

Justifiable Reliance
Financial Statement
Reckless Indifference
§ 523(a)(2)(A)
§ 523(a)(2)(B)

Daniels v. Holman, Adversary No. 14-3285
James Joel Holman and Candice Evangeline Holman, Case No. 14-35381-rld7

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Creditors filed an adversary proceeding against debtors seeking a determination that a debt for a loan owed to them was nondischargeable based on the debtors' alleged fraud.

In summary judgment proceedings before trial the court ruled that the creditors could not prevail on their § 523(a)(2)(A) claim against debtor wife, where the facts were undisputed that she had not communicated with the creditors before the loan was made.

After trial, the court ruled on the remaining claims as follows:

- With respect to the § 523(a)(2)(A) claim against debtor husband, the court ruled in favor of debtor husband because the evidence failed to establish either that he did not intend to repay the loan or that the creditors justifiably relied on his representations regarding the collateral he offered as security for the loan.
- With respect to the § 523(a)(2)(B) claim against debtor wife, the court ruled in favor of the debtor wife because the evidence established that she participated neither in the preparation or the transmission of the financial statement which the creditors alleged was fraudulent.
- With respect to the § 523(a)(2)(B) claim against debtor husband, the court ruled in favor of the creditors because the evidence established that debtor husband, an experienced business owner, had been recklessly indifferent to the accuracy of the financial statement balance sheet as reflected by the facts that it (1) contained inflated values for the debtors' residence and their business, (2) omitted a \$92,000 encumbrance against the residence upon which the creditors were relying as collateral for the loan, and (3) omitted all liabilities owed by the business in computing the debtors' alleged net worth.

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

11	In Re:)	
12	James Joel Holman and Candice)	Bankruptcy Case
13	Evangeline Holman,)	No. 14-35381-rld7
14	Debtors.)	
15	Dwight and Laura Daniels,)	
16	husband and wife,)	Adversary Proceeding
17	Plaintiffs,)	No 14-03285-rld
18	v.)	MEMORANDUM OPINION
19	James Joel Holman and Candice)	
20	Evangeline Holman,)	
21	Defendants.)	

21 This adversary proceeding ("Adversary Proceeding") was tried
22 before me (the "Trial") on Thursday, August 13, 2015. The plaintiffs,
23 Dwight and Laura Daniels (the "Daniels"), asserted exception to discharge
24 claims against the debtor defendants, James and Candice Holman (the
25 "Holmans"), under 11 U.S.C. §§ 523(a)(2)(A) - fraud, and 523(a)(2)(B) -
26

1 false financial statement.¹ Prior to the Trial, I granted partial
2 summary judgment in favor of Mrs. Holman on the Daniels' § 523(a)(2)(A)
3 claim but reserved judgment on their § 523(a)(2)(B) claim against her.

4 During the Trial, I listened carefully to witness testimony and
5 the arguments of counsel. Following the Trial, I have reviewed my notes
6 from the Trial, the admitted exhibits and the parties' Trial memoranda.
7 I further have taken judicial notice of relevant entries on the docket
8 and documents filed in the Adversary Proceeding and in the Holmans' main
9 chapter 7 case for the purposes of confirming and ascertaining facts not
10 reasonably in dispute. Federal Rule of Evidence 201; In re Butts, 350
11 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006). I have considered the testimony
12 and arguments presented by the parties. In addition, I have reviewed
13 relevant authorities, both as cited to me by counsel for the parties and
14 as located through my own research.

15 Based on that review and consideration, I have come to a
16 decision. The findings of fact and conclusions of law stated in this
17 Memorandum Opinion constitute my findings and conclusions for purposes of
18 Fed. R. Civ. P. 52(a), applicable in this Adversary Proceeding under Fed.
19 R. Bankr. P. 7052.

20 Facts from the Evidence

21 Mr. Daniels comes from a background of 25-30 years in the
22 insurance business. Mrs. Daniels has worked as an escrow officer but
23 never has been an owner, officer or loan officer with a bank.

24
25 ¹ Unless otherwise indicated, all chapter and section references are
26 to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1532. The Oregon
Revised Statutes (2013) are referred to as "ORS."

1 In early 2011, Dwight Daniels was introduced to James Holman by
2 a mutual friend. The Daniels had funds that they wished to invest, and
3 the Holmans apparently owned a business that met the Daniels' criteria
4 for investment. The parties had never met before they interacted in the
5 transaction that is the subject of this Adversary Proceeding.

6 Mr. Daniels' understanding was that the Holmans' business,
7 Pacific Courier Services, LLC ("PCS"), was in a cash crunch and needed
8 loan funds "to get [the business] over the hump." There was some
9 wrangling with respect to Mr. Holman's testimony, both at Trial and in
10 his deposition, as to whether PCS was in "financial distress" in early
11 2011. However, Mr. Daniels testified, without contradiction, as to his
12 understanding that the proceeds from the loan the Daniels were being
13 asked to make were going to be used for operating expenses, including
14 business payroll, among other things. At or about the time that the loan
15 transaction closed, Mr. Holman emailed Mr. Daniels requesting to know
16 when a wire transfer was being made "so I can immediately transfer to PCS
17 . . . thanks for understanding and time is of the essence to some
18 degree." See Exhibit 1, at 1. In these circumstances, I find that Mr.
19 Holman's business had a need for funds that was at least pressing.

20 In any event, loan negotiations proceeded fairly quickly by
21 telephone and email between Mr. Holman and Mr. Daniels. The agreed loan
22 amount was \$300,000 ("Loan"). Mr. Holman apparently offered to pay
23 interest of as high as 15-20% on the Loan, but the Daniels felt those
24 rates were "too high" and ultimately agreed on 10% interest. See Exhibit
25 3; Exhibit 14, at 2. Exhibit 3 is a copy of Mr. Daniels' hand-written
26 notes setting forth the terms of the proposed Loan as he understood them.

1 The Loan would be paid "interest only" for three years, at the end of
2 which term, the Loan would be payable in full. The Daniels would retain
3 "2 Points" (\$6,000) and send funds to the Holmans in the amount of
4 \$294,000, although interest would accrue on the entire \$300,000 Loan
5 amount. No prepayment penalty would apply. As security for repayment of
6 the Loan, the Holmans would provide the Daniels with a trust deed on
7 their home, an assignment of \$300,000 business life insurance on Mr.
8 Holman, and a UCC filing on business assets. (Mr. Daniels indicated both
9 in his notes and in his testimony that he had no familiarity with what a
10 UCC-1 financing statement was or what it did.) See Exhibit 3.

11 At some point during the negotiations, Mr. Holman submitted an
12 unsigned personal financial statement ("Financial Statement") to Mr.
13 Daniels for himself and his wife. See Exhibit 2. It is not clear
14 exactly when the Financial Statement was sent to Mr. Daniels, but it is
15 dated as of February 1, 2011. See Exhibit 2, at 1. The balance sheet in
16 the Financial Statement states that the Holmans had assets with a total
17 value of \$6,814,500 and liabilities totaling \$866,000, for a net worth of
18 \$5,948,500. Id. Of particular note in the balance sheet is the
19 valuation of the closely held business at \$5,000,000. Mr. Holman
20 testified that \$5,000,000 represented the gross value of the business.
21 Yet, none of the liabilities of the business were included on the
22 liabilities side of the balance sheet. Id. On page 2 of the Financial
23 Statement, the Holmans' home was valued at \$775,000, with a mortgage
24 balance of \$450,000, reflecting equity of \$325,000. See Exhibit 2, at 2.
25 Mr. Holman's testimony confirmed that he reviewed and made arrangements
26 to pay the family's bills and mortgage statements. Mr. Holman also

1 prepared the Financial Statement and sent it to Mr. Daniels without any
2 input from Mrs. Holman. Mrs. Holman testified that she was not aware of
3 the Financial Statement and did not believe that she saw it before it was
4 sent to Mr. Daniels. She also testified that she did not recall any
5 conversation with Mr. Holman about the Financial Statement.

6 The Daniels both testified that they reviewed the Financial
7 Statement before deciding to make the Loan and relied on the Financial
8 Statement in making their Loan decision. Mr. Daniels specifically
9 testified that the Daniels would not have made the Loan if they had known
10 that the figures on page 2 of the Financial Statement with respect to the
11 value of the Holmans' residence versus the mortgage balance on it were
12 inaccurate.

13 The Loan closed on or about the end of February 2011 and was
14 documented by a promissory note ("Note"); a deed of trust ("Trust Deed")
15 on the Holmans' residence property; a UCC-1 ("UCC-1") filing with the
16 Oregon Secretary of State's office; and an Assignment of Life Insurance
17 Policy ("Insurance Assignment"). See Exhibits 4, 5, 6 and 8. Consistent
18 with the terms discussed between Mr. Daniels and Mr. Holman, the Note,
19 dated February 24, 2011, is in the principal amount of \$300,000, with a
20 loan fee of \$6,000, and bears interest at 10% per annum. Payments were
21 to be made interest only for 36 months, with repayment of the entire Note
22 balance due in full on April 1, 2014. See Exhibit 4, at 1. The Trust
23 Deed, the only security expressly referenced in the Note (see Exhibit 4,
24 at 2), was recorded on February 28, 2011. Both the Note and the Trust
25 Deed were signed individually by Mr. and Mrs. Holman. However, Mrs.
26 Holman testified that she did not remember any discussion about the terms

1 of the Loan, and she did not speak to either of the Daniels prior to the
2 Loan being made.

3 The UCC-1, identifying PCS as the debtor, was filed with the
4 Oregon Secretary of State's office on February 25, 2011. See Exhibit 6,
5 at 1-2. The UCC-1 covered the following PCS collateral: "Inventory,
6 Equipment, accounts receivables, deposit accounts, intangibles, general
7 intangibles." See Exhibit 6, at 2. Apparently, the UCC-1 was filed by
8 Todd Mitchell, whose law firm represented Mr. Holman's business. See id.
9 The Insurance Assignment is dated August 8, 2011, and is signed by Mr.
10 Holman and by Mrs. Holman as "Secretary of Integrity Transport Group."
11 See Exhibit 8, at 1-2.

12 At approximately the time the Loan was funded, Mr. Holman
13 provided a title insurance policy ("Title Insurance Policy") for the
14 Holmans' residence to the Daniels. See Exhibit J. The Title Insurance
15 Policy reflects two recorded deeds of trust on the residence property for
16 loans in original principal amounts of \$326,000 (dating from 2004) and
17 \$258,000 (dating from 2005). See Exhibit J, at 5-6.

18 Mr. Daniel testified that he arranged to send the Loan funds to
19 the Holmans on February 28, 2011. Thereafter, the Holmans began making
20 interest payments on the Loan. The parties' testimony is consistent that
21 over time, the Holmans made at least 6 payments on the Loan obligation
22 and did not ask for a deferral of any payments until August 2011.
23 However, after the 60-day deferral period passed, the Holmans made only a
24 few sporadic payments to the Daniels. Apparently, the last interest
25 check received by the Daniels from the Holmans was in October 2012. See
26 Exhibit 14, at 2.

1 In the meantime, unbeknownst to the Daniels, on August 18,
2 2011, the UCC-1 was terminated. See Exhibit 9. Although the termination
3 statement indicated that it was authorized by Mr. Daniels, he testified,
4 consistent with the documentary evidence, that he knew nothing about the
5 termination at the time. See Exhibit 9; Exhibit 13, at 3-4; Exhibit 14,
6 at 2. Apparently, secured loans were made to PCS by AT&T Capital
7 Services, Inc. and Greystone Capital in the fall of 2011 after the UCC-1
8 was terminated. See Exhibit 15, at 3-6. While Mr. Holman consistently
9 has denied any knowledge as to who authorized the UCC-1 to be terminated,
10 the evidence submitted tends to indicate that the UCC-1 was terminated by
11 counsel for PCS. See Exhibit 10; Exhibit 11, at 2; Exhibit 12, at 1;
12 Exhibit 16.

13 Ultimately, PCS was liquidated in bankruptcy. The insurance
14 covered by the Insurance Assignment apparently evaporated with it. In
15 any event, the Insurance Assignment no longer is available as collateral
16 for the Loan. The Holmans followed PCS into chapter 7 bankruptcy on
17 September 23, 2014. Main Case Docket No. 1. They scheduled the Daniels
18 as undersecured creditors on their Schedule D with a third trust deed
19 secured interest in their residence property valued at \$25,000. See Main
20 Case Docket No. 11. The Daniels filed the Adversary Proceeding timely on
21 December 29, 2014. See Main Case Docket No. 43.

22 Jurisdiction

23 I have jurisdiction to decide the claims at issue in this
24 Adversary Proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(I).
25
26

1 Discussion

2 A. Motions in Limine

3 In Creditors'/Plaintiffs Trial Memorandum and Motions in Limine
4 ("Plaintiffs' Trial Memorandum"), the Daniels included a number of
5 motions in limine that, for the most part, were noncontroversial or
6 agreeable to the Holmans. However, the motions included two requests
7 that I take judicial notice on which I did not explicitly rule at the
8 Trial: 1) that the UCC-1 termination statement was requested and filed by
9 the Ater Wynne law firm; and 2) that Todd Mitchell was employed with Ater
10 Wynne as of 2011. I decline to take judicial notice of those asserted
11 facts as they are not relevant to my findings and conclusions in this
12 case.

13 B. Exceptions to Discharge Generally

14 Because it is a fundamental policy objective of the Bankruptcy
15 Code to provide a fresh start to beleaguered debtors through a discharge
16 of their debts, it is settled in the Ninth Circuit as elsewhere that the
17 statutory exceptions to discharge are to be construed narrowly in favor
18 of the debtors. See, e.g., Snoke v. Riso (In re Riso), 978 F.2d 1151,
19 1154 (9th Cir. 1992). That principle informs my consideration of the
20 factual evidence and analysis of applicable legal authorities in this
21 case.

22 C. Section 523(a)(2)(A) - Fraud

23 Section 523(a)(2)(A) excepts from a debtor's discharge debts
24 for money obtained by "false pretenses, a false representation or actual
25 fraud." The elements of an exception to discharge claim under
26 § 523(a)(2)(A) are:

1 (1) the debtor made a representation, or omitted to
2 state a material fact(s) to the creditor;
3 (2) at the time that the subject representation or
4 omission was made, the debtor knew that the
5 representation was false, or knew that the omission
6 created a false statement, and the debtor was under a
7 duty to disclose the omitted information;
8 (3) the debtor made the subject representation or
9 omission with the intention of deceiving the creditor;
10 (4) the creditor justifiably relied; and
11 (5) the creditor sustained damages as the proximate
12 result of the representation or omission having been
13 made.

14 See, e.g., Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1246 n.4 (9th
15 Cir. 2001); Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re
16 Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000). The creditor bears the
17 burden of proof on each of these elements by a preponderance of the
18 evidence. Grogan v. Garner, 498 U.S. 279, 286-91 (1991); First Beverly
19 Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986).
20 However, fraudulent intent can be established through the presentation of
21 circumstantial evidence. See, e.g., In re Adeeb, 787 F.2d at 1343;
22 Devers v. Bank of Sheridan, Mont. (In re Devers), 759 F.2d 751, 754 (9th
23 Cir. 1985); and In re Johnson, 68 B.R. 193, 198 (Bankr. D. Or. 1986).

24 During argument at the Trial, I confirmed with the Daniels'
25 counsel that the alleged misrepresentation upon which they based their
26 § 523(a)(2)(A) claim was the representation by Mr. Holman that repayment
of the Loan would be secured in part by the UCC-1 on business assets.
The Daniels' argument is the offer of the UCC-1 as security was
fraudulent or illusory in light of the subsequent termination of the UCC-
1 without the Daniels' authorization or consent.

In light of the evidence presented, I conclude in favor of Mr.
Holman on the Daniels' § 523(a)(2)(A) claim for the following reasons.

1 First, the UCC-1, at least initially, was granted to the Daniels as
2 purported security for repayment of the Loan. It was filed with the
3 Oregon Secretary of State's office on February 25, 2011, and by its
4 terms, it covered PCS's inventory, equipment, accounts receivable,
5 deposit accounts, intangibles and general intangibles. Thereafter, until
6 August 2011, the Holmans made payments on the Loan on the terms specified
7 in the Note. The termination of the UCC-1 occurred in August 2011. It
8 may or may not be coincidence that termination of the UCC-1 occurred at
9 approximately the same time that the Holmans first asked the Daniels for
10 deferral of their payment obligations under the Note. However suspicious
11 the circumstances of the unauthorized termination of the UCC-1, the
12 evidence does not establish that Mr. Holman intended to terminate the
13 UCC-1 and default on the Loan payments at the outset of the Loan
14 transaction.

15 Second, the evidence presented tends to indicate that the
16 negotiations leading up to the Loan through the documentation of the Loan
17 transaction could be characterized as "the blind leading the blind" as to
18 the UCC-1. Although by the time of the Trial, Mr. Holman's testimony
19 reflected a rudimentary understanding as to how security interests were
20 created and worked, he testified that he thought the UCC-1 was valid when
21 it was filed. The Daniels both testified that they knew nothing about
22 UCC's at the time that they agreed to make the Loan. In his handwritten
23 notes setting forth proposed Loan terms, Mr. Daniels refers to "UCC" with
24 the notation "no familiarity with." See Exhibit 3. I generally found
25 the testimony of all of the parties at Trial to be credible, although I
26 have some questions about Mr. Holman's testimony with respect to

1 termination of the UCC-1.

2 Finally, and perhaps most importantly, I cannot find from the
3 evidence presented that the Daniels justifiably relied on the promise of
4 Mr. Holman to provide the UCC-1 as security for repayment of the Loan.
5 Since the Supreme Court's decision in Field v. Mans, 516 U.S. 59 (1995),
6 "justifiable reliance" is recognized as an intermediate standard between
7 the objective, "reasonable person" standard under § 523(a)(2)(B) and
8 unqualified acceptance of whatever is communicated.

9 Justification is a matter of the qualities and
10 characteristics of the particular plaintiff, and the
11 circumstances of the particular case, rather than of
the application of a community standard of conduct to
all cases.

12 Id. at 71, quoting the Restatement (Second) of Torts (1976), § 545A,
13 Comment b.

14 A person is "required to use his senses, and cannot
15 recover if he blindly relies upon a misrepresentation
16 the falsity of which would be patent to him if he had
utilized the opportunity to make a cursory examination
or investigation."

17 Id., quoting the Restatement (Second) of Torts (1976), § 541, Comment a.
18 See Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsh (In re
19 Kirsh), 973 F.2d 1454, 1460 (9th Cir. 1992) (In determining the issue of
20 justifiable reliance, "the court must look to all of the circumstances
21 surrounding the particular transaction, and must particularly consider
22 the subjective effect of those circumstances upon the creditor.").

23 In this case, the Daniels have freely admitted that when Mr.
24 Holman offered them a UCC-1 as partial security for repayment of the
25 Loan, they had no idea what a UCC-1 was or how it worked. A cursory
26 investigation would have revealed to them that two steps generally are

1 required to create a security interest in personal property assets under
2 the Uniform Commercial Code, in Oregon as elsewhere: 1) A security
3 interest attaches when a debtor has signed a security agreement that
4 grants a security interest in the subject collateral (see, e.g., ORS
5 § 79.0203(1) and (2)(c)(A)); and 2) the security interest is perfected by
6 filing a UCC-1 statement with the Oregon Secretary of State's office
7 (see, e.g., ORS §§ 79.0310 and 79.0501(b)). The Daniels likewise would
8 have been able to determine that if they made the Loan to the Holmans
9 personally (as they did), the grant of a security interest in their favor
10 by PCS might not be enforceable, as not supported by consideration.
11 Further, they would have been able to determine that the priority of
12 secured interests is determined in part by the order and timing of filing
13 of UCC-1 statements (see, e.g., ORS § 79.0317(b)(B)), and if they
14 conducted a UCC search, they might find that there was limited or no
15 value of PCS assets available to secure repayment of the Loan in light of
16 prior perfected security interests. However, they took none of these
17 steps to ascertain whether the filing of the UCC-1 provided them with any
18 real security for repayment of the Loan. In these circumstances, I
19 cannot find that the Daniels justifiably relied on Mr. Holman's offer of
20 the UCC-1 as security.

21 Accordingly, I cannot conclude in favor of the Daniels on their
22 § 523(a)(2)(A) claim against Mr. Holman.

23 D. Section 523(a)(2)(B) - False Financial Statement

24 Section 523(a)(2)(B) excepts from discharge debts arising from
25 the debtor's intentional use of a false financial statement on which the
26 creditor reasonably relied. The elements to establish an exception to

1 discharge under § 523(a)(2)(B) are:

- 2 (1) the debtor made a representation of fact in writing;
- 3 (2) the representation was material;
- 4 (3) the debtor knew at the time that the representation was false;
- 5 (4) the debtor made the representation with the intention of deceiving the creditor;
- 6 (5) the creditor relied on the representation;
- 7 (6) the creditor's reliance was reasonable; and
- 7 (7) damages proximately resulted from the representation.

8 Siriani v. Northwestern Nat'l Ins. Co. (In re Siriani), 967 F.2d 302, 304
9 (9th Cir. 1992) (citations omitted). Of particular relevance in this
10 case, to establish the "intent to deceive" element, the creditor must
11 show by a preponderance of the evidence "that the debtor's alleged false
12 statement in writing was either knowingly false or made so recklessly as
13 to warrant a finding that the debtor acted fraudulently." 4 Collier on
14 Bankruptcy ¶ 523.08[2][e][ii] (Alan N. Resnick & Henry J. Sommer eds.,
15 16th ed.), citing Insurance Co. of N. Am. v. Cohn (In re Cohn), 54 F.3d
16 1108, 1118-19 (3d Cir. 1995); Investors Credit Corp. v. Batie (In re
17 Batie), 995 F.2d 85, 90 (6th Cir. 1993); Bank One Lexington v. Woolum (In
18 re Woolum), 979 F.2d 71, 73 (6th Cir. 1992), cert. denied, 507 U.S. 1005
19 (1993); Driggs v. Black (In re Black), 787 F.2d 503, 506 (10th Cir.
20 1986). See Barlaam v. Financial Services Vehicle Trust (In re Barlaam),
21 2014 WL 3398381 (9th Cir. BAP July 11, 2014) ("Besides serving to impute
22 the knowledge of falsity, a finding that a debtor acted with gross
23 recklessness satisfies the element of intentional deception in
24 § 523(a)(2)(B)(iv).") (emphasis in original and citations omitted). As
25 with § 523(a)(2)(A), the creditor bears the burden of proof by a
26 preponderance of the evidence to establish each of the § 523(a)(2)(B)

1 elements. Grogan v. Garner, 498 U.S. at 286-91.

2 At the outset, the Financial Statement made a number of written
3 representations as to the Holmans' financial situation in February 2011.
4 The representations as to the Holmans' net worth and the values of their
5 real estate holdings and the encumbrances against them in the Financial
6 Statement were material. The Daniels relied on the information included
7 in the Financial Statement in deciding to make the Loan, and when the
8 Holmans could not repay the Loan, damages resulted to the Daniels from
9 their reliance on the representations in the Financial Statement.
10 Accordingly, I find that elements (1), (2), (5) and (7) have been
11 satisfied.

12 Mr. Daniels testified that he had no reason not to believe the
13 information in the Financial Statement was accurate. Mr. Holman had been
14 introduced to him by a respected friend as a legitimate businessman
15 looking for loan financing. Mr. Holman freely submitted the Financial
16 Statement as an inducement to the Daniels to make the Loan, without
17 prodding. The Financial Statement stated that the Holmans had a net
18 worth of \$5,948,500, providing an abundance of reasons to believe that
19 the Holmans had the resources to repay a loan of \$300,000. I find in
20 these circumstances that the Daniels' reliance on the representations in
21 the Financial Statement was reasonable, satisfying element (6).

22 That leaves elements (3) and (4), whether the Holmans knew that
23 the representations in the Financial Statement were false when it was
24 submitted to the Daniels or that the representations were so recklessly
25 made as to satisfy that standard, and whether those representations were
26 made with the intent to deceive the Daniels. It is a truism (Perry Mason

1 aside) that parties virtually never admit at trial that they acted with
2 an intent to deceive or defraud the opposing party. "We acknowledge that
3 because a debtor will rarely, if ever, admit that deception was his
4 purpose, this fourth element of § 523(a)(2)(B) is extremely difficult for
5 a creditor to prove by direct evidence." In re Cohn, 54 F.3d at 1118.
6 "Because a debtor is unlikely to testify directly that his intent was
7 fraudulent, the courts may deduce fraudulent intent from all the facts
8 and circumstances of a case." In re Devers, 759 F.2d at 754.

9 On these elements, the paths of Mr. and Mrs. Holman diverge.
10 Mr. Holman prepared the Financial Statement without any input from his
11 wife, and he sent the Financial Statement to Mr. Daniels without
12 discussing it with his wife. Neither of the Holmans signed the Financial
13 statement, even though it was submitted in both their names. Mrs. Holman
14 testified that she was not aware of the Financial Statement at the time
15 it was sent to Mr. Daniels.

16 While the testimony at Trial focused on the market value for
17 the Holmans' residence and the mortgage balance against it stated in the
18 Financial Statement, the information included in the Financial Statement
19 suffers from a much more fundamental inaccuracy. In the balance sheet on
20 the first page of the Financial Statement, Mr. Holman valued his closely
21 held business at \$5,000,000. One ordinarily would assume in a net worth
22 calculation that the \$5,000,000 value without any corresponding
23 liabilities included in the balance sheet represented equity value.
24 However, Mr. Holman testified that the \$5,000,000 value represented the
25 gross value of his business. And he testified that he arrived at that
26 figure from an appraisal for the business that he obtained one or two

1 years earlier at \$4.1-\$4.2 million. I don't question in general the
2 logic of assuming that the value of an expanding business might have
3 increased over time, but not to include the liabilities of the business
4 on the opposite side of the ledger from the estimated gross value was
5 grossly misleading. From the Financial Statement, the Daniels were given
6 the representation that repayment of their proposed \$300,000 Loan was not
7 an issue because on the first page of the Financial Statement, they were
8 told that almost \$6,000,000 of net worth protected them. As an
9 experienced businessman, Mr. Holman had to know better.

10 I have given Mr. Holman the benefit of the doubt as to his lack
11 of knowledge of what giving a UCC-1 as security meant in this
12 transaction. As a layman, even with substantial business experience, I
13 do not assume that he had a working knowledge of the requirements to
14 create a security interest under Article 9 of the Uniform Commercial
15 Code. However, he is entitled to no such benefit with respect to the
16 balance sheet he prepared in the Financial Statement. By its terms, a
17 "balance sheet" sets forth a person or entity's assets v. liabilities to
18 arrive at net worth. Based on his experience as a business owner, Mr.
19 Holman had to know that including the value for his business that he did
20 on the Financial Statement without including its corresponding
21 liabilities grossly overstated the net value of his business, resulting
22 in a very material overstatement of the Holmans' net worth. I find that
23 driven by his need to close a loan transaction quickly with the Daniels,
24 he was inexcusably reckless in including the value for his business that
25 he used in the Financial Statement. The circumstances supporting that
26 finding include that Mr. Holman apparently had exhausted his

1 possibilities for obtaining more conventional financing for PCS. If he
2 had not, why would he be approaching private lenders like the Daniels and
3 offering them "hard money" rates of interest? In addition, in these
4 circumstances, it is reasonable to assume that PCS already had borrowed
5 what it could from more conventional sources, but none of those
6 obligations are reflected on the Financial Statement balance sheet. Mr.
7 Holman had a pressing need for funds for his business, and he put the
8 Financial Statement together and submitted it with reckless indifference
9 to the truth of the numbers he presented in it to induce the Daniels to
10 make a lending decision quickly in his favor. It was Mr. Holman who
11 communicated to Mr. Daniels that "time was of the essence."

12 The value for and mortgage balance against the Holmans' home
13 stated on page 2 of the Financial Statement reinforce the point: I find
14 Mr. Holman essentially credible in his overly optimistic valuation of the
15 home based on the listing price for the property across the street and
16 his testimony about improvements to the home that had been made.
17 However, his statement that the "mortgage balance" was \$450,000, when the
18 trust deed balances owed at the time actually totaled over \$542,000 (see
19 Exhibit 10, Response to Interrogatory No. 6), was recklessly indifferent
20 to the truth when he had ready access to the current monthly statements
21 as the person responsible for paying the bills.

22 Ultimately, I find that the Financial Statement prepared and
23 submitted to the Daniels by Mr. Holman included net worth and home equity
24 values that were grossly and recklessly inflated to induce the Daniels to
25 arrive at a quick decision to make the Loan to the Holmans. In these
26 circumstances, I conclude that elements (3) and (4) are satisfied as to

1 Mr. Holman, and the Daniels are entitled to a judgment against him on
2 their § 523(a)(2)(B) claim.

3 My conclusion is the opposite as to Mrs. Holman. She had
4 nothing to do with the preparation of the Financial Statement. At the
5 time, she was unaware that it was being prepared for submission to the
6 Daniels. She never discussed it with Mr. Holman prior to its being
7 presented, and there is no evidence that she knew that it was sent to the
8 Daniels. She certainly did not discuss the representations in the
9 Financial Statement with the Daniels at any point in time. She did not
10 benefit personally from the Loan transaction, and the record is
11 consistent that, for better or worse, she had no role in the financial
12 transactions of the Holman family. I find in favor of Ms. Holman on the
13 Daniels' § 523(a)(2)(B) claim. See, e.g., Sachan v. Huh (In re Huh), 506
14 B.R. 257 (9th Cir. BAP 2014) (en banc).

15 Conclusion

16 Based on the foregoing findings, analysis and conclusions, Mr.
17 Holman is entitled to a judgment in his favor on the Daniels'
18 § 523(a)(2)(A) claim against him; the Daniels are entitled to a judgment
19 in their favor against Mr. Holman on their § 523(a)(2)(B) claim against
20 him; and Mrs. Holman is entitled to judgment in her favor on the Daniels'
21 § 523(a)(2)(B) claim against her. A Judgment consistent with this
22 Memorandum Decision will be issued contemporaneously.

23
24 # # #

25 cc: R Hunter Bitner, III
26 Darian Stanford
Paul B Heatherman