

DEC 31 2015

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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NOT FOR PUBLICATION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

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In re:	)	BAP No.	SC-14-1150-KiKuJu
	)		
BIRGER GREG BACINO,	)	Bk. No.	09-20080-LT
	)		
Debtor.	)	Adv. No.	10-90315-LT
	)		
_____	)		
	)		
BIRGER GREG BACINO,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
FEDERAL DEPOSIT INSURANCE	)		
CORPORATION, as Receiver for	)		
La Jolla Bank FSB,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on January 22, 2015,  
at Pasadena, California

Filed - December 31, 2015

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

Honorable Laura S. Taylor, Chief Bankruptcy Judge, Presiding

Appearances: John L. Smaha, Esq. of Smaha Law Group argued for  
appellant Birger Greg Bacino; Duncan N. Stevens,  
Esq. argued for appellee Federal Deposit Insurance  
Corporation.

Before: KIRSCHER, KURTZ and JURY, Bankruptcy Judges.

<sup>1</sup> 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 8024-1.

1 Debtor Birger G. Bacino<sup>2</sup> appeals a judgment after trial  
2 determining that his debt to the Federal Deposit Insurance Company  
3 as Receiver for La Jolla Bank FSB ("the Bank"), was excepted from  
4 discharge under § 523(a)(2)(A)<sup>3</sup> and (a)(2)(B). Debtor also  
5 appeals a prior ruling granting in part the FDIC's motion for  
6 summary judgment and denying his cross-motion for summary  
7 judgment. We AFFIRM.

## 8 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### 9 A. Background of Debtor's entities

10 Debtor successfully practiced law as a personal injury  
11 attorney, holding licenses to practice law in Texas (surrendered  
12 in 2006), California (surrendered in 2006) and the District of  
13 Columbia (suspended in 2010). Debtor also operated two real  
14 estate development entities: ALB Properties, Inc. of which he was  
15 100% owner, and Barioni Lakes Estates, LLC, in which he held a 90%  
16 interest. These entities acquired residential lots in different  
17 stages of development including properties known as the Roxbury  
18 and the Imperial projects.

19 In 2002, Debtor also acquired an interest in a healthcare  
20 management conglomerate of several companies collectively called  
21 Premier. Prior to 2004, Premier was the largest provider of  
22 workers' compensation related healthcare services in the state of

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24 <sup>2</sup> On September 28, 2015, Appellant's attorney notified the  
25 BAP that appellant died on August 7, 2015. Although the  
26 notification suggests that no state probate or other death  
proceeding will occur, the Panel issues this memorandum on the  
merits of the appeal, without considering issues of mootness.

27 <sup>3</sup> Unless specified otherwise, all chapter, code and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 California. Premier did not provide medical services directly,  
2 but facilitated patient care, billing, collection and  
3 therapeutical, translation and clinic support for doctors. Debtor  
4 also held a 100% interest in a company called Tammy, Inc. Tammy  
5 provided medical management services to Premier and provided legal  
6 management services to Debtor's law practice.

7 From 2003 through 2010, Premier and Debtor defended criminal  
8 and civil litigation by several governmental entities. In late  
9 2004, sweeping changes were proposed in California's workers'  
10 compensation law. Premier decided to cease obtaining new lien  
11 claims secured by workers' compensation reimbursements and to  
12 focus on collecting its existing lien claims, which totaled  
13 approximately \$400 million, and to defend against litigation  
14 related to those claims. In 2010, Debtor finally resolved the  
15 criminal claims against Premier by negotiating a plea agreement,  
16 wherein he waived all rights to the collection of Premier's  
17 receivables.

18 During the relevant time period, Debtor's ownership in  
19 Premier, Tammy and his law practice comprised his personal income  
20 and net worth. The management fees he anticipated Tammy would  
21 generate from collecting on Premier's receivables represented a  
22 significant portion of his represented 2004-2008 net worth, which  
23 he believed to be in excess of \$300 million.

24 **B. The loans with the Bank**

25 In 2004, an independent loan broker introduced Debtor to  
26 David Yoder, a loan officer and director of loan origination with  
27 the Bank. Yoder recommended to the Bank's loan committee that  
28 Debtor, who Yoder considered a highly desirable borrower, be given

1 three loans to fund the Roxbury project, which Yoder considered a  
2 favorable long-term investment. Yoder admitted the Bank actively  
3 recruited Debtor and his projects as a long-term customer for the  
4 Bank.

5 Between 2004-2008 Debtor, either individually or as the  
6 principal of ALB or Barioni, obtained eight loans from the Bank to  
7 fund the development projects and also entered into ten  
8 modifications and/or maturity date extensions of the existing  
9 loans. The loans and modifications totaled approximately \$39  
10 million; Debtor served either as a borrower or guarantor. The  
11 subject eighteen loans and modifications are as follows:

- 12 • Loan 21130 ("Loan 1") - 2004
- 13 • Loan 21197 ("Loan 2") - 2004
- 14 • Loan 20001 ("Loan 3") - 2004
- 15 • Modification of Loan 2 (21197) ("Loan 4") - 2005
- 16 • Modification of Loan 3 (21001) ("Loan 5") - 2005
- 17 • Loan 22090 ("Loan 6") - 2006
- 18 • Loan 00033 (also known as 22225) ("Loan 7") - 2006
- 19 • Loan 22354 ("Loan 8") - 2006
- 20 • First modification of Loan 6 (22090) ("Loan 9") - 2006
- 21 • First modification of Loan 1 (21130) ("Loan 10") - 2006
- 22 • Loan 00066 ("Loan 11") - 2006
- 23 • First modification of Loan 11 (00066) ("Loan 12") - 2007
- 24 • Modification of Loan 7 (00033) ("Loan 13") - 2007
- 25 • Loan 23203 ("Loan 14") - 2007
- 26 • Modification of Loan 8 (22354) ("Loan 15") - 2008
- 27 • Second modification of Loan 6 (00033) ("Loan 16") - 2008
- 28 • Second modification of Loan 11 (00066) ("Loan 17") - 2008

1 • Second modification of Loan 1 (21130) ("Loan 18") - 2008.  
2 Ultimately, once the real estate market began its rapid  
3 decline in 2008-2009, Debtor defaulted on some of the loans.  
4 After 2009, the FDIC became the receiver of the Bank.

5 **C. FDIC's nondischargeability action**

6 Debtor filed a chapter 7 bankruptcy case on December 31,  
7 2009. The FDIC filed its nondischargeability complaint on July 2,  
8 2012, seeking relief under § 523(a)(2)(A) and (a)(2)(B). The FDIC  
9 contended that Debtor had materially misrepresented his assets,  
10 income, net worth and liabilities in loan applications, personal  
11 financial statements ("PFS") and other documents submitted by him  
12 or on his behalf from his CPA, Warren Thefeld, on which the Bank  
13 relied for each of the loans and/or modifications. Alternatively,  
14 the FDIC contended that Debtor intentionally misled the Bank by  
15 failing to disclose his true financial numbers and did so with the  
16 intent to deceive and induce the Bank to make loans or extend  
17 credit to Debtor on existing loans.

18 **1. The cross-motions for summary judgment**

19 The parties later filed cross-motions for summary judgment.  
20 The FDIC sought summary judgment or partial adjudication on its  
21 § 523(a)(2)(B) claim ("MSJ"); Debtor sought summary judgment on  
22 both of the FDIC's claims, contending that it could not establish  
23 either reasonable or justifiable reliance ("Cross MSJ").

24 **a. The FDIC's motion**

25 In the FDIC's initial brief in support of its MSJ, and to a  
26 greater extent in its supplemental brief ("FDIC's Supplemental  
27  
28

1 Brief"),<sup>4</sup> the FDIC alleged material misrepresentations and/or  
2 omissions by Debtor in connection with each of the loans and  
3 modifications; it set forth the evidence it believed supported  
4 nondischargeability of each particular loan or modification and  
5 stated whether such evidence was disputed or undisputed by Debtor.

6 **i. General allegations**

7 As to all of the loans and modifications, the FDIC alleged:

8 (1) Debtor had continually misrepresented the value of Tammy  
9 at \$25 million.

10 (2) In 2004, upon Thefeld's advice, Debtor set up a tax  
11 shelter via an Employee Stock Ownership Plan ("ESOP"), which  
12 allowed him to defer until retirement taxes on \$25 million worth  
13 of income from Premier, ALB and his law practice. For the ESOP,  
14 an accrual of \$25 million was recorded on Tammy's books and 2004  
15 tax return. In essence, Debtor could collect the accrued  
16 \$25 million in management fees from Tammy and not pay income tax  
17 because it had already been "paid" (deferred until retirement) in  
18 2004. Approximately \$12 million of the \$25 million accrual was  
19 attributed to Debtor's income from Premier and his law practice;  
20 the other \$13 million was attributed to Debtor's income from ALB.

21 (3) The \$25 million accrual had no reasonable basis in  
22 accounting and created the fiction of overstated assets of both  
23 Tammy and ALB. By the end of 2008, only approximately  
24 \$7.5 million of the \$12 million related to Premier was collected.  
25 Thus, according to the FDIC, the accrual was overstated by 40%.

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27 <sup>4</sup> This supplemental brief contains a chart of material facts  
28 and supporting facts and evidence and admissions as to whether a  
material fact was disputed or undisputed by Bacino.

1 At no time from 2004-2008 did Debtor ever disclose to the Bank  
2 that the Premier collections making up the value of Tammy were  
3 overvalued and that its value trended downward significantly from  
4 2004-2008.

5 (4) The FDIC argued that Debtor had also inflated Tammy's  
6 value by not disclosing the Premier investigation and Workers  
7 Compensation Appellate Board ("WCAB") stay.

8 (5) The Bank had relied on Debtor's continued representation  
9 that Premier maintained accounts receivable totaling \$300 million  
10 of which Tammy would realize an estimated \$12 million in fees,  
11 when Debtor was aware as early as 2003 or 2004 that Premier's  
12 anticipated receivables were in jeopardy as being uncollectible  
13 due to its illegal activity and he never disclosed any of this  
14 information in writing to the Bank.

15 (6) Debtor had not disclosed that he knew as early as 2005  
16 that a waiver of the Premier receivables could be a condition of a  
17 plea agreement.

18 (7) Debtor failed to inform the Bank in writing about the  
19 WCAB stay and the negative effect it had on Tammy's ability to  
20 collect the \$300 million in Premier receivables.

21 (8) For each loan or modification, only Debtor knew about  
22 the investigation and the WCAB Stay, which were not readily  
23 discoverable by the Bank.

24 (9) Debtor understated his liabilities for each loan or  
25 modification by omitting ALB's \$13 million loan from Tammy, costs  
26 of construction and, in some instances, the debt on his yacht. No  
27 loan application or PFS reflected the \$13 million liability of  
28 ALB, which was never paid back. Tammy's valuation of \$25 million

1 on the loan applications was based in part on ALB's loan  
2 receivable in favor of Tammy. Debtor applying the indebtedness of  
3 ALB to Tammy increased the value of Tammy's assets. However, by  
4 not balancing the asset with the corresponding liability, Debtor  
5 improperly inflated his net worth by \$13 million.

6 (10) Debtor repeatedly omitted the costs of construction,  
7 which were listed on Debtor's tax returns for the years 2005 and  
8 2006.

9 (11) Debtor consistently listed his yacht as having a value  
10 between \$2.5 and \$3.5 million, often without taking into account  
11 the \$2.1 million owed against it. At deposition, Debtor could not  
12 explain why the yacht debt was not disclosed in some of the loan  
13 applications and PFSs.

14 (12) The Bank conformed with its standard practices in  
15 evaluating Debtor's credit worthiness by performing an  
16 underwriting analysis, credit check and property appraisal and by  
17 requesting tax returns, balance sheets, profit & loss statements,  
18 bank statements and information from Thefeld, Debtor's CPA, to  
19 explain the complex financial structure of Debtor's entities.

20 **ii. Evidence supporting each loan or modification**

21 In addition to the general paraphrased allegations noted  
22 above, the FDIC provided evidence to support nondischargeability  
23 of the eighteen transactions individually, which consisted of the  
24 following:

25 **Loans funded in 2004 - Loan 1, Loan 2, Loan 3.** The Bank  
26 funded these three loans on November 3, 2004, in the amounts of  
27 \$4,184,500, \$1,850,000 and \$1,850,000 respectively. Because the  
28 Bank funded these loans together, the FDIC's evidence in support

1 of its claim was essentially the same. Debtor admitted  
2 inaccuracies existed in the loan applications submitted to the  
3 Bank, and his expert, Walter Schiller, opined that the financial  
4 information Debtor provided to the Bank contained "glaring errors  
5 from the very first loan."

6 In the applications submitted for these loans, dated  
7 October 31, 2004, Debtor represented his monthly income as \$57,512  
8 or approximately \$690,000 per year. The FDIC contended this  
9 statement was a misrepresentation because Debtor's 2004 income tax  
10 return showed an annual income of only \$270,000.

11 Debtor also represented that his net worth was \$49,908,015,  
12 reflecting total assets of \$56,440,038 minus total liabilities of  
13 \$6,532,023. The \$49 million net worth figure included \$32 million  
14 in "Net worth of business(es) owned." Before these loans were  
15 funded, the Bank requested verification "to support [Debtor's]  
16 stated \$32.0 million business net worth figure, which is in  
17 addition to his 100% real estate interests shown on his real  
18 estate schedule." In response, Thefeld provided the Bank with a  
19 Tammy Statement of Income for 2003 in which management fees were  
20 identified as \$30,027,345.64. Thefeld also provided the Bank with  
21 a 2003 Tammy Balance Sheet identifying total assets of  
22 \$30,027,299.80, which included an accounts receivable of  
23 \$29,696,239.02. To substantiate Tammy's value for 2004, Thefeld  
24 provided the Bank with a Tammy Profit & Loss Statement from  
25 January through August 2004 identifying income of \$7,483,215.62 in  
26 management fees. At deposition, Thefeld testified that Tammy was  
27 worth \$29 million in 2004, which included the accrued \$25 million  
28 receivable based on anticipated income from ALB and the management

1 fees from collecting the Premier receivables.

2 In addition, Debtor prepared for the Bank a memorandum,  
3 entitled "Tammy, Inc. receivables through Premier Medical" (the  
4 "Tammy Memorandum"), wherein he represented that "[t]he  
5 \$305 million in accounts receivable may be collected at 50%, which  
6 would mean that my share would be 35% of \$150 million. . . . This  
7 year, Tammy can expect to collect \$150 million times 20%  
8 (collection rate) times 35%, which is my share or 10 million.  
9 This amount is a bit more then [sic] past years, as my share was  
10 around 8 million."

11 Based on the expert opinion of Robert Wallace, the FDIC  
12 contended Debtor's identified net worth constituted a  
13 misrepresentation as it was based on the overstated value of  
14 Tammy, resulting from the accrual of unrealized management fees.  
15 Of the \$25 million accrued for 2004, which made up the majority of  
16 Debtor's stated business net worth of \$32 million, only  
17 \$7.5 million was actually collected between 2004 and 2008. The  
18 FDIC further contended Debtor was engaging in "double accounting"  
19 of the same asset wherein the same money was represented as  
20 (1) monthly base income from Tammy and his law practice and (2) a  
21 Tammy asset of \$25 million.

22 The FDIC contended that Debtor had also misrepresented his  
23 liabilities by identifying one of the Roxbury lots with a value of  
24 \$8 million and a debt of \$552,000. Debtor admitted this was an  
25 error; the debt was actually \$5.5 million.

26 The FDIC also contended that the Bank's reliance on Debtor's  
27 representations of income, assets and net worth was evidenced in  
28 the Underwriting Analysis for each of the three loans, which

1 stated: "Mr. Bacino is a self-employed attorney and real estate  
2 investor, with an est. \$49.9 million net worth and earnings in  
3 excess of \$706,000 per year." The Bank's reliance on Debtor's net  
4 worth was also demonstrated by the Bank's Credit Memorandums  
5 generated for Loan 2 and Loan 3, which stated: "Net worth -  
6 \$38,521,892 . . . Strengths: Strong Guarantor Net Worth."

7 **Loans funded in 2005 - Loans 4 & 5.** Loan 4 was a  
8 modification of Loan 2, wherein Debtor received an additional  
9 \$1,440,000; Loan 5 was a modification of Loan 3, wherein Debtor  
10 received an additional \$390,000. These loans were funded on  
11 August 12, 2005. In addition to Debtor's submitted loan  
12 applications, Thefeld had also submitted to the Bank a letter  
13 dated August 11, 2005 (the "August 2005 Letter"), which discussed  
14 Debtor's and Tammy's income. It stated: "My firm is the  
15 accountant for Greg Bacino. . . . His adjusted gross income on  
16 his 1040 for 2004 will be approximately \$3,300,000. In addition,  
17 approximately \$25,000,000 of additional income was earned and will  
18 be reported as income by his ESOP pension plan."

19 In the applications for these loans dated June 15, 2005,  
20 Debtor represented his monthly income was \$600,000, or \$7.2  
21 million per year. The FDIC contended this was a misrepresentation  
22 because Debtor testified that he did not recall making \$600,000  
23 per month in 2006 and Thefeld, who did Debtor's taxes,  
24 corroborated that Debtor did not personally earn that much money.  
25 Thefeld estimated that Debtor's income could have been no greater  
26 than \$300,000 per month. Further, contended the FDIC, Debtor had  
27 improperly "double counted" the Tammy asset because any income  
28 from Tammy and his law practice had already been identified as

1 part of the \$25 million accrual and could not be considered  
2 "income" in the subsequent years when actually collected.

3 As for his alleged net worth misrepresentations, in the  
4 application for Loan 4, Debtor represented total assets of  
5 \$65,895,349, including \$32 million in "Net worth of business(es)  
6 owned" and \$32,300,000 in "Real estate owned." In the application  
7 for Loan 5, dated the same date, Debtor represented total assets  
8 of \$71,175,318, including \$32 million in "Net worth of  
9 business(es) owned" and \$35 million in real estate. Besides the  
10 \$5.2 million discrepancy in the asset figure between the two  
11 applications, Wallace opined that Debtor had also misrepresented  
12 his net worth due to his overstated value of Tammy and his double  
13 accounting of that asset. The FDIC contended that Debtor had also  
14 misrepresented his liabilities. Neither loan application  
15 identified any debts, which Debtor could not explain.

16 The FDIC argued the Bank relied on Debtor's representations  
17 of income, assets and net worth as demonstrated by the  
18 Underwriting Analysis for each loan, which stated: "He has a net  
19 worth in excess of \$2.9 million which consists of approximately  
20 \$35 million in real estate owned, \$32 million in net worth of  
21 business and \$1.25 million in personal property." The Bank's  
22 reliance on Debtor's stated net worth figure of \$71 million, which  
23 reflects the lack of any debts, was also demonstrated by the  
24 Credit Memorandum generated for each loan, which stated: "Bacino  
25 Net Worth \$71,175,318 & Liquidity \$2,925,318. Recommend file for  
26 approval." Based on the expert opinion of Thomas Tarter, the FDIC  
27 contended it was reasonable and customary for the Bank to rely on  
28 Thefeld's August 2005 Letter in extending additional credit to

1 Debtor because of Thefeld's status as a CPA.

2       **Loans funded in 2006** – Loan 6. The Bank funded Loan 6 for  
3 \$8,075,000 on February 15, 2006. In connection with this loan,  
4 Thefeld authored a letter dated February 6, 2006 (the "February 6,  
5 2006 Letter") to Jim Fardeen of Merrill Lynch, which was  
6 ultimately submitted to the Bank. It stated: "The following is a  
7 brief summary of the income tax structure of Greg's Entities  
8 . . . . [Premier's] [a]ccounts receivable are in excess of  
9 \$300,000,000 and are considered collectible by Greg. . . . The  
10 cash net income in 2004 was over \$5,000,000. Greg has estimated  
11 that his future Premier collections from January 2006 forward will  
12 total \$12,000,000-15,000,000. . . . The estimated income for the  
13 law firm for 2005 is \$900,000."

14       In the application submitted for Loan 6 dated February 8,  
15 2006, Debtor represented his monthly income was \$600,000. The  
16 FDIC contended this was a misrepresentation because Debtor's 2006  
17 personal income tax return reflected that his salary and wages  
18 were \$0.

19       Debtor represented his net worth of \$64,835,604, reflecting  
20 total assets of \$86,435,773 minus liabilities of \$21,600,169.  
21 Debtor represented his assets included \$32 million in "Net worth  
22 of business(es) owned" and \$33,750,000 in real estate. As with  
23 prior loans, Wallace opined that Debtor had misrepresented his net  
24 worth due to his overstated value of Tammy and his double  
25 accounting of that asset. Debtor had also failed to list various  
26 debts of ALB and Barioni.

27       The FDIC contended that the Bank's reliance on Debtor's  
28 representations of income, assets and net worth was evidenced in

1 the Underwriting Analysis: "Mr. Bacino has a stated net worth of  
2 \$64,835,604. This is comprised mainly of equity originating from  
3 his business (approx. \$32 million) and his real estate investments  
4 (approx. \$22 million). . . . Strengths: Guarantor's net worth."  
5 Tarter opined that it was reasonable and customary for the Bank to  
6 rely on Thefeld's February 6, 2006 Letter in extending credit to  
7 Debtor for Loan 6. The FDIC argued that it was also reasonable  
8 for the Bank to rely on the updated financials for Tammy: the  
9 2005 Tammy Balance Sheet showed accounts receivable of  
10 \$25,840,521; and the Tammy 2005 Profit & Loss Statement listed  
11 management fees of \$2,075,263.

12 Loan 7. The Bank funded Loan 7 on March 10, 2006, for  
13 \$3 million. On February 22, 2006, Debtor authored a letter for  
14 the Bank discussing his and Tammy's income (the "February 22, 2006  
15 Letter"). Debtor represented that "Tammy, Inc. has accrued and  
16 paid tax on \$25 million in income. Even though Tammy is entitled  
17 to accrue \$25 million, the pension amount will be regulated by  
18 existing pension laws. In excess of \$12 million has already been  
19 run through Tammy's qualified ESOP and been invested into ALB  
20 Properties."

21 In Debtor's PFS dated November 15, 2005, Debtor represented  
22 total income of \$7.4 million, which consisted of \$900,000 from his  
23 law practice, \$4 million from ALB and \$2.5 million from Tammy.  
24 The FDIC contended these figures misrepresented Debtor's income.  
25 Schiller opined that Debtor's stated total income, which was the  
26 same amount he represented in every PFS, was not substantiated by  
27 any document. Thefeld, who did Debtor's tax returns, suspected  
28 Debtor was not making \$900,000 annually and admitted that Debtor's

1 income from Tammy and his law practice was substantially reduced  
2 from 2005-2008, but was never reflected in any PFS. The FDIC also  
3 disputed Debtor's asserted \$2.5 million income for Tammy; Tammy's  
4 2006 tax return showed an income of only \$652,000. The FDIC  
5 contended this reported \$2.5 million income was also an improper  
6 "double counting," when the Tammy asset was already part of the  
7 \$25 million accrual. Finally, the FDIC disputed Debtor's asserted  
8 \$4 million income for ALB; ALB made no money in 2006.

9 In the loan application Debtor submitted for Loan 7 dated  
10 March 9, 2006, Debtor represented a \$600,000 monthly income. This  
11 statement, however, argued the FDIC, contradicted Debtor's 2006  
12 income tax return, which showed his income as \$0.

13 In the November 15, 2005 PFS, Debtor represented total assets  
14 of \$124,691,730, including \$84,050,000 in owned real estate,  
15 \$5.5 million in his law practice, \$25 million in Tammy and  
16 \$2.5 million in his yacht. In the March 9, 2006 loan application,  
17 Debtor represented total assets of \$96,778,117, including  
18 \$1,020,509 in "Net worth of business(es) owned," \$33,750,000 in  
19 real estate and \$11 million in vested interest in his retirement  
20 fund (the ESOP). The FDIC contended that Debtor had engaged in  
21 "triple accounting" of the Tammy asset wherein the same money was  
22 represented as (1) \$600,000 monthly based income, (2) an  
23 \$11 million vested retirement plan, and (3) Tammy equity of  
24 \$32-33 million. Debtor admitted at deposition that this appeared  
25 to be true.

26 The FDIC argued the Bank's reliance on Debtor's  
27 representations of income, assets and net worth was demonstrated  
28 by the Underwriting Analysis: "Overall credit summary: Total

1 Assets: \$96,778,117; Total Liabilities: \$22,760,452; Net Worth:  
2 \$74,017,665. . . . Mr. Bacino's net worth is \$74,017,665. This  
3 is comprised mainly of equity originating from his various  
4 business ventures (approx. \$47.5 million). . . . Mr. Bacino's  
5 financial statements also reflect \$11 million in retirement  
6 reserves[.] . . . The borrower high debt ratios are partially  
7 offset by the borrower's sizable expected income from accounts  
8 receivable held in his qualified ESOP's. The receivables are  
9 estimated to be around \$16.6 million over the next few years."  
10 The FDIC contended the Bank's reliance on Debtor's net worth was  
11 also demonstrated by the Credit Memorandum generated for Loan 7:  
12 "Mr. Bacino has a stated Net Worth of \$74,077,162. . . .  
13 Strengths: The borrower has strong Net Worth, Repeat Borrower,  
14 Guarantor has consistent Strong Net Income. . . . Based on the  
15 financial strength of the borrower and guarantor, approval is  
16 recommended."

17 Additionally, the FDIC argued that in funding Loan 7 it was  
18 reasonable for the Bank to rely on (1) the Tammy Memorandum, (2) a  
19 recent February 2006 Tammy Balance Sheet, which listed accounts  
20 receivable as \$25,840,521 and contained the same double accounting  
21 error, (3) an updated 2005 Tammy Profit & Loss Statement, which  
22 stated management fees of \$2,705,263, but failed to disclose this  
23 "income" was an asset and technically not income because it was  
24 already taxed in 2004, (4) the February 6, 2006 Letter wherein  
25 Thefeld represented accounts receivable were in excess of  
26 \$300 million and considered collectible by Debtor and that future  
27 Premier collections would total \$12-15 million, and (5) Debtor's  
28 February 22, 2006 Letter.

1        Loan 8. The Bank funded Loan 8 on June 29, 2006, in the  
2 amount of \$2,015,000. For reasons unexplained, two loan  
3 applications both dated June 21, 2006, were submitted for this  
4 loan. In the first loan application, Debtor represented his  
5 personal monthly income was \$600,000. As noted with prior loan  
6 applications, the FDIC contended this was a misrepresentation as  
7 Debtor never made \$600,000 per month between the years 2004 and  
8 2008 and his 2006 tax return showed his salary and wages as \$0.  
9 Further, any income claimed to be derived from Tammy was an  
10 improper double accounting.

11        The FDIC contended that Debtor had also misrepresented his  
12 net worth. In the first loan application Debtor represented total  
13 assets of \$71,848,587, including \$32 million in "Net worth of  
14 business(es) owned," \$5.5 million in real estate and \$31,730,000  
15 in "other assets," which included the Imperial property valued at  
16 \$26,280,000. In the second loan application, Debtor represented  
17 total assets of \$116,855,820, which reflects a difference of over  
18 \$45 million from the first application. During Debtor's  
19 deposition taken on October 13, 2010, and as confirmed in the  
20 FDIC's Supplemental Brief, Doc. No. 362, Fact 379, Debtor doubted  
21 the figures presented in the second loan application were  
22 accurate.

23        Debtor represented his total liabilities in the first  
24 application as \$5,071,917 and in the second as \$12,946,674.  
25 Regardless of the figure, the FDIC contended he understated his  
26 liabilities based on the general allegations as to all of the  
27 transactions noted above. Debtor had also failed to disclose  
28 various debts of ALB and Barioni.

1           The FDIC contended that the Bank's reliance on Debtor's  
2 representations of income, assets and net worth was evidenced in  
3 the Credit Memorandum, which stated: "Net Worth: His stated net  
4 worth is in excess of \$66.77 million. This consists of \$32.0  
5 million in net worth of business owned . . . . "Mitigating  
6 factors supporting approval of the loan, include guarantor's net  
7 worth in excess of \$66.77 million and guarantors' real estate  
8 investing experience." As with Loan 7, the FDIC argued that in  
9 funding Loan 8 it was reasonable for the Bank to rely on  
10 misrepresentations made in the Tammy Memorandum, the February 2006  
11 Tammy Balance Sheet, the 2005 Tammy Profit & Loss Statement,  
12 Thefeld's February 6, 2006 Letter and Debtor's February 22, 2006  
13 Letter.

14           Loan 9. Loan 9 was the first modification of Loan 6, wherein  
15 Debtor received an additional \$2,513,400. It was funded on or  
16 around August 1, 2006. It appears from the record provided in  
17 support of the FDIC's MSJ that Debtor did not submit a loan  
18 application or a PFS for this loan. Nonetheless, the FDIC claimed  
19 that based on statements made by the Bank in the related Credit  
20 Memorandum, the Bank relied on Debtor's misrepresentations of  
21 income, assets and net worth. In that Memorandum, the Bank stated  
22 Debtor's net worth was "in excess of \$36.1 million." "Strengths:  
23 Net Worth is in excess of \$36.1 million," and "Weakness:  
24 Mr. Bacino's 2003 Federal Income Tax Returns reflect income loss -  
25 Offset with Net-Worth in excess of \$36 million." The documents  
26 the FDIC claimed supported the Bank's reliance for funding Loan 9  
27 included (1) the Tammy Memorandum, (2) an updated July 2006 Tammy  
28 Balance Sheet, which showed receivables of \$25,840,521, (3) the

1 2005 Tammy Profit & Loss Statement, (4) Thefeld's February 6, 2006  
2 Letter, and (5) Debtor's February 22, 2006 Letter.

3       Loan 10. Loan 10 was the first modification of Loan 1,  
4 wherein Debtor received an additional \$1 million. It was funded  
5 on August 11, 2006. It also appears that Debtor did not submit a  
6 loan application for this loan. Although the FDIC's MSJ  
7 referenced Exhibit 109 as the loan application, Exhibit 109 was  
8 the loan application for Loan 7 funded in March 2006. The FDIC  
9 did contend, however, that for this loan the Bank relied on  
10 Debtor's misrepresentations regarding his income, liabilities and  
11 net worth in his PFS from November 15, 2005. Because Loan 7 was  
12 also supported in part by this same PFS, the FDIC presented  
13 essentially the same evidence to support its claim for  
14 nondischargeability for Loan 10.

15       The FDIC contended the Bank's reliance on Debtor's  
16 representations of income, assets and net worth was evidenced by  
17 its statement made in the Underwriting Analysis for this loan,  
18 which is identical to what was stated in the Underwriting Analysis  
19 for the original loan funded in November 2004: "Mr. Bacino is a  
20 self-employed attorney and real estate investor, with an est.  
21 \$49.9 million net worth and earnings in excess of \$706,000 per  
22 year." The other documents the FDIC claimed supported the Bank's  
23 reliance for funding Loan 10 included (1) the Tammy Memorandum,  
24 (2) the July 2006 Tammy Balance Sheet, (3) the 2005 Tammy Profit &  
25 Loss Statement, (4) Thefeld's February 6, 2006 Letter, and  
26 (5) Debtor's February 22, 2006 Letter.

27       Loan 11. Loan 11 was funded on December 20, 2006, for  
28 \$1 million. Again, two loan applications were submitted for this

1 loan. In the first loan application dated November 20, 2006,  
2 Debtor represented his monthly income was \$57,512, including  
3 \$36,787 of "partnership income." The second application dated  
4 December 13, 2006, indicated that Debtor's monthly income was  
5 \$616,666, including \$208,333 from Tammy. Besides the discrepancy  
6 in monthly income between the two applications, the FDIC argued  
7 that Debtor had misrepresented his income because his 2006 tax  
8 return identified his salary and wages as \$0.

9 Debtor's recent PFS dated November 10, 2006, reflected his  
10 total income as \$7.4 million, which consisted of \$900,000 from his  
11 law practice, \$4 million from ALB and \$2.5 million from Tammy.  
12 The FDIC contended these figures were also misrepresentations of  
13 Debtor's income for the same reasons it stated in Loan 7.

14 As for his assets, the first loan application stated total  
15 assets of \$56,440,038, including \$23,500,000 in real estate and  
16 \$32 million in "Net worth of business(es) owned." The second loan  
17 application represented total assets of \$123,201,232. Thus, a  
18 \$66 million discrepancy in assets existed between the two  
19 applications dated just weeks apart.

20 The FDIC contended the Bank's reliance on Debtor's  
21 representations of income, assets and net worth was evidenced by  
22 the Credit Memorandum, which stated that the loan's weaknesses  
23 were "mitigated by the guarantor's real estate experience, PIQ  
24 locations and guarantor's net worth in excess of \$82.28 million."  
25 The FDIC further contended it was reasonable for the Bank to also  
26 rely on (1) the Tammy Memorandum, (2) the February 2006 Tammy  
27 Balance Sheet, which showed receivables of \$25,840,521, (3) an  
28 updated 2006 Tammy Profit & Loss Statement, which listed

1 management fees of \$2,345,842.63, but still contained the same  
2 double accounting error, (4) Thefeld's February 6, 2006 Letter,  
3 and (5) Debtor's February 22, 2006 Letter.

4       **Loans funded in 2007** - Loan 12. Loan 12 was the first  
5 modification of Loan 11, wherein Debtor received an additional  
6 \$1,224,500. It was funded on March 1, 2007. In the submitted PFS  
7 dated February 14, 2007, Debtor represented total income of  
8 \$7.4 million, which consisted of \$900,000 from his law practice,  
9 \$4 million from ALB and \$2.5 million from Tammy. Schiller opined  
10 that Debtor's represented income of \$7.4 million was not  
11 substantiated by any document and neither was the purported  
12 \$2.5 million income from Tammy. The FDIC contended the Tammy  
13 income was a misrepresentation because the 2007 Tammy tax return  
14 showed an income of \$619,000. The FDIC contended Debtor also  
15 misrepresented the \$4 million ALB income; the 2007 ALB tax return  
16 showed an income of -\$2,966,734. Schiller opined that nowhere did  
17 Debtor ever report \$4 million in income from ALB to the IRS.

18       In the loan application dated February 14, 2007, Debtor  
19 represented his personal monthly income as \$616,666, including  
20 \$208,000 from Tammy. The FDIC contended this was a  
21 misrepresentation of Debtor's income because his 2007 tax return  
22 showed his salary and wages as \$0. As for Tammy income, Debtor  
23 had admitted at deposition that he did not know of any income of  
24 \$208,000 per month, even if the application had been considering  
25 collection of the Premier receivable, which was not the amount  
26 collected in 2007. The FDIC contended that Debtor's  
27 representation of "rental income" for \$333,333 was also incorrect;  
28 Debtor testified he had no rental income. Debtor's employee,

1 Anne Berens, testified that many of these numbers were simply  
2 carried over from prior years.

3 In the February 14, 2007 PFS, Debtor represented assets  
4 totaling \$124,867,868, including real estate at \$90,050,000, law  
5 practice at \$5.5 million, Tammy at \$25 million and the yacht at  
6 \$2.5 million. In the loan application, Debtor represented assets  
7 totaling \$123,337,295, including \$4,050,000 in real estate,  
8 \$86 million in "Bus. Re Owned" and \$25 million in Tammy. As with  
9 prior loans, Wallace opined that Debtor had misrepresented his net  
10 worth due to his overstated value of Tammy and his double  
11 accounting of that asset.

12 The FDIC contended the Bank's reliance on Debtor's  
13 representations of income, assets and net worth was demonstrated  
14 by the Credit Memorandum: "Stated Net Worth: \$67.517MM which is  
15 largely made up of partnership and real estate equity interest.  
16 . . . Strength: High Net Worth of Guarantor." The FDIC further  
17 contended it was reasonable for the Bank to also rely on (1) the  
18 Tammy Memorandum, (2) the February 2006 Tammy Balance Sheet,  
19 (3) the 2006 Tammy Profit & Loss Statement, (4) Thefeld's  
20 February 6, 2006 Letter, and (5) Debtor's February 22, 2006  
21 Letter.

22 Loan 13. Loan 13 was a modification of Loan 7, wherein  
23 Debtor received an additional \$3 million. It was funded on  
24 May 10, 2007. As additional collateral, Debtor pledged 350 shares  
25 of Premier stock, valued at \$6 million. On May 4, 2007, Thefeld  
26 had authored another letter to the Bank on Debtor's behalf, which  
27 provided updated information regarding the receivables (the  
28 "May 4, 2007 Letter"). Thefeld represented that the \$25 million

1 accrual had been decreased by collections, of which Tammy was  
2 estimated to still receive \$19.1 million.

3 As with Loan 12, Debtor had submitted for Loan 13 the PFS  
4 dated February 14, 2007, which the FDIC contended contained the  
5 same misrepresentation of his monthly income, assets and  
6 liabilities. In the loan application dated May 9, 2007, Debtor  
7 represented his personal monthly income was \$616,666. The FDIC  
8 contended this was also a misrepresentation of Debtor's income  
9 because his 2007 tax return showed his salary and wages as \$0.

10 The FDIC contended the Bank's reliance on Debtor's  
11 representations of income, assets and net worth was evidenced by  
12 the Underwriting Analysis, which discussed the receivables details  
13 in Thefeld's May 4, 2007 Letter, noted Debtor's net worth of  
14 "\$85,619,103," and stated that one of the strengths for Loan 13  
15 was the "Strong Net Worth of Borrower." The FDIC further  
16 contended it was reasonable for the Bank to also rely on (1) the  
17 Tammy Memorandum, (2) the February 2006 Tammy Balance Sheet,  
18 (3) the 2006 Tammy Profit & Loss Statement, (4) Thefeld's  
19 February 6, 2006 Letter, (5) Debtor's February 22, 2006 Letter,  
20 and (6) Thefeld's May 4, 2007 Letter.

21 Loan 14. The Bank funded Loan 14 for \$2.54 million on  
22 December 31, 2007. Loan 14 was paid in full by a title insurance  
23 company, but the FDIC sought nondischargeability of any litigation  
24 fees that might be incurred in a future adverse ruling.

25 In a recent PFS dated December 18, 2007, Debtor represented  
26 his total income was \$7.4 million, which consisted of \$900,000  
27 from his law practice, \$4 million from ALB and \$2.5 million from  
28 Tammy. The FDIC presented the same evidence for why these income

1 figures were misrepresentations as it did for Loan 12.

2 In the loan application dated December 28, 2007, Debtor  
3 represented his total monthly income as \$121,083, which equates to  
4 \$1,452,996 million annually. The FDIC contended this was another  
5 misrepresentation of Debtor's income because his 2007 tax return  
6 identified his salary and wages of \$0.

7 The FDIC also pointed to inconsistencies regarding Debtor's  
8 net worth in the PFS dated December 18, 2007, and the loan  
9 application dated December 28, 2007. The PFS stated that assets  
10 totaled \$141,497,000, including real estate at \$117,497,000, law  
11 practice at \$5.5 million, Tammy at \$15 million and the yacht at  
12 \$3.5 million. The loan application stated assets totaling  
13 \$96,648,115, including "\$0" in real estate, \$5.5 million in "Net  
14 worth of business(es) owned," \$72,631,295 in "Net LLC Equity,"  
15 \$15 million in Tammy and \$3.5 million in the yacht. As with prior  
16 loans, the FDIC contended Debtor had misrepresented his net worth  
17 based on Wallace's opinion that Debtor had overstated the value of  
18 Tammy and double accounted for that asset. The FDIC contended  
19 that Debtor had also misrepresented his liabilities by stating in  
20 the PFS they totaled \$57,065,705, but stating in the loan  
21 application they totaled only \$6,140,409.

22 The FDIC contended that the Bank's reliance on Debtor's  
23 representations of income, assets and net worth was demonstrated  
24 by the Underwriting Analysis, which stated that Debtor had "a  
25 stated net worth of \$90.5 million. This is comprised largely of  
26 \$72.6 million in net partnership and LLC real estate equity[.]"  
27 . . . "Sources of Repayment: Guarantor/Borrower's other real  
28 estate, LLC income and/or liquidation of a portion of

1 \$90.5 million net worth." The FDIC further contended it was  
2 reasonable for the Bank to also rely on (1) the Tammy Memorandum,  
3 (2) the February 2006 Tammy Balance Sheet, (3) the 2006 Tammy  
4 Profit & Loss Statement, (4) Thefeld's February 6, 2006 Letter,  
5 (5) Debtor's February 22, 2006 Letter and (6) Thefeld's May 4,  
6 2007 Letter.

7 **Loans funded in 2008 - Loan 15.** Loan 15 was an assumption of  
8 Loan 8 from one of Debtor's entities to another. No new funds  
9 were advanced in this transaction occurring on January 7, 2008.

10 Loan 16. Loan 16 was a second modification of Loan 6. It  
11 was funded on April 11, 2008, wherein Debtor received an  
12 additional \$1.6 million.

13 In the submitted PFS dated April 10, 2008, Debtor represented  
14 total income of \$7.4 million, which consisted of \$900,000 from his  
15 law practice, \$4 million from ALB and \$2.5 million from Tammy.  
16 The FDIC contended the Tammy income was a misrepresentation  
17 because the 2008 Tammy tax return showed an income of \$102,713.  
18 Thefeld had also confirmed that Debtor's law firm income in 2008  
19 was \$170,542, not the \$900,000 represented in the PFS. The FDIC  
20 contended Debtor also misrepresented the \$4 million ALB income;  
21 the 2008 ALB tax return showed an income of -\$13 million.

22 In the loan application dated April 10, 2008, Debtor  
23 represented his personal monthly income was \$121,083, including  
24 \$40,078 listed as "other" without explanation. The FDIC contended  
25 this statement was an additional misrepresentation in Debtor's  
26 income because Debtor's 2008 tax return identified his total  
27 income as -\$2,361,183.

28 The FDIC also noted the inconsistencies regarding Debtor's

1 net worth in the PFS and loan application, both dated April 10,  
2 2008. In the PFS, Debtor represented total assets of  
3 \$141,347,000, including \$5.5 million for his law practice,  
4 \$15 million for Tammy and \$3.5 million for the yacht. The loan  
5 application stated Debtor's assets totaled \$94,437,323, including  
6 "\$0" in real estate, \$5.5 million in "Net worth of business(es)  
7 owned," \$70,631,295 in "Net LLC Equity," \$15 million in Tammy and  
8 \$3.5 million in the yacht. Debtor claimed his net worth was  
9 \$82,821,399, based on his liabilities of \$11,615,924. A  
10 Borrower/Guarantor Analysis created by the Bank for Loan 16  
11 reflects Debtor's net worth was \$82,821,399. The FDIC contended  
12 that Debtor also misrepresented his liabilities, which he stated  
13 in the PFS totaled \$59,265,705, but stated in the loan application  
14 they totaled \$11,615,924.

15 The FDIC contended the Bank's reliance on Debtor's  
16 representations of income, assets and net worth was evidenced in  
17 the Underwriting Analysis, which indicated the "Strong Net Worth  
18 of Borrower." The FDIC further contended it was reasonable for  
19 the Bank to also rely on (1) the Tammy Memorandum, (2) the  
20 February 2006 Tammy Balance Sheet, (3) an updated 2007 Tammy  
21 Profit & Loss Statement, which listed management fees of  
22 \$1,578,679.18, but still contained the same double accounting  
23 error, and (4) Thefeld's May 4, 2007 Letter.

24 Loan 17. Loan 17 was a second modification of Loan 11,  
25 wherein Debtor received an additional \$1.2 million. It was funded  
26 on September 19, 2008.

27 In the PFS dated May 12, 2008, Debtor represented his total  
28 income was \$7.4 million, which consisted of \$900,000 from his law

1 practice, \$4 million from ALB and \$2.5 million from Tammy. The  
2 FDIC presented the same evidence for why these income figures were  
3 misrepresentations as it did for Loans 12 and 14.

4 In the loan application dated September 18, 2008, Debtor  
5 represented his personal monthly income was \$616,666, which  
6 included \$333,333 in rental income Debtor admitted did not exist.  
7 See FDIC's Supplemental Brief, Doc. No. 362, Facts 684-687. The  
8 FDIC contended this was a misrepresentation of Debtor's income  
9 because his 2008 tax return showed his total income was  
10 -\$2,361,183.

11 The FDIC also noted significant inconsistencies regarding  
12 Debtor's net worth in the PFS dated May 12, 2008, and the loan  
13 application dated September 18, 2008. The PFS stated assets  
14 totaling \$141,347,000, including real estate owned at  
15 \$117,497,000, his law practice at \$5.5 million, Tammy at  
16 \$15 million and the yacht at \$3.5 million. The loan application  
17 stated assets totaling \$77,286,040, including "\$0" in real estate,  
18 \$5.5 million in "Net worth of business(es) owned," \$53,248,205 in  
19 "Net LLC Equity," \$15 million in Tammy and \$3.5 million in the  
20 yacht.

21 The FDIC contended that the Bank's reliance on Debtor's  
22 representations of income, assets and net worth was evidenced in  
23 the Underwriting Analysis for Loan 17: "The guarantor's Net Worth  
24 is \$67.517 MM made up largely from partnership interest and real  
25 estate equity." The Bank's reliance was also evidenced in the  
26 generated Credit Memorandum, which referenced Debtor's stated  
27 \$67.517 million net worth and stated that the "High Net Worth of  
28 Guarantor" was a strength for the loan and something that overcame

1 its weaknesses. The FDIC further contended it was reasonable for  
2 the Bank to also rely on (1) the Tammy Memorandum, (2) the  
3 February 2006 Tammy Balance Sheet, (3) the 2007 Tammy Profit &  
4 Loss Statement and (4) Thefeld's May 4, 2007 Letter.

5 Loan 18. Loan 18 was the second modification of Loan 1.  
6 However, this transaction on July 1, 2008, was only a maturity  
7 date extension of Loan 1 and no additional funds were advanced.

8 At any rate, it appears that Debtor did not submit a loan  
9 application or a PFS in connection with this transaction. The  
10 Tarter report also shows the absence of these documents.

11 Nonetheless, the FDIC claimed that based on statements made in the  
12 Bank's related Underwriting Analysis, Credit Memorandum and  
13 Borrower/Guarantor Analysis, the Bank relied on Debtor's  
14 representations of income, assets and net worth to issue the  
15 extension. The Underwriting Analysis stated: "The guarantor's  
16 Net Worth is \$67.5MM made up largely from partnership interest and  
17 real estate equity." The Borrower/Guarantor Analysis referenced  
18 the \$67.5 million net worth figure and stated that "Greg Bacino  
19 reports stated income of \$75,000/month in legal fees, \$208,333  
20 monthly average in net income from Tammy, Inc., and a monthly  
21 average of \$333,333 in ALB Properties, LLC net real estate  
22 income." Finally, in the Credit Memorandum, the Bank referenced  
23 Debtor's net worth of \$67.5 million and stated that a strength for  
24 the extension was the "High Net Worth of Guarantor."

25 **b. Debtor's Cross MSJ**

26 In short, Debtor argued the FDIC had failed to show: (1) he  
27 made any misrepresentations to the Bank with the intent to  
28 deceive; (2) that the Bank justifiably relied on any material

1 representation within the context of § 523(a)(2)(A); (3) that the  
2 Bank reasonably relied on any written statements provided by  
3 Debtor; or (4) that any discernable damages were caused by his  
4 alleged representations. Debtor's Cross MSJ was supported by  
5 92 exhibits and the declarations of Debtor, Yoder and his expert  
6 Schiller.

7       As part of Debtor's defense that the Bank could not have  
8 reasonably relied on his written representations, Schiller opined  
9 that the loan applications and PFSS Debtor submitted to the Bank  
10 contained "glaring" errors, at least 250 of them, which should  
11 have sent up red flags in the Bank's underwriting department that  
12 further investigations and inquiry were needed. Debtor also  
13 alleged that the Bank, not he, created some of the loan  
14 applications. Yoder declared that the Bank's underwriting and  
15 loan processing departments were "relatively weak," that the  
16 "individuals did not seem to understand large loans, project  
17 depth, the need of bonds, or complexity in the development process  
18 in general." Yoder also believed the Bank's underwriting staff  
19 "were not properly trained in sophisticated scenarios to review  
20 batch financials and comparisons."

21       In reviewing each of the transactions, Schiller opined that  
22 the Bank failed to meet the standard of care in issuing the  
23 various loans and modifications or extensions. Specifically,  
24 Schiller opined that the Bank's files were cumulative, so the  
25 errors and omissions in the first loans "tainted" subsequent loan  
26 files. Therefore, for the Bank to solely rely on subsequent loan  
27 files and ignore prior loan files was commercially unreasonable  
28 and a breach of the standard of care. Schiller also opined that

1 the Bank erred by relying solely on what he called "company  
2 prepared" material, the least reliable type of underwriting  
3 information, particularly when loaning approximately \$50 million.  
4 Instead, the Bank should have required audited and certified  
5 material. In sum, Schiller opined that due to the Bank's zeal to  
6 compete in the hot real estate market, it "basically overlooked  
7 submitted financial information with glaring discrepancies and  
8 inconsistencies that they never should have accepted without  
9 further extensive evaluation."

10 As for the Bank's claim under § 523(a)(2)(A), Debtor  
11 contended that to support the first element of representation, the  
12 representation had to be one of "an existing or past fact."  
13 Debtor contended that at the time the loans and modifications were  
14 executed, he made no representation of an existing or past fact,  
15 only "opinions" as to values. And, in any event, these opinions  
16 all related to his "financial condition," which was not actionable  
17 under § 523(a)(2)(A). Further, the Bank could not show  
18 justifiable reliance on any omissions by Debtor in his written  
19 statements.

20 The crux of Debtor's opposition to the FDIC's MSJ was that it  
21 lacked any affidavits or declarations of material facts from Bank  
22 personnel affirming: (1) what the Bank relied upon; (2) what the  
23 Bank's purported "standard practices" were; and (3) whether any  
24 efforts were made to verify the financial information Debtor  
25 provided, especially when clearly inconsistent information was  
26 within the loan files.

27 **2. The ruling on the cross-motions for summary judgment**

28 The bankruptcy court held a hearing on the MSJ and Cross MSJ

1 on January 31, 2013. The court agreed with Debtor's counsel that  
2 for purposes of summary judgment, it would have to review each  
3 loan or modification on a loan-by-loan basis and the evidence that  
4 purported to support nondischargeability of each loan or  
5 modification.

6 In its order entered on March 11, 2014, and in substantial  
7 conformance with its tentative ruling issued just prior to the  
8 hearing, the bankruptcy court granted the FDIC partial summary  
9 judgment as to its § 523(a)(2)(B) claim and denied Debtor's Cross  
10 MSJ in its entirety ("MSJ Order"). The court found that, absent  
11 evidence to the contrary from Debtor, the Bank had provided Debtor  
12 with money or an extension of credit based on a written  
13 representation of fact as to Debtor's financial condition or that  
14 of his insider for all transactions, except Loan 15 which was an  
15 assumption and Loan 18 which was an extension of time. Thus, the  
16 first element for a claim under § 523(a)(2)(B) was met as to the  
17 sixteen other transactions and summary judgment was appropriate.

18 The court also granted summary judgment to the FDIC as to the  
19 material falsity of Debtor's representations. In his defense to  
20 reasonable reliance, Debtor had conceded the numerous inaccuracies  
21 in his written financial information relating to the loans and  
22 modifications. Further, the court found that the transactions  
23 involved loans supported by Debtor's guaranty, and that Debtor's  
24 (and his insiders') financial information was necessarily required  
25 and material to the transactions as a result. Thus, the second  
26 element for a claim under § 523(a)(2)(B) was met as to all  
27 transactions.

28 The court also granted summary judgment to the FDIC as to

1 actual reliance for all transactions. The court found that the  
2 documents Debtor provided were typical for any loan, and Debtor  
3 did not dispute that the Bank relied on them. Yoder's declaration  
4 failed to suggest that any of the particular documents submitted  
5 were not necessarily relied upon by the Bank to some extent in its  
6 decision to lend. Further, Debtor in his responses to the FDIC's  
7 statements of uncontroverted facts prepared in support of the  
8 FDIC's MSJ failed to dispute statements establishing actual  
9 reliance by the Bank. See FDIC's Supplemental Brief, Doc.  
10 No. 362. Thus, the fourth element for a claim under  
11 § 523(a)(2)(B) was met as to all transactions.

12 Finally, the court found that the Bank's reliance was  
13 reasonable as to the initial loans - Loan 1, Loan 2 and Loan 3.  
14 Neither Debtor nor Schiller addressed why Loan 1 would have raised  
15 red flags such that the Bank could not reasonably assume the  
16 information presented by, or on behalf of, Debtor was accurate.  
17 Schiller did not even discuss Loan 1; Debtor did not directly  
18 discuss it. As for Loan 2 and Loan 3, the court found that  
19 Schiller's declaration contained only minimal assertions; it  
20 concluded that the "scintilla" of evidence he raised was not  
21 sufficient to create a triable issue as to whether reasonable  
22 reliance existed for these three loans. Thus, Debtor had not  
23 sufficiently rebutted the FDIC's evidence. Therefore, the fifth  
24 element for a claim under § 523(a)(2)(B) was met as to Loan 1,  
25 Loan 2 and Loan 3, but triable issues of material fact existed as  
26 to the Bank's reasonable reliance on Loans 4 through 18.

27 The court denied summary judgment as to Debtor's actual  
28 intent on all transactions, but noted that state of mind could be

1 established by recklessness. Here, Debtor's own evidence showed  
2 he delegated responsibility for preparation and presentation of  
3 his financial information and made little, if any, effort to  
4 ensure the Bank received accurate financial information. The  
5 court opined that Debtor's conduct could support a recklessness  
6 finding, but it was not going to grant summary judgment on that  
7 issue.

8 The court also denied summary judgment as to damages. In  
9 short, it believed that a trial was necessary to determine whether  
10 reasonable reliance existed in connection with the transactions  
11 where it had not already found otherwise. Further, the FDIC still  
12 had to prove proximate cause. Thus, damages, if any, were not yet  
13 determinable.

14 **3. The trial on the FDIC's nondischargeability action**

15 With summary judgment having been granted in part to the  
16 FDIC, the remaining issues of intent, reasonable reliance,  
17 causation and damages for its claim under § 523(a)(2)(B) were  
18 tried, as well as all issues for its claim under § 523(a)(2)(A).  
19 Trial briefs were filed both before and after the trial. The  
20 trial took fourteen days, twelve witnesses testified and  
21 approximately 1000 exhibits were entered into evidence.

22 The bankruptcy court entered a written decision on  
23 February 28, 2014. It found in favor of the FDIC as to the  
24 remaining elements for its claim under § 523(a)(2)(B) and as to  
25 all elements for its claim under § 523(a)(2)(A). A judgment was  
26 entered on March 17, 2014, determining that the Bank's debt of  
27 \$14,724,003.80 was nondischargeable under both § 523(a)(2)(A) and  
28 (a)(2)(B). Debtor timely appealed the judgment on March 31, 2014.

1 **II. JURISDICTION**

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

4 **III. ISSUES**

5 1. Did the bankruptcy court err in denying Debtor summary  
6 judgment?

7 2. Did the bankruptcy court err in determining that the debts to  
8 the Bank were excepted from discharge under § 523(a) (2) (B)?

9 3. Did the bankruptcy court err in determining that the debts to  
10 the Bank were excepted from discharge under § 523(a) (2) (A)?

11 **IV. STANDARDS OF REVIEW**

12 We review summary judgment determinations de novo. See  
13 Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125  
14 (9th Cir. 2014). "Summary judgment is proper if the pleadings,  
15 depositions, answers to interrogatories, and admissions on file,  
16 together with the affidavits, if any, show that there is no  
17 genuine issue as to any material fact and that the moving party is  
18 entitled to a judgment as a matter of law." Celotex Corp. v.  
19 Catrett, 477 U.S. 317, 322 (1986) (internal quotation marks  
20 omitted). Under this standard, the moving party is entitled to  
21 summary judgment if the nonmoving party "after adequate time for  
22 discovery . . . fails to make a showing sufficient to establish  
23 the existence of an element essential to that party's case, and on  
24 which that party will bear the burden of proof at trial." Id.;  
25 see also Ilko v. Cal. State Bd. of Equalization (In re Ilko),  
26 651 F.3d 1049, 1052 (9th Cir. 2011) (applying Celotex summary  
27 judgment standard to bankruptcy adversary proceeding). As  
28 explained in Celotex, all other facts are immaterial when the

1 nonmoving party fails to submit sufficient proof of an essential  
2 element of its case. Id. at 323.

3 In reviewing a bankruptcy court's determination of an  
4 exception to discharge, we review its findings of fact for clear  
5 error and its conclusions of law de novo. Oney v. Weinberg  
6 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009). For  
7 purposes of § 523(a)(2), a debtor's intent, materiality, whether  
8 the creditor relied upon the debtor's false statements and  
9 proximate cause are all questions of fact we review under the  
10 clearly erroneous standard. Candland v. Ins. Co. of N. Am.  
11 (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996). A factual  
12 finding is clearly erroneous if it is illogical, implausible or  
13 without support in the record. Retz v. Samson (In re Retz),  
14 606 F.3d 1189, 1196 (9th Cir. 2010). We give great deference to  
15 the bankruptcy court's findings when they are based on its  
16 determinations as to the credibility of witnesses. Id.

17 "We may affirm 'on any ground supported by the record,  
18 regardless of whether the [bankruptcy] court relied upon,  
19 rejected, or even considered that ground.'" Fresno Motors, LLC v.  
20 Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014)  
21 (citation omitted).

## 22 V. DISCUSSION

23 When determining whether a debt is excepted from discharge, a  
24 bankruptcy court must construe the evidence against the creditor  
25 and in favor of the debtor. Mele v. Mele (In re Mele), 501 B.R.  
26 357, 363 (9th Cir. BAP 2013). A creditor objecting to  
27 dischargeability of its claim bears the burden of proving, by a  
28 preponderance of the evidence, that the particular debt falls

1 within one of the exceptions to discharge enumerated under  
2 § 523(a). Grogan v. Garner, 498 U.S. 279, 286-291 (1991).

3 Debtor contends the bankruptcy court erred by "lumping" the  
4 loans and modifications together and not trying the case on a  
5 loan-by-loan basis. Debtor contends he was denied due process  
6 because each of the eighteen separate transactions were not tried  
7 as separate debts. Debtor fails to point out in the record where  
8 he made this due process objection. Further, in reviewing the  
9 trial transcripts, it is clear the court tried the case on a loan-  
10 by-loan basis. In fact, Debtor's counsel complained at the end of  
11 trial day 7 that the FDIC was taking far too much time with  
12 testimony on each of the transactions individually. In response  
13 to his complaint, both the FDIC and the court reminded Debtor's  
14 counsel that he was the one arguing in favor of that very approach  
15 at summary judgment. Nonetheless, we agree that the bankruptcy  
16 court took a "global" approach in its decision. As we discuss in  
17 more detail below, this caused it to err as to at least two of the  
18 loans.

19 **A. The bankruptcy court erred in determining that Loan 9 and**  
20 **Loan 10 were excepted from discharge under § 523(a)(2)(B),**  
21 **but correctly determined that the other transactions were**  
22 **excepted from discharge under § 523(a)(2)(B).**

23 To prevail on an exception to discharge claim under  
24 § 523(a)(2)(B),<sup>5</sup> the creditor must show: (1) it provided debtor

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25 <sup>5</sup> Section 523(a)(2)(B) provides:

26 (a) A discharge under . . . this title does not discharge an  
27 individual debtor from any debt . . . (2) for money,  
28 property, services, or an extension, renewal, or refinancing  
of credit, to the extent obtained by . . . (B) use of a  
(continued...)

1 with money, property, services or credit based on a written  
2 representation of fact by the debtor as to the debtor's financial  
3 condition; (2) the representation was materially false; (3) the  
4 debtor knew the representation was false when made; (4) the debtor  
5 made the representation with the intention of deceiving the  
6 creditor; (5) the creditor relied on the representation; (6) the  
7 creditor's reliance was reasonable; and (7) damage proximately  
8 resulted from the representation. See In re Candland, 90 F.3d at  
9 1469; Siriani v. Nw. Nat'l Ins. Co. (In re Siriani), 967 F.2d 302,  
10 304 (9th Cir. 1992); Gertsch v. Johnson & Johnson (In re Gertsch),  
11 237 B.R. 160, 167 (9th Cir. BAP 1999) (adopting the elements  
12 required under the companion section 523(a)(2)(A), with the  
13 additional and obvious requirement that the alleged fraud stem  
14 from a false statement in writing).

15 **1. There must be a statement in writing respecting the**  
16 **debtor's or insider's financial condition that contains**  
**a false representation of fact.**

17 The bankruptcy court determined on summary judgment that,  
18 absent contrary evidence from Debtor, the Bank had provided Debtor  
19 with money or an extension of credit based on a written  
20 representation of fact as to his or his insider's financial  
21 condition for all transactions, except for Loans 15 and 18. The  
22 court reiterated this finding again in its written decision after  
23 trial, but it is not clear whether it intended to still exclude  
24

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25 <sup>5</sup>(...continued)  
26 statement in writing - (i) that is materially false;  
27 (ii) respecting the debtor's or an insider's financial  
28 condition; (iii) on which the creditor to whom the debtor is  
liable for such money, property, services, or credit  
reasonably relied; and (iv) that the debtor caused to be made  
or published with intent to deceive[.]

1 these loans. Debtor does not raise this issue on appeal.  
2 However, we conclude that Loan 9 and Loan 10, both of which were  
3 modifications of loans to ALB, were not supported by a "written  
4 representation of fact" as to Debtor's "financial condition," and  
5 Debtor should have been granted summary judgment with respect to  
6 these two loans under § 523(a)(2)(B).

7 A loan application containing information about an  
8 applicant's income constitutes a statement in writing respecting  
9 the applicant's financial condition for purposes of  
10 § 523(a)(2)(B). See Cashco Fin. Servs. v. McGee (In re McGee),  
11 359 B.R. 764, 768 (9th Cir. BAP 2006). The same would be true for  
12 a personal financial statement. The Panel examined the meaning of  
13 the term "financial condition" as it is used in § 523(a)(2)(B) in  
14 Barnes v. Belice (In re Belice), 461 B.R. 564, 578 (9th Cir. BAP  
15 2011), and held that it must be interpreted narrowly:

16 Statements that present a picture of a debtor's overall  
17 financial health include those analogous to balance  
18 sheets, income statements, statements of changes in  
19 overall financial position, or income and debt statements  
20 that present the debtor or insider's net worth, overall  
21 financial health, or equation of assets and liabilities  
22 . . . . What is important is not the formality of the  
23 statement, but the information contained within it –  
24 information as to the debtor's or insider's overall net  
25 worth or overall income flow.

22 Id. at 578. In other words, the writing must be a complete or  
23 comprehensive statement regarding a debtor's income and expenses.

24 Id. at 579.

25 No loan application or PFS was submitted for Loan 9. This is  
26 clear from the FDIC's MSJ and the Tarter and Wallace reports.  
27 Wallace did not discuss this loan at all; Tarter's report shows  
28 that no application or PFS were submitted for it. The record also

1 indicates that Debtor did not submit a loan application for  
2 Loan 10, which is also reflected in the MSJ. Tarter and Wallace  
3 failed to address this loan at all in their reports. Although the  
4 FDIC's MSJ referenced a PFS it claims was submitted with Loan 10,  
5 it cited to the wrong document.

6       The other documents the FDIC claimed supported the Bank's  
7 reliance for funding both loans included (1) the Tammy Memorandum,  
8 (2) a July 2006 Tammy Balance Sheet, (3) the 2005 Tammy Profit &  
9 Loss Statement, (4) Thefeld's February 6, 2006 Letter, and  
10 (5) Debtor's February 22, 2006 Letter. The Tammy Memorandum  
11 discusses only Debtor's potential income he would derive from  
12 Tammy. The July 2006 Tammy Balance Sheet again shows only the  
13 financial health of Tammy, not Debtor's overall financial health.  
14 Plus, these loans were to ALB, not Tammy. The same is true with  
15 the 2005 Tammy Profit & Loss Statement. The February 6, 2006  
16 Letter seems more akin to a statement of Debtor's net worth or  
17 overall financial health, but the focus is still primarily on his  
18 income only; it did not discuss any of his liabilities. Finally,  
19 the February 22, 2006 Letter discusses briefly the Tammy accrual,  
20 the ESOP and what properties ALB owns and is developing and  
21 estimated sales figures.

22       While each of these alleged misrepresentations reflect some  
23 aspect of Debtor's income and the profitability of his entities,  
24 "they do not either separately or when taken together reflect his  
25 overall cash flow situation, his overall income and expenses, or  
26 the relative values and amounts of his assets and liabilities."  
27 In re Belice, 461 B.R. at 579. Accordingly, without a "written  
28 representation of fact" as to Debtor's financial condition with

1 respect to Loan 9 and Loan 10, the bankruptcy court erred in  
2 denying summary judgment to Debtor for these loans under  
3 § 523(a)(2)(B). However, they may still be nondischargeable under  
4 § 523(a)(2)(A).

5 As for the remaining loans (with the exception of Loan 15 and  
6 Loan 18), the bankruptcy court did not err in finding that the  
7 Bank provided Debtor with money or an extension of credit based on  
8 a written representation of fact as to Debtor's or an insider's  
9 financial condition. Debtor submitted loan applications and/or  
10 PFSs with each of the remaining loans, and Debtor does not dispute  
11 that each contained significant falsity.

12 **2. The misrepresentation must be material.**

13 A materially false statement is one which "paints a  
14 substantially untruthful picture of a financial condition by  
15 misrepresenting information of the type which would normally  
16 effect [sic] the decision to grant credit." First Interstate Bank  
17 of Nev. v. Greene (In re Greene), 96 B.R. 279, 283 (9th Cir. BAP  
18 1989) (citations omitted). "'Material falsity' in a financial  
19 statement can be premised upon the inclusion of false information  
20 or upon the omission of information about a debtor's financial  
21 condition." Id. See also N. Park Credit v. Harmer  
22 (In re Harmer), 61 B.R. 1, 5 (Bankr. D. Utah 1984) (a "long line of  
23 cases" has held that in a financial statement, the "omission,  
24 concealment, or understatement of any of the debtor's liabilities  
25 constitutes a 'materially false' statement.") (citing cases). "A  
26 statement can be materially false if it includes information which  
27 is 'substantially inaccurate' and is of the type that would affect  
28 the creditor's decision making process." In re Greene, 96 B.R. at

1 283 (citations omitted). See In re Candland, 90 F.3d at 1470  
2 (adopting Greene standard for "material falsity" and holding that  
3 "significant misrepresentations of financial condition – of the  
4 order of several hundred thousand dollars – are of the type which  
5 would generally affect a lender's or guarantor's decision").

6 In its summary judgment ruling, the bankruptcy court found in  
7 favor of the FDIC on this element as to all of the transactions.  
8 After trial, relying on Candland, it again found in favor of the  
9 FDIC, determining the inaccuracies in the loan applications and  
10 PFSs were material and of the type the Bank actually relied upon  
11 in making the decision to advance the loans. In addition, the  
12 court found that Debtor's omitted information – his resignation  
13 from two state bars in 2006, the Premier investigation and the  
14 WCAB Stay – was of the type that would be material to the Bank,  
15 because it reflected on Debtor's character, which Tarter opined  
16 was one of the "5 C's" for obtaining credit. This finding is  
17 consistent with Greene, as material falsity can also be  
18 established by omissions of information about a debtor's financial  
19 condition.

20 Debtor contends the bankruptcy court applied an improper  
21 standard for material falsity under § 523(a)(2)(B) at summary  
22 judgment and after trial. He argues, essentially, that we ignore  
23 controlling case law and adopt the standard set forth in Matter of  
24 Bogstad, 779 F.2d 370, 375–376 (7th Cir. 1985). In Bogstad, the  
25 Seventh Circuit held that for a statement to be materially false  
26 for purposes of § 523(a)(2)(B), the test is whether the lender  
27 would have made the loan had he known of the debtor's true  
28 financial condition. That is not the standard in the Ninth

1 Circuit. In fact, the Candland court expressly rejected Bogstad  
2 and adopted this Panel's standard for material falsity set forth  
3 in Greene. Candland, 90 F.3d at 1470.

4 More concerning is that Debtor's counsel agreed with the  
5 bankruptcy court during the summary judgment hearing that the  
6 standard it applied for material falsity was the correct one:

7 MR. SMAHA: So to the extent that we're saying yes, there  
8 are numbers on here that would be of the type that a bank  
9 would be interested in, and that they relied on those  
10 numbers, I don't have any problem with that concept.

11 . . . .

12 THE COURT: I'm saying pretty much for all loans, I think  
13 there are misstatements of a type that a bank would rely  
14 on.

15 MR. SMAHA: I would agree with that --

16 THE COURT: All transactions.

17 MR. SMAHA: I believe that would be a true statement, and  
18 we would probably -- we would admit to that.

19 . . . .

20 MR. SMAHA: But yes, we agree that they relied on all the  
21 documents that were provided by Mr. Bacino.

22 Hr'g Tr. (Jan. 31, 2013) 31:14-17, 32:10-16, 34:22-23. Thus, it  
23 would appear Debtor has waived any argument on this issue. In any  
24 event, we conclude the bankruptcy court applied the correct  
25 standard for material falsity.

26 **3. Debtor knew the misrepresentation at the time to be  
27 false and the debtor made it with the intention of  
28 deceiving the creditor.**

The bankruptcy court did not find actual intent to deceive,  
but did find that Debtor had acted with the requisite recklessness  
to establish his intent under § 523(a)(2)(B), whether applying  
either a "gross" recklessness standard or some lesser form. Mem.

1 Decision (Feb. 28, 2014) 20-21. Specifically, the court found  
2 that Debtor borrowed or guaranteed millions of dollars through the  
3 use of documents that were highly inaccurate. They presented a  
4 false sense of his personal net worth. Id. at 21. They failed to  
5 disclose facts known to Debtor that created a significant risk to  
6 him and to anyone relying on him for repayment. He delegated  
7 responsibility for truthful disclosure to others who lacked the  
8 information, opportunity or sophistication to provide an accurate  
9 picture of his financial condition, and he did so repeatedly.  
10 Although Debtor testified that he read the documents prior to the  
11 closings of the various loans, the court found that no evidence  
12 existed "that he corrected a single syllable." Id.

13 Debtor contends the bankruptcy court applied an incorrect  
14 standard for intent. He contends that in light of Bullock, none  
15 of the exceptions to discharge under § 523(a) can be satisfied  
16 with a showing of "mere negligence." See Bullock v.  
17 BankChampaign, N.A., 133 S.Ct. 1754 (2013). The bankruptcy court  
18 did not make a finding of "mere negligence" or apply any such  
19 standard, which is not the standard in this circuit at any rate.  
20 In this circuit, reckless disregard for the truth of a  
21 representation or reckless indifference to the debtor's actual  
22 circumstances can support a finding of intent for purposes of  
23 § 523(a)(2). See Anastas v. Am. Sav. Bank (In re Anastas),  
24 94 F.3d 1280, 1286 (9th Cir. 1996); In re Gertsch, 237 B.R. at  
25 167-68 (applying the reckless standard to § 523(a)(2)(B)); Arm v.  
26 A. Lindsay Morrison, M.D., Inc. (In re Arm), 175 B.R. 349, 354  
27 (9th Cir. BAP 1994). The bankruptcy court may consider  
28 circumstantial evidence that tends to establish what the debtor

1 must have actually known when taking the injury-producing action.  
2 Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir.  
3 2005).

4 In Bullock, the Supreme Court held that the intent  
5 requirement for a fiduciary's defalcation should be the same as  
6 the other specifically enumerated acts found in § 523(a)(4) –  
7 i.e., larceny and embezzlement. 133 S.Ct. at 1759. An innocent  
8 defalcation does not suffice. The fiduciary's conduct requires  
9 intentional, improper conduct and "reckless conduct of the kind  
10 that the criminal law often treats as the equivalent." Id.  
11 Accordingly, where actual knowledge is lacking, intent can still  
12 be shown for purposes of § 523(a)(4) if the "fiduciary  
13 'consciously disregards' (or is willfully blind to) 'a substantial  
14 and unjustifiable risk' that his conduct will turn out to violate  
15 a fiduciary duty." Id. at 1759-60 (quoting Model Penal Code  
16 § 2.02(c)).

17 We disagree that Bullock applies to § 523(a)(2)(B), or if it  
18 does, that the standard set forth in Bullock has heightened the  
19 standard of recklessness already applied in this circuit. In any  
20 event, we perceive no clear error in the bankruptcy court's  
21 finding that Debtor's actions here satisfy the standard of gross  
22 recklessness. Debtor admitted delegating the responsibility for  
23 preparing PFSs and loan applications to his employees, Berens and  
24 Judy Brenning, who often signed for him, and relying heavily on  
25 them for providing the correct information. Berens, who began  
26 filling out the PFSs and loan applications in early 2007,  
27 testified that generally she carried numbers over from prior  
28 documents, with Debtor's knowledge, that she did not verify

1 Debtor's income figures and that she believed it was Debtor's  
2 responsibility to verify whether the numbers were true and  
3 correct. Brenning admitted that in filling out the first PFS she  
4 had "no idea what to do" and had to consult with Thefeld.  
5 Brenning testified that she relied on Debtor or Thefeld for much  
6 of the financial information contained in later PFSs and loan  
7 applications; she had no knowledge of what the numbers were on her  
8 own.

9 Debtor testified he also relied heavily on Thefeld for  
10 correct information in the PFSs and loan applications. However,  
11 Thefeld testified that other than assisting Brenning with some  
12 information for the first loans, he never discussed with Debtor or  
13 any of his staff financial information for PFSs or loan  
14 applications. Although Debtor testified that he "glanced" at  
15 every loan application at the Bank's Escondido office before  
16 submitting them, he also testified that he did not think he needed  
17 to review them because he had a "super team." Berens also  
18 testified that it would not be unusual for Debtor to ask her to  
19 sign his name to a PFS without him reviewing it.

20 Clearly, many of the facts contained in the PFSs and loan  
21 applications were not accurate. And it appears Debtor did little  
22 if anything to ensure that they contained accurate information  
23 before signing or submitting them. Failure to review documents  
24 containing false statements about a debtor's financial condition,  
25 with the knowledge that those documents will be submitted to  
26 obtain money or credit, supports a finding of reckless disregard.  
27 Merchs. Bank of Cal. v. Oh (In re Oh), 278 B.R. 844, 858 (Bankr.  
28 C.D. Cal. 2002). The bankruptcy court did not find Debtor's

1 testimony credible that he believed his staff could submit  
2 accurate and complete information without his input. Mem.  
3 Decision (Feb.28, 2014) 9:16-28. We must give this credibility  
4 finding great deference. In re Retz, 606 F.3d at 1196.  
5 Accordingly, the bankruptcy court applied the correct standard for  
6 intent; we conclude its finding against Debtor on that element was  
7 not clearly erroneous.

8 **4. Creditor must reasonably rely on the misrepresentation.**

9 To meet the reliance standard under § 523(a)(2)(B), there  
10 must be reasonable reliance. Reasonable reliance means reliance  
11 that would have been reasonable to a hypothetical average person.  
12 Heritage Pac. Fin., LLC v. Machuca (In re Machuca), 483 B.R. 726,  
13 736 (9th Cir. BAP 2012). Reasonable reliance is analyzed under a  
14 "prudent person" test. In re McGee, 359 B.R. at 774; First Mut.  
15 Sales Fin. v. Cacciatori (In re Cacciatori), 465 B.R. 545, 555  
16 (Bankr. C.D. Cal. 2012) (court must objectively assess the  
17 circumstances to determine if creditor exercised degree of care  
18 expected from a reasonably cautious person in the same business  
19 transaction under similar circumstances). Reasonable reliance is  
20 judged in light of the totality of the circumstances on a  
21 case-by-case basis. In re Machuca, 483 B.R. at 736.

22 A creditor's reliance may be reasonable if the creditor  
23 adhered to its normal business practices. In re Gertsch, 237 B.R.  
24 at 172. The court may consider whether the lender's normal  
25 practices align with industry standards, or if any "red flags"  
26 exist that would alert a reasonably prudent lender to consider  
27 whether the representations relied on were inaccurate. Nat'l City  
28 Bank v. Hill (In re Hill), 2008 WL 2227359, at \*3 (Bankr. N.D.

1 Cal. May 23, 2008) (citing Ins. Co. of N.A. v. Cohn (In re Cohn),  
2 54 F.3d 1108, 1117 (3d Cir. 1995)). A creditor cannot simply  
3 ignore red flags that directly call into question the truth of the  
4 statements on which the creditor claims to have relied.  
5 In re Machuca, 483 B.R. 736-37 (citing In re McGee, 359 B.R. at  
6 775). Under such circumstances, the creditor must support  
7 reasonable reliance with evidence explaining why it was reasonable  
8 for it to rely on the statements notwithstanding the red flags.  
9 Id. However, when the evidence shows materially false statements  
10 were made by the debtor, little investigation is required by the  
11 creditor to have reasonably relied on the debtor's representation.  
12 In re Gertsch, 237 B.R. at 170.

13 The bankruptcy court found that the Bank actually and  
14 reasonably relied on the erroneous and incomplete information  
15 provided by Debtor. Mem. Decision (Feb. 28, 2014) 21-24. Debtor  
16 disputes this finding of fact, which we review for clear error.  
17 In short, Debtor contends that because the Bank did its own income  
18 analysis, it did not actually rely on the stated income numbers.  
19 He further contends the Bank took no action on the discrepancies  
20 that were actually noted by personnel. In other words, the  
21 numerous "red flags" at issue precluded the Bank's reasonable  
22 reliance on Debtor's misrepresentations.

23 The bankruptcy court agreed with Debtor that the Bank  
24 apparently did discover some of his errors, such as those  
25 identifiable from credit reports, and utilized its own information  
26 in connection with the lending decisions. Mem. Decision (Feb. 28,  
27 2014) 22. The court also agreed that had the discoverable errors  
28 been the only ones out there, Debtor would have had a defense.

1 However, they were not. Debtor failed to disclose a host of  
2 transactions requiring disclosure that were not readily  
3 discoverable by the Bank. These transactions included loans  
4 between his various entities (\$13 million ALB loan from Tammy) and  
5 several private loans from Berens (\$300,000), her brother  
6 (\$75,000), Fish (\$6-8 million), and Jerry Hall, the father of the  
7 Bank's president (amount unknown). Id. Debtor had also failed to  
8 disclose that he was no longer licensed to practice law in Texas  
9 and California. And, what the court found most troubling, Debtor  
10 failed to disclose the serious challenges, ultimately leading to  
11 criminal liability, that faced Premier.

12 The bankruptcy court rejected Debtor's defense that the Bank  
13 did not rely on his net worth but rather on the development  
14 projects. First, the Bank required a guaranty, which provided a  
15 source of repayment if the projects did not generate sufficient  
16 proceeds and which was consistent with its general practice and  
17 industry standards. Further, the Underwriting Analyses and Credit  
18 Memoranda consistently pointed to Debtor's net worth as support  
19 for the loans. Due to Debtor's erroneous information, his net  
20 worth and liquidity were not as represented in the documents he  
21 signed. While the Bank discovered some of these errors and  
22 reduced its estimate of net worth accordingly, the court found  
23 that the Bank could not find all of them through any reasonable  
24 means. The intercompany and private loans would not show up on a  
25 credit report; the Premier issues were also undiscoverable with  
26 any reasonable due diligence.

27 Finally, the bankruptcy court disagreed with Debtor's "red  
28 flag" argument, supported by Schiller. The court found that the

1 FDIC established through Tarter, and through factual testimony,  
2 that the Bank could reasonably rely on Debtor's submissions, even  
3 if it identified serious errors. The errors identified still  
4 resulted in a conclusion that Debtor had significant net worth.  
5 No alerts existed that led to the discovery of the many loans and  
6 transactions that would never be disclosed by a balance sheet, or  
7 the serious problems with Premier. The court also found  
8 compelling that Debtor and his entities were repeat customers, and  
9 that Debtor's legal training could reasonably lead the Bank to  
10 conclude he was sophisticated and aware of his obligations for  
11 full disclosure.

12 We see nothing illogical, implausible or without support in  
13 the record as to the bankruptcy court's finding that the Bank  
14 actually and reasonably relied on Debtor's misrepresentations.  
15 The loan approval documents generated by the Bank clearly show its  
16 actual reliance on Debtor's misrepresentations by its repeated  
17 references to his significant, yet overstated, net worth. And,  
18 contrary to Debtor's argument, his misrepresentations went far  
19 beyond his income. With the exception of Loan 9 and Loan 10 (and  
20 Loan 18), Debtor continually overstated his assets and understated  
21 his liabilities on each loan application and PFS submitted to the  
22 Bank. Further, as established by the FDIC's experts, the Bank  
23 adhered to industry standards and took reasonable measures to  
24 verify Debtor's representations. This adherence, along with the  
25 Bank's inability to discover the omitted and significant  
26 intercompany and private loans and Debtor's failure to disclose  
27 the Premier problems, supports a finding of reasonable reliance.  
28 Due to Debtor's many materially false statements, the Bank was

1 only required to perform a minimal investigation, which it did.  
2 In re Gertsch, 237 B.R. at 170.

3 **5. Creditor suffered damages proximately resulting from the**  
4 **debtor's misrepresentation.**

5 The bankruptcy court held that based on the totality of the  
6 evidence, the FDIC had met its burden of proof that losses  
7 sustained were the proximate result of Debtor's actions. The  
8 court rejected Debtor's argument that the FDIC failed to introduce  
9 testimony from a loan officer stating what the Bank would have  
10 done had it known. No such testimony was required; Debtor failed  
11 to offer this same type of testimony favorable to his cause when  
12 the burden of proof shifted to him given the standard articulated  
13 in Siriani and Candland.

14 In Siriani, the Ninth Circuit held that in the case of credit  
15 renewals, "a creditor seeking nondischargeability under section  
16 523(a) (2) (B) must show that it had valuable collection remedies at  
17 the time it agreed to renew its commitment to the debtor, and that  
18 those remedies later became worthless." 967 F.2d at 305. Stated  
19 another way, where credit renewals are involved, the creditor must  
20 show some proximately-caused damage beyond the unpaid debt. The  
21 bankruptcy court did not address this part of Siriani's holding.  
22 Instead, it relied on Siriani's directive that bankruptcy courts  
23 are not required "to divine what might have happened" with respect  
24 to the creditor's diligence, or lack thereof, in exercising its  
25 collection remedies. Id. at 306.

26 Debtor contends the FDIC failed to make any showing of  
27 proximately-caused damages beyond the unpaid debt and the  
28 bankruptcy court improperly shifted the burden to him on this

1 element. Siriani would appear to apply only to those transactions  
2 that were renewals of credit – i.e., the ten loan modifications  
3 and/or maturity date extensions – which Debtor seems to concede,  
4 and not to the "new" money transactions. The FDIC contended that  
5 the Bank had collection remedies based on the promissory notes,  
6 collateral and abundance of caution liens filed for the various  
7 loans. These collection remedies were extended each time a loan  
8 was modified or extended. After the modifications and maturity  
9 date extensions when Debtor defaulted and failed to make the  
10 required payments, the Bank began foreclosure proceedings.  
11 However, due to Debtor's bankruptcy filing, the FDIC as receiver  
12 for the Bank was unable to collect all of the remaining  
13 outstanding loans, unless the court determined the debts were  
14 excepted from discharge, for which Debtor was also a guarantor.

15 We conclude that the FDIC made a sufficient evidentiary  
16 showing of proximate cause for the loan modifications and/or  
17 maturity date extensions. Therefore, any potential error by the  
18 bankruptcy court was harmless, as the record supports a proximate  
19 cause finding for the renewals that occurred in this case.

20 Debtor does not appear to challenge the bankruptcy court's  
21 proximate cause finding as to the eight "new" money loans. To the  
22 extent he does, we conclude the court's finding was not clearly  
23 erroneous. For new money loans, proximate cause is established  
24 when the falsehoods are material and involve significant amounts  
25 of money. Candland, 90 F.3d at 1471. Here, the falsehoods were  
26 material and involved significant amounts of money, far greater  
27 than the amount at issue in Candland.

28 Accordingly, except for Loan 9 and Loan 10, we conclude the

1 bankruptcy court did not err in determining that amounts owed on  
2 account of the loans are nondischargeable under § 523(a)(2)(B).

3 **B. The bankruptcy court did not err in excepting Loan 9 and**  
4 **Loan 10 from discharge under § 523(a)(2)(A).**

5 For this claim, we address only Loan 9 and Loan 10, as we  
6 have already concluded the bankruptcy court did not err in  
7 determining the other loans were excepted from Debtor's discharge  
8 under § 523(a)(2)(B).

9 Section 523(a)(2)(A) excepts from a debtor's discharge debts  
10 resulting from "false pretenses, a false representation, or actual  
11 fraud, other than a statement respecting the debtor's or  
12 an insider's financial condition." A creditor seeking to except a  
13 debt from discharge based on fraud must establish each of five  
14 elements: (1) misrepresentation, fraudulent omission or deceptive  
15 conduct; (2) knowledge of the falsity or deceptiveness of such  
16 representation(s) or omission(s); (3) an intent to deceive;  
17 (4) justifiable reliance by the creditor on the subject  
18 representation(s) or conduct; and (5) damage to the creditor  
19 proximately caused by its reliance on such representation(s) or  
20 conduct. Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222  
21 (9th Cir. 2010); In re Weinberg, 410 B.R. at 35. By its terms, a  
22 creditor will not be entitled to a claim under § 523(a)(2)(A) if  
23 the debtor's fraudulent representations consist of "statement[s]  
24 respecting the debtor's or an insider's financial condition."  
25 Heritage Pac. Fin., LLC v. Edgar (In re Montano), 501 B.R. 96, 102  
26 n.5 (9th Cir. BAP 2012).

27 **1. False representation made with intent to deceive**

28 In addition to affirmative false representations not

1 respecting a debtor's or insider's financial condition, a debtor's  
2 silence or omission of a material fact can constitute a false  
3 representation for purposes of § 523(a)(2)(A). Citibank (S.D.),  
4 N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1089 (9th Cir. 1996).  
5 However, in order to find liability for fraud based upon silence  
6 or omission, there must be a duty to disclose. Id.

7       Loans 9 and 10 were funded in early August 2006. By this  
8 time, Debtor was well aware of the WCAB Stay and the criminal  
9 investigation pending against Premier and the negative impact  
10 these two things had, or could have, on his income and ability to  
11 repay the loans. The WCAB Stay was imposed in June 2004 and  
12 precluded Tammy from collecting on approximately \$70 million in  
13 lien claims. Debtor never informed the Bank in writing about the  
14 WCAB Stay. Although he claimed he told the Bank's president about  
15 it, the bankruptcy court found that no evidence in the record  
16 suggested this information went from the president to the Bank.  
17 Even if this finding was erroneous, which we do not conclude,  
18 Debtor admitted he knew as early as 2005 that a waiver of the  
19 Premier receivables could be a condition of a plea agreement.  
20 That meant he would not receive several millions of dollars in  
21 income he repeatedly told the Bank he would. Debtor admitted he  
22 never informed the Bank in writing or otherwise about the Premier  
23 investigation or potential waiver.

24       Due to their business relationship, Debtor had a duty to  
25 disclose the material information about Premier to the Bank when  
26 applying for Loans 9 and 10. See In re Eashai, 87 F.3d at 1089  
27 (citing to the Restatement (Second) of Torts § 551(1)(1976)). The  
28 bankruptcy court's finding that he had a duty to do so was not

1 clearly erroneous. Further, Yoder testified that the negative  
2 impact on Premier receivables is something he and the Bank would  
3 have wanted to know before making any loans, as it could have  
4 affected Debtor's ability to handle his projects. Thus, Debtor's  
5 failure to disclose the problems facing Premier was an omission of  
6 a material fact.

7 As with § 523(a)(2)(B), intent to deceive under  
8 § 523(a)(2)(A) can be shown by a debtor's reckless disregard for  
9 the truth of a representation, or reckless indifference to the  
10 debtor's actual circumstances. In re Anastas, 94 F.3d at 1286.  
11 The bankruptcy court found that Debtor had acted with the  
12 requisite recklessness to establish his intent under  
13 § 523(a)(2)(A), particularly with his failure to disclose  
14 Premier's problems. This finding is not clearly erroneous. By  
15 the time Loans 9 and 10 were funded, Debtor had actual knowledge  
16 of the problems facing Premier and how it could negatively impact  
17 his income. Withholding this material information about Premier  
18 from the Bank establishes, at minimum, a reckless indifference to  
19 the truth, if not actual intent to deceive. Thus, the FDIC  
20 established Debtor's intent for purposes of § 523(a)(2)(A).

21 **2. Damages as a result of reliance on the false**  
22 **representation**

23 For a claim under § 523(a)(2)(A), a creditor must also show  
24 it was justified in relying on the debtor's false representations.  
25 Field v. Mans, 516 U.S. 58, 73-76 (1995); In re Eashai, 87 F.3d at  
26 1090. Justifiable reliance is a subjective standard, which turns  
27 on a person's knowledge under the particular circumstances.  
28 In re Eashai, 87 F.3d at 1090.

1           As the bankruptcy court correctly noted, nondisclosure of a  
2 material fact in the face of a duty to disclose can establish the  
3 requisite reliance and causation for actual fraud under the Code.  
4 Apte v. Romesh Japra, M.D., F.A.C.C., Inc. (In re Apte), 96 F.3d  
5 1319, 1323 (9th Cir. 1996). The Supreme Court recognized in the  
6 context of securities fraud the difficulty of proving the reliance  
7 or causation elements in a case of fraudulent nondisclosure in  
8 Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54  
9 (1972). In Apte, the Ninth Circuit extended the holding of  
10 Affiliated Ute Citizens to the context of fraud cases under the  
11 Code:

12           Under the circumstances of this case, involving primarily  
13 a failure to disclose, positive proof of reliance is not  
14 a prerequisite to recovery. All that is necessary is  
15 that the facts withheld be material in the sense that a  
16 reasonable investor might have considered them important  
17 in the making of this decision. This obligation to  
18 disclose and this withholding of a material fact  
19 establish the requisite element of causation in fact.

20 In re Apte, 96 F.3d 1319, 1323 (quoting Affiliated Ute Citizens,  
21 406 U.S. at 153-54).

22           Debtor contends the Bank's reliance was not justified based  
23 on the "entire forest of red flags when underwriting the 18 loans  
24 and making its credit decision." This argument fails to address  
25 the omissions in this case, particularly Debtor's failure to  
26 disclose the detrimental information about Premier of which he was  
27 aware. The bankruptcy court found the Bank had established  
28 justifiable reliance due to the nature of the undisclosed  
information. We perceive no clear error with this finding.

          As to Loans 9 and 10, FDIC expert Tarter opined that the Bank  
was justified in relying on Debtor's failure to disclose the

1 Premier investigation, as it was not a fact the Bank could have  
2 reasonably discovered. "[A] party to a business transaction has a  
3 duty to disclose when the other party is ignorant of material  
4 facts which he does not have an opportunity to discover."  
5 In re Apte, 96 F.3d at 1324. In addition, Yoder indicated that  
6 the trouble with Premier was important information the Bank would  
7 have considered when making the loans or modifications. Thus, the  
8 Bank established justifiable reliance.

9 Finally, the creditor must establish that the claim sought to  
10 be excepted from discharge arose from an injury proximately  
11 resulting from its reliance on the debtor's misrepresentations.  
12 Britton v. Price (In re Britton), 950 F.2d 602, 604 (9th Cir.  
13 1991). Because Debtor failed to disclose the material information  
14 regarding Premier, the Bank's proximate cause for Loans 9 and 10  
15 was established. These loans were not repaid, and the Bank  
16 suffered an actual loss as a result. Thus, Loans 9 and 10, which  
17 totaled approximately \$3.5 million, were properly excepted from  
18 Debtor's discharge under § 523(a)(2)(A).

## 19 VI. CONCLUSION

20 For the foregoing reasons, we AFFIRM the judgment.  
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