

DEC 13 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-10-1107-KiLPa
)
 6 ESSAM AYAD and CATHERINE) Bk. No. SA 05-18024-RK
 AYAD,)
 7) Adv. No. SA 06-01005-RK
 Debtors.)
 8 _____)
)
 9 ESSAM AYAD,)
)
 10 Appellant,)
)
 11 v.) **M E M O R A N D U M**¹
)
 12 FARMERS NEW WORLD LIFE)
 INSURANCE COMPANY,)
 13)
 Appellee.)
 14 _____)

Argued and Submitted on November 17, 2010
at Pasadena, California

Filed - December 13, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Robert N. Kwan, Bankruptcy Judge, Presiding

Appearances: Joseph W. Creed of Creed & Elliott, LLP argued for
 Appellant Essam Ayad
 Lily Chow of Chow & Freisleban, Inc. argued for
 Appellee Farmers New World Life Insurance Company

Before: KIRSCHER, LYNCH, and PAPPAS, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
 Although it may be cited for whatever persuasive value it may
 have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Debtor-Appellant, Essam Ayad ("Ayad"), appeals a judgment
2 from the bankruptcy court determining that his debt to Creditor-
3 Appellee, Farmers New World Life Insurance Company ("FNWL"), was
4 nondischargeable under 11 U.S.C. § 523(a)(2)(A)² and that FNWL
5 was not liable to Ayad on his counterclaims for breach of
6 contract and unjust enrichment. We AFFIRM.

7 I. FACTUAL AND PROCEDURAL BACKGROUND

8 A. Factual Background.

9 In February 1997, Ayad entered into an Agent Appointment
10 Agreement ("AAA") to be an insurance agent for FNWL, Farmers
11 Insurance Exchange, Truck Insurance Exchange, and Mid Century
12 Insurance Company (collectively "the Companies"). FNWL is a life
13 insurance company authorized by the California Department of
14 Insurance ("DOI") to sell life insurance policies in California.
15 In the AAA, the Companies agreed to pay Ayad commissions for
16 policies sold, and Ayad agreed to sell insurance and "to submit
17 every request or application for insurance for the classes and
18 lines underwritten by the Companies and eligible in accordance
19 with their published Rules and Manuals." Upon breach of the AAA,
20 the nonbreaching party could terminate it on thirty (30) days
21 written notice, or the Companies could terminate it for
22 enumerated reasons including embezzlement or willful
23 misrepresentation.

24
25
26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101 et. seq.
28 and to the Federal Rules of Bankruptcy Procedure, Rules 1001 et.
seq. as enacted and promulgated before the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, 119 Stat. 23.

1 Ayad sold life insurance policies for FNWL known as Flexible
2 Universal Life Insurance Policies ("FULI"). FULIs have an
3 investment feature component which allows the applicant, with the
4 agent's guidance, to choose the amount of monthly premiums so
5 long as the premiums exceed the monthly cost of the insurance
6 policy. FULIs are designed to allow policyholders to accumulate
7 savings by placing the excess monthly premium sums (i.e., the
8 amounts above the monthly policy cost) in an interest-bearing
9 "accumulation account" for the policyholders' benefit. All of
10 the life insurance applications submitted by Ayad to FNWL at
11 issue in this case were for FULIs.

12 As a FNWL agent, Ayad was eligible to receive advanced
13 commissions for life insurance policies sold, which he could
14 elect to receive by checking off a box on the Agent's Report page
15 of the policy application. The Agent's Report is a form in which
16 Ayad as the soliciting agent had to make representations in
17 response to questions asking if he knew "of any factor not
18 indicated in this Application which would affect the insurability
19 of the Proposed Insured(s)," or whether "[t]o the best of [his]
20 knowledge, is the insurance being purchased to replace or reduce
21 current coverage in this or any other company." Ayad received
22 advanced commissions after he submitted a potential insureds'
23 application for insurance but before the policy was approved by
24 FNWL's underwriting department and issued. Advanced commissions
25 on FULI policies was 2/3 (i.e., eight months) of the first year's
26 commissions for the policy, which constituted 50% of the first
27 annual premium.

28 In order to qualify for the advanced commissions, Ayad had

1 to submit policies that designated the Bank Check Plan ("BCP") as
2 the method of premium payment. Under the BCP, the monthly policy
3 premiums were to be automatically deducted from a bank account
4 designated by the applicant on a Bank Authorization Form, which
5 Ayad submitted with the life insurance application to FNWL.

6 If an application did not result in the issuance of a policy
7 by FNWL, then the advanced commissions paid to Ayad were debited
8 or "charged back" against his account for a given month. For
9 issued policies that did not continue for eight months after
10 issuance, or if the policy fell off the BCP during the eight
11 months after issuance, the pro-rated unearned advanced commission
12 was also charged back. If a charge back occurred in a month in
13 which Ayad's account had sufficient funds to reimburse FNWL for
14 the advanced commission paid, the funds were deemed recovered by
15 FNWL; if Ayad's account lacked sufficient funds for reimbursement
16 to FNWL, the funds were considered unrecovered and owed by Ayad.

17 FNWL agents were also entitled to quarterly life performance
18 bonuses. Agents could qualify for bonuses at three levels, which
19 were based upon the number of policy applications submitted, the
20 amount of policy premiums, and the commission level. The same
21 "charge back" scheme also applied to performance bonuses.

22 After investigating what FNWL thought were suspicious
23 circumstances on multiple applications, FNWL terminated Ayad on
24 July 20, 2001, by way of letter which stated that the AAA was
25 being terminated for reasons (1) and (5): "Embezzlement of monies
26 belonging to the Companies" and "Willfull [sic] misrepresentation
27 that is material to the operation of the Agency." In the event
28 of termination, the AAA provided that FNWL would pay Ayad a

1 certain sum based on a formulaic calculation (a "Contract
2 Value"), unless the termination was for embezzlement. FNWL paid
3 Ayad a Contract Value of \$13,519, which was credited to the
4 amount he owed in charge backs to FNWL.

5 In May 2003, FNWL filed suit against Ayad in California
6 state court asserting causes of action for breach of fiduciary
7 duty and fraud. That action was stayed once Ayad filed a
8 voluntary chapter 7 petition on October 6, 2005.

9 **B. The Administrative and Adversary Proceedings.**

10 FNWL filed its nondischargeability complaint against Ayad
11 under sections 523(a)(2)(A) and (a)(4) on January 3, 2006. FNWL
12 alleged that Ayad fraudulently incurred a debt of \$234,974.45,
13 which represented unrecovered charge backs of sales commissions
14 and bonuses advanced by FNWL to Ayad. FNWL alleged that 33 life
15 insurance applications completed and submitted by Ayad between
16 March 2000 and June 2001, which all designated the BCP as the
17 monthly payment method and requested advance commissions,
18 contained inaccurate, incomplete, and/or falsified information
19 and induced FNWL to pay Ayad commissions and bonuses to which he
20 was not entitled. In its investigation of Ayad, FNWL concluded
21 that 20 of the 33 life insurance applications were submitted on
22 behalf of applicants who either did not exist, or who did not
23 intend to purchase life insurance policies. None of these
24 applications resulted in issued policies (the "20 non-issued
25 applications") and 10 of them resulted in unrecovered advanced
26 commissions and bonuses totaling \$115,705. FNWL further
27 concluded that the other 13 life insurance applications, while
28 resulting in issued policies, lapsed within 12 months (the "13

1 lapsed policies") and resulted in unrecovered advanced
2 commissions and bonuses totaling \$119,269.45. Ayad
3 counterclaimed for breach of contract and unjust enrichment,
4 seeking approximately \$8 million in damages for what he asserted
5 was a wrongful termination by FNWL.

6 Meanwhile, FNWL had reported Ayad's agency termination to
7 the DOI as mandated by California law. See Cal. Ins. Code
8 §§ 1704 and 1707. At the DOI's request, FNWL prepared and
9 submitted an investigation file regarding the 20 non-issued
10 applications. The DOI also issued subpoenas on FNWL to produce
11 other documents and witnesses, to which FNWL complied. The DOI
12 then drafted and filed a complaint against Ayad in February 2007,
13 seeking to revoke his agency license and alleging causes of
14 action for fraud, negligence, and breach of contract. A hearing
15 was held on February 28, March 1 and 2, and May 22, 23 and 24,
16 2007, before an administrative law judge ("ALJ"). FNWL did not
17 appear at the hearing but, over the objection of Ayad's counsel,
18 FNWL's counsel was allowed to observe the proceedings. The ALJ
19 issued a 36-page Proposed Decision ("ALJ Decision") in October
20 2007, determining that Ayad's conduct was not fraudulent but
21 negligent with respect to three of the 20 non-issued
22 applications. The ALJ ordered Ayad's agency license revoked, but
23 stayed the revocation subject to a 15-day suspension and
24 restricted license for two years.

25 Just prior to the nondischargeability trial, FNWL filed a
26 motion in limine to preclude Ayad's request for judicial notice
27 of the ALJ's Decision (which had been subsequently adopted by the
28 California Insurance Commissioner), for which the bankruptcy

1 court heard oral argument and ordered further briefing from the
2 parties. Ayad opposed FNWL's motion, contending that issue
3 preclusion applied to the ALJ's Decision because the parties were
4 in privity, the same witnesses testified to the same facts, the
5 same issue of fraud had already been litigated and determined,
6 and FNWL had an opportunity to litigate the fraud issue.

7 The bankruptcy court held a five-day trial on the
8 nondischargeability action in early 2008. FNWL conceded on the
9 first day that it was unable to prove embezzlement, so it
10 withdrew its section 523(a)(4) nondischargeability claim. Ayad,
11 along with several witnesses from FNWL, testified. At the close
12 of trial on February 29, 2008, the bankruptcy court ordered the
13 parties to submit closing arguments in written briefs. After the
14 last brief was filed on June 27, 2008, the court took the matter
15 under submission. On April 15, 2009, the court entered an order
16 granting Ayad's ex-parte application to add the ALJ's Decision as
17 a trial exhibit "for identification purposes only."

18 On July 2, 2009, the bankruptcy court entered its memorandum
19 decision on the nondischargeability action ("July 2 Memorandum").
20 It granted FNWL's motion in limine to exclude the ALJ's Decision.
21 It also found in favor of FNWL under section 523(a)(2)(A), but
22 determined that FNWL was unable to prove \$12,000 of its damages;
23 thus, Ayad's debt to FNWL in the amount of \$222,974.45 was
24 nondischargeable. The bankruptcy court further denied Ayad's
25 counterclaims for breach of contract and unjust enrichment
26 because FNWL justifiably terminated Ayad immediately for cause
27 based on willful misrepresentation, as provided in the AAA.
28 However, it determined that the Contract Value due to Ayad was

1 \$28,335.91 (not the \$13,519 admitted by FNWL) based on a three-
2 month notice period which the court believed FNWL was to give
3 Ayad under the AAA since he was not terminated for embezzlement.
4 This amount was to be credited against the unrecovered charge
5 backs to the extent that such amount had not already been
6 credited.

7 Before a judgment was entered, FNWL filed a motion to amend
8 the bankruptcy court's findings in its July 2 Memorandum,
9 contending that the Contract Value of \$13,519 was the proper
10 amount, not \$28,335.91. Ayad opposed. The bankruptcy court held
11 a hearing on the matter on September 29, 2009, and issued an
12 order on March 2, 2010, granting FNWL's motion.

13 A judgment consistent with the bankruptcy court's July 2
14 Memorandum, but reflecting the amended \$13,519 Contract Value,
15 was entered on March 2, 2010. Ayad timely appealed.

16 **II. JURISDICTION**

17 The bankruptcy court had jurisdiction under 28 U.S.C.
18 §§ 157(b)(2)(I) and 1334. We have jurisdiction under 28 U.S.C.
19 § 158.

20 **III. ISSUES**

- 21 1. Did the bankruptcy court err when it determined that the
22 ALJ's Decision could not be given preclusive effect?
23 2. Did the bankruptcy court err in some of its findings of fact
24 to conclude that Ayad's conduct was fraudulent?

25 **IV. STANDARD OF REVIEW**

26 We review de novo the preclusive effect of a judgment;
27 whether issue preclusion applies is a mixed question of law and
28 fact in which the legal questions predominate. The Alary Corp.

1 v. Sims (In re Associated Vintage Group, Inc.), 283 B.R. 549, 554
2 (9th Cir. BAP 2002).

3 We review the bankruptcy court's findings of fact for clear
4 error. Hansen v. Moore (In re Hansen), 368 B.R. 868, 874-75 (9th
5 Cir. BAP 2007). Whether a creditor relied upon false statements
6 is a question of fact reviewed for clear error. Candland v. Ins.
7 Co. of N. Am. (In re Candland), 90 F.3d 1466, 1469 (9th Cir.
8 1996). The clearly erroneous standard also applies to findings
9 of intent to defraud, to findings that the fraud proximately
10 caused the alleged damages, and to materiality. Id. (internal
11 citations omitted). Clear error exists when, on the entire
12 evidence, the reviewing court is left with the definite and firm
13 conviction that a mistake has been committed. We give findings
14 of fact based on credibility particular deference. Anderson v.
15 Bessemer City, 470 U.S. 564, 573-75 (1985); Rule 8013.

16 V. DISCUSSION

17 A. The Bankruptcy Court Did Not Err When It Determined That The 18 ALJ's Decision Could Not Be Afforded Preclusive Effect.

19 Issue preclusion, also referred to by some courts as
20 collateral estoppel, provides that once an issue of ultimate fact
21 has been determined by a valid and final judgment, that issue
22 cannot be litigated again between the same parties in any future
23 lawsuit. Ashe v. Swenson, 397 U.S. 436, 443 (1970). Issue
24 preclusion applies in dischargeability actions. Grogan v.
25 Garner, 498 U.S. 279, 284 n.11 (1991). Both federal and
26 California law recognize that administrative decisions can be
27 afforded preclusive effect. United States v. Utah Constr. and
28 Mining Co., 384 U.S. 394, 421-22 (1966); Goldsmith v. Harck
(In re Harck), 70 B.R. 118, 120-21 (9th Cir. BAP 1987);

1 Pac. Lumber Co. v. State Water Res. Control Bd., 37 Cal. 4th 921,
2 944 (2006) (citing People v. Sims, 32 Cal. 3d 468, 479 (1982)).

3 For issue preclusion to apply to the ALJ's Decision, Ayad
4 had to establish the following elements: (1) identity of the
5 parties or their privies; (2) identity of issues; (3) the parties
6 had an adequate opportunity to litigate the issues in the
7 administrative proceeding; (4) the issues to be precluded were
8 actually litigated and determined in the administrative
9 proceeding; and (5) the findings on the issues to be precluded
10 were necessary to the administrative decision. Pantex Towing
11 Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir. 1985); Harck,
12 70 B.R. at 120-21.

13 Although the bankruptcy court acknowledged that issue
14 preclusion may apply to administrative decisions, it concluded
15 that it did not apply to the DOI proceeding because: (1) the
16 DOI's licensure proceeding was not between the same parties or
17 privies because FNWL was not a party or in privity with the DOI;
18 (2) FNWL did not have an adequate opportunity to litigate the
19 issues in the DOI proceeding; and (3) the DOI proceeding involved
20 a different standard of proof - clear and convincing as opposed
21 to preponderance of the evidence.

22 While Ayad conceded at trial that FNWL was not a party to
23 the DOI proceeding, he contends that FNWL and the DOI were in
24 privity and the bankruptcy court erred in concluding otherwise.
25 Specifically, Ayad argues that since Harck, which the bankruptcy
26 court relied upon, California courts have expanded the definition
27 of privity in MCA Records v. Charly Records, Ltd. to include "a
28 relationship between the party to be estopped and the

1 unsuccessful party in the prior litigation which is 'sufficiently
2 close' so as to justify application of the doctrine of collateral
3 estoppel." 865 F.Supp. 649, 654 (C.D. Cal. 1994)(quoting Clemmer
4 v. Hartford Ins. Co., 22 Cal. 3d 865, 875 (1978)). Ayad further
5 contends that California courts have extended issue preclusion to
6 cover nonparties to the prior litigation of an issue when the
7 nonparty has a direct financial or proprietary interest in and
8 controls the conduct of a lawsuit, and the nonparty expects to be
9 bound by the decision in the prior action. We disagree with
10 Ayad's assertion that MCA Records "expanded" the definition of
11 privity since Harck. MCA Records, decided after Harck in 1994,
12 merely restated California privity law that had been in effect
13 prior to Harck. Therefore, the Harck court considered the same
14 privity law as did the court in MCA Records. We do, however,
15 agree with Ayad's recitation of California law on privity.

16 Ayad argues that privity exists between FNWL and the DOI for
17 several reasons. First, FNWL's counsel represented the DOI's
18 witness, Merrill Jessup ("Jessup"), Ayad's former supervisor,
19 during his deposition. Second, FNWL's counsel was present for
20 almost every session of the administrative hearings and, during a
21 majority of the breaks, FNWL's counsel conferred with counsel for
22 the DOI. Third, FNWL appeared to be the sole source of the DOI's
23 information used to prosecute its case, and the DOI's counsel
24 admitted that no independent investigation was needed since it
25 relied on FNWL's investigation. Fourth, both parties had the
26 same interest in trying to prove Ayad committed fraud,
27 notwithstanding that the outcomes of the two proceedings were
28 different - revocation of Ayad's license versus recovery of an

1 otherwise dischargeable debt. Finally, because FNWL played such
2 a pivotal role in the DOI proceeding, it knew or should have
3 known it would be bound by the ALJ's decision.

4 Ayad fails to establish privity between FNWL and the DOI.
5 Although FNWL's counsel represented Jessup at his deposition, was
6 present at many of the hearings and spoke with the DOI's counsel
7 on breaks, and provided much of the evidence for the DOI's case
8 against Ayad, Ayad fails to establish that FNWL controlled or had
9 "power to suggest courses of action" in the DOI's proceeding.
10 MCA Records, 865 F.Supp. at 657. California law required FNWL to
11 report Ayad's termination to the DOI, and FNWL was required to
12 cooperate with the DOI by providing witnesses and documentation
13 for the DOI's case. Cooperation is not the same as control.
14 United States v. Bhatia, 545 F.3d 757, 760 (9th Cir. 2008).
15 Further, that fruits from FNWL's investigation may have aided the
16 DOI in its licensure action against Ayad does not rise to the
17 level of a mutuality of interests necessary to preclude FNWL's
18 nondischargeability action against him. Id. While FNWL may have
19 taken an interest in the DOI proceeding against Ayad because it
20 had to report him, FNWL had no financial or proprietary interest
21 in it; FNWL had terminated Ayad's agency six years prior and was
22 suing him in state court for its damages. Further, as the
23 bankruptcy court noted, a private life insurance company like
24 FNWL could not be considered a privy of a public entity such as
25 the DOI.

26 Ayad also fails to establish that FNWL had any right or
27 opportunity to litigate in the DOI proceeding or to explain how
28 the bankruptcy court erred in concluding that FNWL had no such

1 opportunity. In fact, FNWL presented evidence that it had no
2 right to participate in the DOI proceeding as it was conducted
3 entirely by counsel for the DOI, it had no right to call, examine
4 or cross-examine any witness, and it did not participate in
5 discovery or the determination of strategy or the presentation of
6 evidence or witnesses at the hearing.

7 Finally, although Ayad argued at trial that burdens of proof
8 are irrelevant in the court's analysis of whether issue
9 preclusion applies, Ayad did not address this issue on appeal.
10 We agree with the bankruptcy court that differences in burdens of
11 proof in cases precludes issue preclusion. Durosko v. Lewis,
12 882 F.2d 357, 361 (9th Cir. 1989). To give preclusive effect to
13 the ALJ's Decision, which applied a clear and convincing
14 standard, to a nondischargeability action that requires a lower
15 standard of preponderance, would have been inappropriate.
16 Grogan, 498 U.S. at 291.

17 We also reject Ayad's argument that the bankruptcy court
18 erred by failing to give any weight to the ALJ's finding that
19 Ayad did not commit fraud with respect to the 20 non-issued
20 applications, but found him only to be negligent in his handling
21 of three of them. The DOI's case against Ayad did not involve
22 the same evidence as FNWL's case against him; the 13 lapsed
23 policies were not before the ALJ because the DOI did not subpoena
24 the information regarding those policies. Notwithstanding that
25 fact, the bankruptcy court was not required to give any deference
26 to the ALJ's findings due to the different burdens of proof.

27 Accordingly, issue preclusion did not apply to the ALJ's
28 Decision in FNWL's nondischargeability action against Ayad, and

1 the bankruptcy court did not err when it granted FNWL's motion in
2 limine to exclude it.

3 **B. The Bankruptcy Court Did Not Clearly Err In Its Findings of**
4 **Fact Under Section 523(a)(2)(A).**

5 Ayad contends on appeal that some of the bankruptcy court's
6 findings are not supported by the record, and thus the court
7 erred when it determined that Ayad's debt to FNWL was
8 nondischargeable under section 523(a)(2)(A).

9 **1. Elements of Section 523(a)(2)(A).**

10 To prevail on a claim under section 523(a)(2)(A), a creditor
11 must demonstrate five elements: (1) misrepresentation, fraudulent
12 omission or deceptive conduct by the debtor; (2) knowledge of the
13 falsity or deceptiveness of his statement or conduct; (3) an
14 intent to deceive; (4) justifiable reliance by the creditor on
15 the debtor's statement or conduct; and (5) damage to the creditor
16 proximately caused by its reliance on the debtor's statement or
17 conduct. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 35 (9th
18 Cir. BAP 2009)(citing Turtle Rock Meadows Homeowners Ass'n v.
19 Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)). A
20 debtor's silence or omission of a material fact can constitute a
21 false representation which is actionable under section
22 523(a)(2)(A). Citibank (South Dakota), N.A. v. Eashai (In re
23 Eashai), 87 F.3d 1082, 1088-89 (9th Cir. 1996). However, in
24 order to find liability for fraud based upon omission or silence,
25 there must also be a duty to disclose. Id. "The creditor bears
26 the burden of proof to establish all five of these elements by a
27 preponderance of the evidence." Weinberg, 10 B.R. at 35 (citing
28 Slyman, 234 F.3d at 1085).

1 **2. Analysis**

2 **a. First Element: Ayad's False Representations to**
3 **FNWL.**

4 FNWL asserted that Ayad made numerous false representations
5 or omissions in order to induce FNWL to advance Ayad commissions
6 and bonuses through submission of life insurance applications
7 under the guise of the BCP. Specifically, FNWL contended that as
8 agent: (1) Ayad failed to report to FNWL that multiple
9 applications were submitted with the same persons signing Bank
10 Authorization Forms and designating the same bank accounts which
11 Ayad knew were not being used to pay premiums under the BCP as
12 they were designated to do, even for the signors' own policies;
13 (2) Ayad failed to report to FNWL that the applications contained
14 incorrect, incomplete and/or false information regarding the
15 applicants' information that could affect their insurability;
16 (3) Ayad failed to report that multiple applications were
17 submitted on behalf of the same applicants, in the same time
18 frame, with the same designated beneficiaries, and designating
19 the same third-party bank accounts for the BCP; and (4) Ayad made
20 false statements on his Agent's Reports regarding the accuracy of
21 the information on the applications.

22 The evidence at trial showed the following. First, Ayad
23 submitted duplicate life insurance policy applications for
24 several individuals. Ayad submitted an application for Said
25 Halaka in March 2000, and a second one for him in December 2000.
26 FNWL declined the first application for diabetes and substance
27 abuse. The second application contained changes in Said's
28 personal information such as his birth date (10 years younger),
height (4" taller), a different social security number, and Ayad

1 checked "No" to the question of whether the proposed insured had
2 any application for life insurance declined. Ayad also checked
3 "No" on his Agent's Report to the question of whether he knew of
4 any factor not indicated in the application that would affect
5 Said's insurability. Said's case is what triggered FNWL's
6 suspicions about Ayad's possible fraudulent activity.

7 Ayad also submitted duplicate life insurance policy
8 applications for Kamal and Samir Gwanny. For these men, Ayad
9 submitted one application for each in September 2000, and one for
10 each a month later in October 2000. Both Kamal's and Samir's
11 applications listed their occupations as "wood cabinet sales."
12 Kamal's first application reflected his annual income as \$58,000
13 and the second stated it was \$158,000; Samir's first application
14 reflected his annual income as \$60,000 and the second stated it
15 was \$168,000. Ayad provided no explanation of the income
16 disparity on either Kamal's or Samir's second application as FNWL
17 required. Even though the first applications were pending, Ayad
18 checked "No" on both of the second applications to the question
19 asking if there were any applications pending on the life of the
20 applicant. The face amounts of Kamal's policies were \$400,000
21 and \$500,000, and the premium deposits were \$2,100 and \$3,400;
22 the face amounts of Samir's policies were \$400,000 and \$600,000,
23 and the premium deposits were \$2,220 and \$3,260. FNWL issued no
24 policies because both men failed to comply with FNWL's medical
25 information requests, but Ayad received advanced commissions and
26 bonuses of \$8,400 and \$13,600 for Kamal's applications and \$8,800
27 and \$12,500 for Samir's, all of which FNWL recovered.

28 Ayad also submitted duplicate life insurance policy

1 applications within one to six months after submitting the first
2 application for at least four other individuals during 2000, for
3 which he received advanced commissions and bonuses, some of which
4 FNWL was unable to recover. These duplicate applications
5 contained similar errors or omissions as the others, such as
6 unexplained significant income disparities (or no income listed
7 whatsoever), and Ayad checked "No" on the second applications to
8 the question asking if any insurance policies were in force on
9 the life of the applicant, even though a policy had been issued
10 upon the first application. Some applications contained Bank
11 Authorization Forms signed by third parties authorizing payment
12 of monthly premiums from the third party's bank account under the
13 BCP. Common to all of them was the fact that few premium
14 payments, if any, were made under the BCP as designated, but
15 rather premiums were paid from Ayad's own accumulation and trust
16 accounts. No policies were issued on any of the second
17 applications due to either the applicant's failure to comply with
18 medical information requests, or the applicant's withdrawal of
19 the application.

20 Several other false representations and/or omissions by Ayad
21 were also shown. Ayad submitted a life insurance application for
22 Adele Samaha to FNWL in February 2001, with a Bank Authorization
23 Form signed by Soulie Elkarake, listed as her son in the
24 application, for payment of premiums under the BCP. The face
25 amount of the policy was \$1,000,000, and the premium deposit was
26 \$5,100. No policy was issued because Adele did not timely submit
27 requested medical information. A check drawn on Soulie's account
28 for \$4,000 to pay the deposit was returned NSF, and FNWL refunded

1 the balance of the premium deposit of \$1,100 for the portion that
2 was actually paid. Ayad received an advanced commission and
3 bonus of \$19,097, which FNWL did not recover. Importantly, Ayad
4 did not disclose to FNWL suspicious information about Adele's
5 application; Adele's birth date indicated she was 67, but her son
6 Soulie's age was listed at 69 on his policy applications
7 submitted the year before. Ayad also did not disclose to FNWL
8 that Soulie's bank account designated for payment of premiums in
9 Adele's application under the BCP was the same account that Ayad
10 had requested a month earlier not be used per the BCP to pay the
11 premiums on Soulie's own policy.

12 Ayad submitted to FNWL a life insurance policy application
13 for Maher Guindi, an acquaintance of Ayad's from when they lived
14 in Egypt as teenagers. Guindi testified that he met with Ayad
15 over dinner. They discussed life insurance but Guindi, a single
16 man with no beneficiaries, told Ayad he was not interested in any
17 life insurance policies. Nevertheless, Ayad's agency submitted
18 to FNWL an application for life insurance for Guindi. The
19 application contained several errors including a misspelled last
20 name ("Guindai"), an incorrect date of birth (making him 10 years
21 older), an incorrect mailing address, incorrect employment and
22 income information, stated that he was a smoker and he is not,
23 and Guindi's signature was forged on various documents included
24 with the application. A Bank Authorization Form was signed by
25 Maher Rophael for automatic drafting of premium payments from his
26 bank account under the BCP and was submitted with Guindi's
27 application. Guindi does not know Maher Rophael. Maher Rophael
28 was also the designated payor for eight other life insurance

1 policy applications submitted by Ayad to FNWL. Ayad received
2 \$6,000 in advanced commission for this application, which was
3 recovered through a charge back against his account. FNWL later
4 declined Guindi's application and issued a refund check in
5 Guindi's name (misspelled Guindai). Guindi testified that he had
6 no idea a policy had been issued for him and that he did not
7 endorse the premium refund check of \$1,500, which someone cashed
8 and endorsed with a signature very similar to the forged
9 signature on the application (first name in cursive with the last
10 name in print all upper case).

11 Ayad also submitted to FNWL life insurance policy
12 applications for three Egyptian residents who were only visiting
13 the United States. Non-U.S. citizens are not eligible for life
14 insurance policies with FNWL. The applications indicated that
15 the applicants were U.S. citizens who did not intend to travel
16 outside the United States for more than 30 days within the next
17 two years. These applications, like the others, were for high
18 dollar policy limits (\$700,000, \$750,000 and \$800,000) and had
19 high dollar monthly policy premiums (\$2,900, \$2,850 and \$2,850).
20 Further, the applicants were each married but listed the same
21 residential address in California. Notably, all three applicants
22 had listed annual incomes of at least \$120,000, but the
23 applications were accompanied by Bank Authorization Forms
24 authorizing payments from the bank account of a single third-
25 party payor under the BCP. Ayad requested and received from FNWL
26 advanced commissions and bonuses for these applications, which
27 resulted in unrecovered charge backs of approximately \$34,000.
28 No policies were issued; two applications were withdrawn and one

1 applicant failed to submit required information.

2 The evidence further showed that with respect to the
3 13 lapsed policies, these applicants were either the same
4 applicants, the bank authorization signors, or relatives of the
5 applicants of the 20 non-issued applications. Moreover, FNWL
6 investigators were unable to contact most of the applicants of
7 the 20 non-issued applications because the phone numbers listed
8 for 15 out of 20 were incorrect. The few applicants FNWL
9 investigators did contact were unusually uncooperative. Social
10 security numbers for 13 out of the 20 applicants were incorrect,
11 and several of the married male applicants listed a relative
12 other than his spouse as the beneficiary, but Ayad did not submit
13 the required spouse's acknowledgment either with the application
14 or anytime thereafter.

15 Finally, and what the bankruptcy court found most
16 compelling, were the suspicious facts surrounding the BCP, the
17 payment method necessary for Ayad to get advanced commissions.
18 In general, although all 33 life insurance applications indicated
19 that the applicant would pay monthly premiums under the BCP
20 through automatic drafts from a designated bank account, the
21 payment history showed that few premiums were paid in this
22 manner. For each application, the initial policy payment was
23 paid by check, and/or the first premium payment due was made by
24 check (some of which were returned NSF), not the BCP. In all
25 cases, soon after the initial policy payment and the first
26 premium payment were made by check, Ayad (or his employees)
27 contacted FNWL and requested that subsequent premium payments, if
28 any were made, be made through Ayad's accumulation or trust

1 accounts at FNWL. FNWL copied Ayad on letters sent to the
2 applicants or policyholders confirming Ayad's requests not to
3 draft monthly premium payments per the BCP.

4 Specifically, Ayad submitted 12 applications for various
5 persons (including Said Halaka) under the BCP with Bank
6 Authorization Forms signed by one individual, Nabih Halaka,
7 authorizing payments to be withdrawn from Nabih's bank account.
8 Ayad received advanced commissions and bonuses for these
9 applications for which FNWL incurred unrecovered charge backs of
10 over \$60,000. Ayad submitted these applications during the same
11 time period from March 2000 to January 2001. FNWL either did not
12 issue policies for these applications or, if policies were
13 issued, they all lapsed for nonpayment. If policies had been
14 issued for all applicants, a total of \$25,295/month needed to be
15 drawn from Nabih Halaka's bank account under the BCP. His
16 monthly gross income was only \$10,000/month - less than one-half
17 of what was needed to support the policies. Three of the
18 applications for which FNWL did not issue policies were submitted
19 by Ayad after July 2001, when he was aware that Nabih's bank
20 account was not being used per the BCP to pay for policy
21 premiums.

22 Ayad also submitted to FNWL eight applications for various
23 persons under the BCP with Bank Authorization Forms signed by one
24 individual, Maher Rophael, authorizing payments to be withdrawn
25 from his bank account. Ayad received advanced commissions and
26 bonuses for these applications for which FNWL incurred
27 unrecovered charge backs of over \$50,000. FNWL did not issue
28 policies on two of them, but did issue policies for the other

1 six, all of which either lapsed for nonpayment or were cancelled
2 at the insured's request. If policies had been issued for all
3 applicants, a total of \$11,780/month needed to be drawn from
4 Maher Rophael's bank account under the BCP. His monthly gross
5 income was only \$12,500/month. Notably, the evidence showed that
6 applicant Alfred Gwanni designated Maher Rophael's bank account
7 to make the premium payments for Alfred's policy, yet Alfred's
8 bank account was the designated account to pay the premiums for
9 both Kamal and Samir Gwanny (their first and second applications)
10 under the BCP.

11 In his defense, Ayad contended that he did not knowingly and
12 fraudulently present any false information to FNWL but, as the
13 selling agent, simply did as FNWL required and wrote down what
14 the applicants provided; it was FNWL's underwriting department's
15 responsibility to verify the information and catch any missing or
16 inaccurate items. Ayad admitted that he was sloppy in answering
17 some of the "boilerplate" questions too quickly, but he figured
18 that underwriting would catch any problems, which they did. Out
19 of the 820 applications Ayad submitted during his time at FNWL,
20 he contended that errors on this "tiny minority" hardly
21 constituted knowing and fraudulent false representations. For
22 the 13 lapsed policies, Ayad pointed out that underwriting issued
23 the policies even though they knew the applications contained
24 inaccurate or incomplete information. As for Guindi, Ayad
25 testified that his application was used as a training device for
26 his employees, that someone inadvertently submitted it to FNWL,
27 but that Ayad had contacted an official at FNWL to alert her
28 about the error. Ayad further testified that in Egyptian culture

1 it is not unusual for relatives to pay for one's life insurance
2 premiums or for a married man to name a beneficiary other than
3 his wife.

4 With respect to the first element, the bankruptcy court
5 rejected Ayad's contention that he was merely a scrivener
6 reporting what the applicants told him and that underwriting
7 would catch any errors or omissions. Jessup, Ayad's former
8 supervisor, testified that agents are not mere salesmen with the
9 ability to write whatever policy they can without regard to
10 FNWL's underwriting requirements. Thus, agent Ayad was
11 responsible for soliciting and reporting factual representations
12 accurately on life insurance applications and his Agent's Report
13 forms. Further, under California law, Ayad had a fiduciary
14 relationship with his principal, FNWL, and owed FNWL fiduciary
15 duties of good faith and loyalty, including a duty to disclose
16 material information to FNWL on policy applications, particularly
17 matters material to risk of the insured.

18 Specifically, the bankruptcy court found that Ayad, as
19 soliciting agent for FNWL, completed and submitted the subject 33
20 life insurance applications along with his corresponding Agent's
21 Report, which set forth factual representations about the
22 insurability of the applicants, requested the payment of advanced
23 commissions, and selected the BCP as the method for premium
24 payments. In those documents, Ayad made false representations or
25 omissions by knowingly failing to disclose to FNWL material
26 information that had a bearing on the applicants' insurability
27 and his request for advance commissions, such as failing to
28 report to FNWL that many of the applications contained incorrect,

1 inconsistent, incomplete and/or false information regarding the
2 applicants' personal, financial or medical background, or
3 residency status which could affect the applicants' insurability.
4 Ayad also failed to report that several applications were
5 submitted on behalf of the same applicants, in the same time
6 frame, with the same beneficiaries, and designating the same
7 third-party bank accounts for the BCP.

8 Particularly regarding the BCP, the bankruptcy court found
9 that Ayad designated on all 33 applications that the BCP would be
10 used when in fact he made sure it was not. The payment history
11 indicated that the BCP was not used to pay the policy premiums,
12 but rather payments were made by check or from Ayad's own
13 accounts. On every policy, Ayad, not the applicant, requested
14 FNWL not to draft the monthly premium payments from the bank
15 accounts designated in the applications, and Ayad received copies
16 of FNWL's letters to policyholders confirming these requests.
17 Thus, Ayad not only knew that the BCP was not being used for
18 payment - material information that if disclosed to FNWL would
19 have prevented Ayad from receiving advanced commissions - but
20 Ayad knowingly manipulated the applications to qualify for
21 advanced commissions and higher bonuses and made sure the BCP was
22 not used. As for Guindi's application, the bankruptcy court
23 rejected Ayad's testimony that it was used as a training device
24 for his staff and submitted in error and found that it was a
25 total fabrication. No one from Ayad's staff or anyone else
26 testified and corroborated Ayad's story about Guindi.

27 On appeal, Ayad contends that the bankruptcy court erred by
28 attributing representations made by the applicants to Ayad.

1 Specifically, he asserts that the life insurance applications
2 were only missing information such as driver's licences, social
3 security numbers, and dates of birth, and none of these omissions
4 affect whether FNWL will insure an applicant. On the duplicate
5 applications, Ayad contends that FNWL failed to show that he
6 remembered what was listed on the first applications in order for
7 him to question information on the second, and, besides, the time
8 waited between submissions allowed for people's health (i.e.,
9 weight) or income to change so Ayad would not question such
10 changes. Ayad also contends that FNWL had no rule about
11 resubmitting applications, and he was not required to announce
12 that an application was being resubmitted.

13 Ayad fails to consider representations he made as agent in
14 answering questions in the applications about the potential
15 insured, or his omissions in failing to inform FNWL about
16 erroneous answers from the applicants, and fails to consider the
17 representations and omissions he made in his own Agent's Reports,
18 such as whether he knew of any factors not reflected in the
19 application that would affect the applicant's insurability.
20 Further, as an experienced agent, Ayad cannot reasonably assert
21 that date of birth is not a significant factor an insurer
22 considers in life insurance applications. As for the duplicate
23 applications submitted a few months apart, perhaps a person's
24 weight and income could change during that time period, however a
25 person's height (by 4"), birth date (by 10 years either way), and
26 social security number would not. Moreover, despite Ayad's
27 contention that he did not have to inform FNWL that he was
28 resubmitting an application, FNWL offered evidence that in cases

1 of where a policy has been denied, the second application must be
2 labeled as a "Trial Application," which Ayad failed to do, and,
3 more significantly, advanced commissions are not available on
4 Trial Applications, yet Ayad does not explain why he checked the
5 box requesting the advance. Finally, Ayad fails to adequately
6 explain why he checked "No" on all of the second applications to
7 the question for the agent of whether there were any applications
8 pending, which would alert FNWL that the second application was a
9 resubmission, or why he checked "No" to the question of whether
10 any life insurance policies were in force on the applicant, which
11 prevents FNWL from the "moral hazard" of over-insuring.

12 Next, Ayad contends absolutely no evidence exists proving
13 that he knew the designated bank accounts would not be used for
14 the BCP, and that the bankruptcy court made erroneous findings
15 that show nothing about Ayad's knowledge at the time he took the
16 applications. Ayad argues that he had no way to "predict the
17 future" that applicants would not use the BCP; his requests to
18 not draft the monthly premium payment from the bank account and
19 FNWL's confirmation letters to policyholders acknowledging these
20 requests all occurred after the applications were submitted.

21 Ayad is incorrect. For Nabih Halaka, whose bank account was
22 designated as the payor for 12 applications under the BCP, Ayad
23 knew as of July 2000 (because he made the request), that premium
24 payments were not to be drafted from Nabih's account yet Ayad
25 submitted several subsequent applications under the BCP
26 designating Nabih's same bank account. For Maher Rophael, whose
27 bank account was designated as payor for eight applications under
28 the BCP, Ayad knew by August 2000, that deductions were not to be

1 made from Maher Rophael's account yet Ayad submitted several
2 subsequent applications under the BCP designating this same bank
3 account. Therefore, Ayad knew at the time, at least with respect
4 to those applications, that the BCP was not being used. We also
5 reject Ayad's argument that the bankruptcy court erred in
6 assuming that Ayad knew in advance that the BCP would not be used
7 to pay premiums just because the result was that applicants had
8 difficulty in paying their premiums. Inability to pay is not why
9 the bankruptcy court found that Ayad knew the BCP would not be
10 used to pay premiums. Rather, it was because Ayad, in several
11 cases, submitted subsequent applications designating the same
12 bank account for premium payments that he had just requested not
13 be used for the BCP. A prime example of this is the duplicate
14 applications submitted for Soulie Elkarake. The first
15 application resulted in a policy issued on September 20, 2000.
16 Less than a month later on October 16, 2000, Ayad contacted FNWL
17 and requested that no premium deductions be taken from the
18 designated bank account. However, on that same day, Ayad
19 submitted a second application for Soulie designating this same
20 bank account for monthly premium deductions under the BCP.
21 Further, Soulie's mother's application, submitted shortly
22 thereafter, designated the same bank account for payment under
23 the BCP that Ayad requested not be used to pay Soulie's premiums.

24 Ayad next contends that FNWL does not preclude one person
25 from signing the Bank Authorization Forms for other family-member
26 applicants and using that person's bank account to pay for
27 multiple policies, and the bankruptcy court erred in using this
28 irrelevant fact to justify its findings. While FNWL concedes

1 that one party can pay for another party's policy premiums, the
2 fact of a one-payer scenario like Nabih Halaka or Maher Rophael
3 for multiple policies was only one fact of many the court relied
4 upon for its findings. Other suspicious facts noted by the
5 bankruptcy court include, inter alia, all of the applications
6 involved high policy limits and large monthly premiums, both
7 parties lacked income to pay the multiple premiums, Ayad
8 immediately requested in all cases after application submission
9 that the BCP not be used for payment of premiums, and Ayad used
10 his personal accounts to pay his clients' premiums.

11 Next, Ayad asserts that the bankruptcy court erred in
12 speculating how much money would need to be drafted from Nabih
13 Halaka's or Maher Rophael's bank accounts under the BCP in order
14 to service the multiple life insurance policies without
15 considering that their family members would and could have made
16 the appropriate deposits into the designated account. Ayad
17 ignores the fact that he immediately requested in all cases that
18 the BCP not be used as the method of premium payment regardless
19 of who was paying, and he ignores the fact that many of the
20 premiums were never paid, or, if they were, some were returned
21 NSF. Therefore, the family members apparently were not making
22 the appropriate deposits to pay for their premiums as Ayad
23 contends.

24 Ayad also argues that the bankruptcy court erred when it
25 determined that he failed to notify FNWL of the duplicate
26 applications he filed for Kamal and Samir Gwanny in September and
27 October 2000, and faulted Ayad for failing to recognize and
28 report the suspicious discrepancy in their incomes. Perhaps Ayad

1 would not be expected to recall every detail about his clients'
2 incomes, but he did check "No" on both of the second applications
3 to the question of whether there were any applications pending on
4 the life of the applicant, which he knew was incorrect. It seems
5 unlikely that Ayad would forget that he had just filed
6 applications for both men less than one month prior. As for the
7 other duplicate applications, Ayad continues to argue that his
8 job was to merely write down what the applicants told him, and
9 his checking the wrong box about any pending applications was
10 only sloppy, not fraudulent. The bankruptcy court correctly
11 rejected this because, as an agent for FNWL, Ayad had a duty to
12 disclose to FNWL material information that had a bearing on the
13 applicant's insurability. He also had a duty to answer correctly
14 the questions contained in his Agent's Reports. If Ayad could
15 not recall whether these applicants already had high-dollar,
16 high-premium life insurance policies in place, which is unlikely
17 since he received thousands of dollars in commissions from them,
18 he could have confirmed this information in a matter of seconds.

19 Finally, Ayad contends that FNWL only learned of Guindi's
20 erroneously submitted application because Ayad contacted FNWL; if
21 he was trying to perpetrate a fraud he would never have informed
22 FNWL about the error. He further argues that, in any event, FNWL
23 recovered the commission paid. First, a FNWL witness testified
24 that FNWL has no record of Ayad notifying it about Guindi's
25 application. Moreover, even if the application was a training
26 device for Ayad's staff and submitted in error, Ayad fails to
27 explain why the \$1,500 refund check FNWL sent to Guindi's
28 "supposed" address, that coincidentally belonged to Maher

1 Rophael, a man he did not know, was forged and cashed by someone
2 other than Guindi.

3 Despite Ayad's many contentions, the record supports the
4 bankruptcy court's finding that Ayad made numerous false
5 representations or omissions, satisfying the first element, and
6 we see no clear error here.

7 **b. Second Element: Ayad Knew at the Time the**
8 **Representations Were False.**

9 For the second element, the bankruptcy court found that with
10 respect to the 13 lapsed policies the evidence showed a pattern
11 of conduct that when Ayad submitted applications to FNWL he
12 knowingly omitted material information that the BCP would never
13 be used for premium payments. Ayad knew the BCP was not being
14 used because he systematically requested FNWL not to draft the
15 monthly premium payments from the designated bank accounts before
16 any payments were made, and he kept policies in force by having
17 the premiums withdrawn from his own accumulation and trust
18 accounts. As for the 33 life insurance applications in general,
19 the bankruptcy court found that Ayad knew many of them contained
20 incorrect, incomplete and/or false information regarding the
21 applicants' personal, financial and medical background, and
22 residency status that affected the applicants' insurability, and
23 he failed to report these matters to FNWL when he submitted the
24 applications.

25 Ayad contends that the only representations he made in each
26 application were the checked boxes; all other representations
27 were made by the applicants. Ayad asserts that just because not
28 all premium payments were made by way of the BCP, this does not
prove that he knew this information beforehand. We have already

1 addressed and rejected Ayad's contentions about the facts
2 surrounding the BCP. We agree with the bankruptcy court that the
3 evidence clearly showed a pattern of fraudulent conduct. As for
4 the other representations, even if we agreed that Ayad's job as
5 agent was to write down what the applicant told him to without
6 verifying any of the information, he fails to adequately explain
7 why he checked "No" on all 33 applications that the applicant did
8 not already have a life insurance application pending or a life
9 insurance policy in force when several of the parties did, or why
10 he checked "No" on all 33 applications that he knew of no reason
11 affecting the applicant's insurability when certain applicants
12 had been previously denied by FNWL for medical reasons or that
13 three applicants were not even U.S. citizens and ineligible for
14 life insurance. This pattern of conduct goes beyond "sloppy."

15 Accordingly, the bankruptcy court's finding that Ayad knew
16 the falsity of his representations is supported by the record,
17 and Ayad has failed to show any clear error.

18 **c. Third Element: Ayad Made the Representations With**
19 **the Intent to Deceive.**

20 For the third element, the bankruptcy court found that as
21 for the 13 lapsed policies Ayad submitted the applications with
22 the intent and purpose to deceive FNWL because he knew that the
23 applicant had to choose the BCP as the payment method in order to
24 qualify him for advanced commissions. Ayad's pattern of
25 submitting applications selecting BCP, then immediately
26 requesting that BCP not be used, and then paying the premiums
27 from his accumulation and trust accounts before any BCP payments
28 would be made indicated an intentional effort to mislead FNWL in
order to qualify for advanced commissions. Ayad's deceit was

1 further shown by the depletion of his accumulation and trust
2 accounts, which meant that the issued policies would lapse for
3 nonpayment with Ayad still having received advanced commissions
4 to which he was not entitled. As for the incorrect, incomplete
5 and/or false information on the 33 life insurance applications
6 that Ayad submitted to FNWL, the bankruptcy court found that Ayad
7 had the intent and purpose to deceive FNWL because he stood to
8 gain by collecting advanced commissions on submission of these
9 applications, which would not have been paid if Ayad had informed
10 FNWL of the incorrect, incomplete and/or false information
11 material to insurability.

12 Ayad contends that he did not make the representations the
13 bankruptcy court attributed to him because he is not charged with
14 having to investigate the facts relayed to him by applicants.
15 However, if he did incorrectly check a box on the form, Ayad
16 asserts it was only because he was busy at the time. We have
17 already rejected these arguments. Moreover, Ayad does not
18 explain away the suspicious circumstances regarding his conduct
19 about the BCP, the bogus application of Guindi and subsequent
20 forged and cashed refund check, and the fact that Ayad knew the
21 three Egyptian applicants were not U.S. citizens yet he submitted
22 their applications anyway, which, of course, designated the BCP
23 as the method of payment.

24 We believe the record substantially supports the bankruptcy
25 court's finding that Ayad intended to deceive FNWL with his false
26 representations and omissions, thereby satisfying the third
27 element. Accordingly, we see no clear error here.

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1 **d. Fourth and Fifth Elements: FNWL Justifiably Relied**
2 **Upon Ayad's Representations; FNWL's Damages Were**
3 **Proximately Caused By Its Reliance on Ayad's**
4 **Representations.**

5 The bankruptcy court found that FNWL justifiably relied on
6 Ayad's representations because Ayad was an experienced agent that
7 had been with FNWL since 1997, he had been a licensed agent since
8 1989 and possessed a sophisticated level of knowledge about the
9 insurance industry including underwriting requirements, and
10 because he demonstrated that he had the requisite knowledge and
11 training to differentiate between insurable and noninsurable
12 applicants. Hence, FNWL had no reason to suspect any wrongdoing
13 by Ayad. As agent, Ayad had an affirmative duty to disclose
14 information that would disqualify the applicants from being
15 issued a policy by FNWL and Ayad breached this duty by not
16 disclosing what he knew about the applicants. Because FNWL
17 relied on Ayad's fraudulent representations and paid him advanced
18 commissions and bonuses that he was not entitled to as a result,
19 the bankruptcy court found that FNWL sustained nondischargeable
20 damages of \$222,974.45. It further found that because FNWL
21 properly terminated Ayad for willful misrepresentation per the
22 AAA, Ayad was not entitled to damages on his counterclaims for
23 breach of contract and unjust enrichment.

24 All Ayad contends here is that each time he incorrectly
25 checked boxes on the form, FNWL "clearly looked at the two
26 submissions together and was not harmed so even if intent to
27 deceive could be found based on Ayad's sloppy handling of this
28 form, FNWL handled the applications together and was not harmed
 because of the incorrectly checked box." What Ayad argues here
 is unclear, particularly what he means by the "two submissions"

1 reviewed by FNWL. Perhaps he is referring to the duplicate
2 applications he submitted and is arguing that FNWL was not harmed
3 by the second submissions. If so, he is incorrect. FNWL's
4 policy was to pay the advanced commissions to agents after
5 submission of the application but prior to the policy being
6 approved by underwriting, which Ayad knew. As a result of the
7 duplicate applications, FNWL was induced to pay Ayad thousands of
8 dollars in commissions and bonuses that it was unable to recover.

9 In any event, the record supports the bankruptcy court's
10 findings that FNWL justifiably relied on Ayad's false
11 representations or omissions and suffered damages as a proximate
12 result, thus satisfying the fourth and fifth elements. As a
13 result, FNWL properly terminated Ayad under the AAA for willful
14 misrepresentation and he was not entitled to damages for his
15 counterclaims.

16 VI. CONCLUSION

17 Based on the foregoing reasons, we AFFIRM.
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