. See, e.g., Eashai, 87 F.3d at 1090 ("Thus,
9 by kiting, the debtor induces the creditor to refrain from action in
10 reliance on the appearance of the debtor's intent to repay").

11 Creditor has not demonstrated justifiable reliance upon Debtor's
12 promise, implicit in the use of his AT&T card, to repay over \$8,000.
13 Defendant's income, known to Plaintiff before Plaintiff sent him an
14 AT&T card, was only \$640 per month. The finance charge rate (referred
15 to as "Effective Annual Percentage Rate" on Plaintiff's statements to
16 Defendant) was 15.50 percent. Trial Exhibit 3 at pages 4 and 5. The
17 statement for the period 8/26/96 through 9/25/96 reflects a "New
18 Balance" of \$9,227.46, finance charges for that month alone of
19 \$120.46, and a "Minimum Payment" of \$1,545.62. It is unreasonable to
20 expect that someone with a total monthly income of \$640 could possibly
21 make these payments. Plaintiff could not justifiably rely on
22 Defendant's ability to repay \$8,000 or \$9,000 at 15.50 percent
23 interest from a monthly income of \$640.

24 Although Plaintiff apparently knew Defendant was unemployed
25 before it provided Defendant with a credit card, the Court does not
26 rely upon this fact in reaching its decision. Even if Defendant's
27 \$640 monthly income was derived from earnings, he could not have

1 repaid Plaintiff \$8,000 or more.¹²

2 Plaintiff's income should have raised major "red flags" that made
3 reliance by Plaintiff unjustifiable. Anastas, 94 F.3d at 1286.¹³
4 Instead plaintiff chose to provide Defendant with an \$8,000 line of
5 credit -- which was more than Defendant's entire gross yearly income.
6 Defendant could not afford the minimum payment on that sum.
7 Additionally, Plaintiff then made the decision to allow Defendant to
8 exceed that limit by \$1,175.84.¹⁴

9 Plaintiff has not shown that Defendant had a history, prior to
10 January 1996, of borrowing and repaying any sums approaching \$8,000
11 or \$9,000. The record is silent as to the amount of credit Defendant
12 used prior to 1996, or the frequency, or period of time, during which
13 Defendant ever used credit. Holly's testimony about Defendant's FICO
14 score does not demonstrate justifiable reliance on Plaintiff's part
15 for either a credit line of \$8,000, or for allowing Defendant to
16 exceed that limit by \$1,175.84, because of the limitations of the FICO
17 methodology to which Holly testified.

18 There is no evidence on the record before this Court that
19 Plaintiff had any reason to believe that Defendant had any assets or
20 any real prospect for paying back the money Plaintiff lent to him.
21 Thus, Plaintiff chose to offer an amount of credit to Defendant that
22 Plaintiff knew, or certainly should have known, that Defendant could
23 not repay.

24 The Court also notes, but does not rely on the fact that
25 Plaintiff knew, before offering Defendant credit, that Defendant
26 possessed other credit cards; Plaintiff knew, or could have known,
27 from the Credit Bureau what the credit limits were on those cards.

28

1 When Plaintiff decided to offer \$8,000 in credit to Defendant, he
2 already had a \$10,700 line of credit on his NationsBank card (Trial
3 Exhibit 6), a \$4,700 credit line on his Shell card (Trial Exhibit 7),
4 and a \$10,000 credit line on his First Card (Trial Exhibit 8). Thus,
5 Plaintiff gave Defendant an AT&T card with an \$8,000 line of credit,
6 knowing that he would then have a total of about \$32,400 in credit on
7 his four credit cards, although his monthly income was only \$640 per
8 month.

9 Stated differently, four of Defendant's creditors (including
10 Plaintiff), which are among the most important lending institutions
11 in the country, lent a total of over \$32,400 to an unemployed man in
12 his mid-seventies, for whom English was not a first language, with an
13 income of \$640 per month.

14 15 C. Defendant's Reasonable Attorney Fees

16 The issue remaining before the Court is whether Plaintiff should
17 be required to pay Defendant's reasonable attorney's fees under
18 Bankruptcy Code Section 523(d).

19 The award of reasonable attorney's fees under 11 U.S.C. §523(d)
20 is within the Bankruptcy Court's sound discretion. See Vaselli v.
21 Wells Fargo Bank, N.A.(In re Vaselli), 5 F.3d 351, 352 (9th Cir.
22 1993); In re Stahl, 222 B.R. 497, 504 (Bankr. W.D. N.C. 1998)
23 ("Stahl") ; In re Williams, 217 B.R. 387, 388 (Bankr. D. Conn. 1998)
24 ("Williams"). The Court need not find that the Plaintiff acted in bad
25 faith or acted frivolously before fees and costs may be awarded.
26 Stahl, 222 B.R. at 505; Williams, 217 B.R. at 388. The court must
27 only make the determination that the plaintiff proceeded past a point
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1 where it knew, or should have known, that it could not carry its
2 burden of proof. See Williams, 217 B.R. at 389, citing American
3 Savings Bank v. Harvey (In re Harvey), 172 B.R. 314, 318-19 (9th Cir.
4 BAP 1994). "Substantially justified" has been interpreted to require
5 that the plaintiff-creditor had a reasonable basis both in fact and
6 in law to bring and pursue its non-dischargeability action. Stahl,
7 222 B.R. at 505; Williams, 217 B.R. at 388.

8 The strongest support for allowance of attorney's fees to
9 Defendant in this case comes from Defendant's very limited income of
10 \$640 per month -- a fact known to Plaintiff before providing Defendant
11 with a credit card. Plaintiff knew Defendant's income from
12 Defendant's credit application before Plaintiff issued the card.
13 Before bringing this action, Plaintiff also had access to Defendant's
14 schedules which were consistent with Defendant's credit application
15 form (to the Plaintiff) as to Defendant's \$640 per month income.
16 Based on that income, Plaintiff should have known that it could not
17 demonstrate the essential element of justifiable reliance. Both when
18 Plaintiff issued a credit card to Defendant and when Plaintiff filed
19 the instant action, Plaintiff had no evidence or reason to believe
20 that Defendant had the ability to repay \$8,000 or \$9,000 from a source
21 other than his income. Plaintiff's position in this case --
22 especially on the justifiable reliance issue -- was not substantially
23 justified. Indeed, it is preposterous for an experienced lender, such
24 as Plaintiff, to assume that a person in Defendant's position could
25 repay over \$8,000 at 15.50 percent interest.

26 In AT&T Universal Card Services Corp. v. Duplante (In re
27 Duplante), 215 B.R. 444, 450 (9th Cir. BAP 1997) ("Duplante"), the BAP

1 stated that the Ninth Circuit standard for finding substantial
2 justification on the issue of intent as: "[a] creditor reviewing the
3 credit card statements and Debtor's schedules and financial statements
4 would have been justified in believing, at least initially, that it
5 could prevail in a Dougherty analysis." The BAP analyzed the
6 adversary process on a continuum, looking for any point (between
7 filing of the complaint through judgment) that the plaintiff was not
8 substantially justified in pursuing or continuing the litigation.
9 Duplante, 215 B.R. at 450.

10 As discussed above at pages 12-17, the Dougherty factors go to
11 the issue of whether or not there was an intent on the part of the
12 debtor to deceive. However, in order to prevail in a §523(a)(2)(A)
13 action, the creditor must also prove the other elements of common law
14 fraud, including a false representation, justifiable reliance, and
15 damages. Eashai, 87 F.3d at 1088; Anastas, 94 F.3d at 1284. In the
16 instant case, Plaintiff was alerted by the "red flags" in Defendant's
17 credit application that Plaintiff could not justifiably rely on
18 Defendant's ability to repay \$8,000 or more at 15.50 percent interest.
19 Plaintiff had no reason to believe that its reliance was justified --
20 from the time prior to filing its complaint through the trial.
21 Plaintiff knew, or certainly should have known, that Defendant could
22 not repay \$8,000, much less the \$9,419.72 for which Plaintiff sued
23 Defendant. The Court therefore "concludes that a reasonable creditor
24 in the plaintiff's shoes would not have litigated with the debtor and
25 that the plaintiff was not substantially justified in so proceeding."
26 Williams, 217 B.R. at 388.

27 No special circumstances make this award of attorney fees unjust.
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1 In this connection, there is no evidence that Plaintiff's
2 representative attended the §341 Meeting of Creditors held in
3 Defendant's bankruptcy case, which might have provided an opportunity
4 to ask Defendant questions, the answers to which might have convinced
5 Plaintiff not to file the instant action. Plaintiff apparently also
6 filed this lawsuit without seeking an examination of Defendant under
7 Bankruptcy Rule 2004.

8 Plaintiff also could have sought an extension of the discharge
9 date in order to conduct a 2004 exam of Defendant, but did not.
10 During the litigation, Plaintiff sent Defendant written
11 interrogatories and document requests, to which Defendant responded.
12 Trial Exhibits 5, 9, and E.¹⁵

13 Plaintiff noticed Defendant's deposition and sought documents in
14 connection with that deposition. See Trial Exhibit 11 noticing
15 Defendant's deposition for October 20, 1997. On October 17, 1997,
16 Defendant's counsel wrote to Plaintiff advising that Defendant was not
17 available on October 20, 1997, and inviting Plaintiff's counsel to
18 call to reschedule the deposition. Trial Exhibit 13. Plaintiff's
19 counsel apparently tried unsuccessfully to reach Defendant's counsel
20 to reschedule it. Trial Exhibit 14. However, Plaintiff did not file
21 a motion to compel Defendant's appearance at a deposition or to
22 continue the trial in order to depose the Defendant.

23 Duong, Defendant's attorney, submitted a Declaration in Support
24 of Defendant's Request for Attorney's Fees. Duong's charges are
25 \$3,760 in attorney's fees, \$65.20 in costs and \$129.85 in interest
26 charges. Plaintiff, although given every opportunity to do so, did
27 not challenge a single charge, or the total bill. Except for the
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1 matter of interest on the unpaid bill, the amounts set forth in the
2 Duong Declaration appear to the Court to be reasonable. Duong charges
3 \$150 per hour, which is in the low-to- medium range of fees of
4 bankruptcy practitioners. However, the Court's impression is that
5 Duong has less bankruptcy experience than many bankruptcy
6 practitioners who appear regularly before the Court and is not yet a
7 seasoned trial lawyer.

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D. Interest on Attorney Fees

10 Duong purports to charge Defendant for "interest" on the unpaid
11 portion(s) of his bill. Defendant, who did not brief the attorney fee
12 issue, offers no support for having to pay his own bankruptcy lawyer
13 either pre-petition or post-petition interest or for charging
14 Plaintiff for such interest.

15 There is no evidence before the Court that Defendant has a legal
16 obligation to pay his attorney any interest. No fee contract pursuant
17 to which Defendant agreed to pay interest to his attorney accompanies
18 the request. No other basis for charging interest is asserted.
19 Plaintiff, however, did not challenge Defendant's request for interest
20 for his attorney. Nevertheless, the only factor that suggests to the
21 Court that some interest might be appropriate in this case was the
22 delay caused by Plaintiff's failure to follow this Court's orders by
23 failing to file and serve a timely Response to Defendant's request for
24 attorney fees. However, the Court has decided in this case to
25 exercise its discretion not to award to Defendant, and against the
26 Plaintiff, the interest which Defendant's attorney purports to charge
27 him.

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IV. Conclusion

For the reasons hereinabove set forth, Debtor's \$9,175.84 credit card debt is not excepted from discharge under 11 U.S.C. §523(a)(2)(A). Further, Plaintiff was not substantially justified in filing and pursuing the instant action. Accordingly, the Court awards Defendant the sum of \$3,825.20¹⁶ as his reasonable attorney fees and costs in having to defend this action under 11 U.S.C. §523(d).

Counsel for Defendant shall submit a form of Judgment consistent with this Memorandum Decision after review as to form by counsel for Plaintiff.

DATED:

ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE

1. The Court, by separate Order, directed counsel for Defendant to serve and file a declaration as to the amount of attorney's fees incurred in this matter, together with an itemization or breakdown of charges. Defendant was allowed, but not required, to file a brief on the attorney fee issue. The Plaintiff was allowed, but not required, to respond to Defendant's counsel's declaration (and pleading if one was filed). Defendant was allowed to file a reply.

Counsel for Defendant timely filed his "Declaration of Tan N. Duong, Esq. Regarding Defendant Tony B. Nguyen's Attorney's Fees." Over a month after the deadline required by the Court's scheduling Order, the Court received in Chambers, by facsimile reproduction, a responsive pleading by Plaintiff. Plaintiff did not seek leave of Court to submit a late response. Plaintiff also neglected to file its pleading with the Clerk's Office. Counsel for Plaintiff also did not seek prior Court approval to fax a copy of his pleading to Chambers as required by the undersigned.

Defendant filed an objection to Plaintiff's response, asking the Court to disregard it as untimely. The undersigned did not receive a copy of that document in Chambers until two and a half months later, because it did not state, on the face of the document, that the matter was "under submission."

The Court decided to consider Plaintiff's response even though it was tardy. No prejudice was alleged by Defendant in his objection to the late pleading.

1 Accordingly, the Court ordered Plaintiff to file its response
2 and, to be fair to Defendant -- who could not have known whether or
3 not the Court intended to consider Plaintiff's late filed response --
the Court allowed him additional time to file a reply. No such reply
was filed.

4 2. After trial began, Plaintiff offered to adjourn and continue the
5 trial in order to engage a Vietnamese interpreter at Plaintiff's
6 expense. Defendant declined and stated that he believed he could
understand counsel for Plaintiff's questions and preferred to proceed
with trial as scheduled.

7 3. He testified about his physical condition as part of his
8 explanation as to why he was declining Plaintiff's offer to continue
9 the trial for the purpose of bringing a Vietnamese interpreter to
Court.

10 4. Plaintiff's witness, Holly, apparently had with her at trial a copy
11 of the form Defendant sent back to Plaintiff, but stated that
Defendant's income was not legible on her copy.

12 5. Trial Exhibit 10, which was compiled by Plaintiff's employees,
13 relates to the account of Defendant. It shows that his FICO score was
776.

14 6. Holly was not, however, able to explain the mechanism by which
15 Plaintiff decided to offer Defendant \$8,000 in credit, rather than
16 more or less than that amount. She was questioned about Trial Exhibit
10 (Plaintiff's internal credit form) but did not know what "income:
62" or "limit: 50" meant on that form, although she testified she was
generally knowledgeable about Plaintiff's forms and credit policy.

17 7. At a different point, Holly testified that information as to
18 whether a person is employed or not would not appear on the pre-
solicitation form but might be available from the Credit Bureau.

19 8. Holly did not testify as to whether the FICO score would tell
20 Plaintiff how often (or for how long) Defendant had ever used credit.

21 9. Defendant traveled to Vietnam once, and perhaps twice, in
22 connection with his father's passing. His brother in France paid for
at least one trip. Defendant testified that it was extremely
important in his culture for him to return to Vietnam at that time.

23 10. If one were to "back out" the "finance charges" and "cash advance
24 fees," the amount by which he exceeded his credit limit would be
reduced by about \$170.

25 11. The record was not clear as to the purpose of the charges incurred
26 in July 1996 in Vietnam.

1 12. The record is not clear whether Plaintiff knew Defendant's age;
2 such information might have been available to Plaintiff from the
3 Credit Bureau.

4 13. The Court is not relying at all on the line of cases discussed
5 earlier that hold that a creditor assumes the risk that every credit
6 card holder will repay the amounts charged unless the cardholder uses
7 the card after the card has been revoked and that revocation has been
8 communicated to him. The Court is deciding this case on its facts.
9 Defendant's application should have raised huge "red flags" for
10 Plaintiff. Here, Plaintiff could not justifiably rely on any implied
11 promise by Defendant to repay over \$8,000 at 15.50 percent interest
12 on a monthly income of \$640.

13 14. Plaintiff allowed Defendant to exceed his credit card limit on
14 the AT&T card during the period August 18 - 22, 1996. However, by
15 August 17, 1996, Defendant already had substantial balances on his
16 other credit cards (including \$9,172 on his First Card, over \$4,000
17 on his Shell Card, and over \$2,000 on his NationsBank card). The
18 information about the balances on Defendant's other credit cards was
19 almost certainly available to Plaintiff from the Credit Bureau before
20 Plaintiff decided to permit Defendant to exceed his credit limit. The
21 Court notes, but does not rely upon, Plaintiff's access to this
22 information in reaching its decision herein.

23 15. Defendant also sought and obtained written discovery from
24 Plaintiff.

25 16. Duong's Declaration dated April 17, 1998 listed attorney fees
26 owing of \$3,760.00 and costs of \$65.20.

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