NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 8 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: MICHAEL ADRIAN MANION,

Debtor

MICHAEL ADRIAN MANION,

Appellant.

v.

STRATEGIC FUNDING SOURCE, INC.,

Appellee.

No. 25-2507

D.C. No.
24-1088

MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
William J. Lafferty, III, Julia W. Brand, and Robert J. Faris, Bankruptcy Judges, Presiding

Argued and Submitted August 11, 2026
Reno, Nevada

Before: OWENS, FORREST, and VANDYKE, Circuit Judges;
Concurrence by Judge Forrest;
Concurrence by Judge VanDyke.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Debtor Michael Adrian Manion challenges the bankruptcy court's holding, upheld by the bankruptcy appellate panel (BAP), that his debt to Plaintiff Strategic Funding Source, Inc. d/b/a Kapitus, Inc. (Kapitus) is nondischargeable under 11 U.S.C. § 523(a)(2)(A). *See Manion v. Strategic Funding Source, Inc. (In re Manion)*, 667 B.R. 473 (B.A.P. 9th Cir. 2025). We have jurisdiction, and we affirm.

We review appeals from the BAP by looking directly at the bankruptcy court's decision. *See Leslie v. Mihranian (In re Mihranian)*, 937 F.3d 1214, 1216 (9th Cir. 2019). On review of a bench trial in an adversary proceeding, we review the bankruptcy court's findings of fact for clear error and its legal conclusions de novo. *DZ Bank AG Deutsche Zentral-Genossenschaft Bank v. Meyer*, 869 F.3d 839, 842 (9th Cir. 2017). Findings of fact are clearly erroneous where they are "illogical, implausible, or without support in the record." *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010).

1. ***Factual Challenges*.** To the extent Manion asserts that the bankruptcy court made erroneous findings of fact, we reject those arguments. The bankruptcy court's findings as to both the financial state of Manion's company when he sought the loan from Kapitus and Manion's intentions in seeking the loan were not illogical, implausible, or without support in the record. Rather, they were reasonable inferences drawn from Manion's course of conduct, the nature of his transaction with Kapitus, and the significance of the information that he withheld in the transaction.

We confine the rest of our analysis to whether the bankruptcy court committed legal error.

2. ***Reliance.*** Manion requests that we overturn our earlier decision in *Apte v. Japra (In re Apte)*, which held that the reliance required under § 523(a)(2)(A) could be inferred where a debtor breached his duty to disclose facts material to a transaction. 96 F.3d 1319, 1323–24 (9th Cir. 1996). Under *Miller v. Gammie*, a three-judge panel may overturn a circuit precedent only where a subsequent decision by the Supreme Court or an en banc panel is "clearly irreconcilable" with the result reached in the earlier case. 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Here, that burden has not been met. Manion argues that *Apte* is inconsistent with *Field v. Mans*, 516 U.S. 59 (1995), and *Husky International Electronics, Inc. v. Ritz*, 578 U.S. 355 (2016), which directed that courts interpret § 523(a)(2)(A) based on the common law of fraud at the time the Bankruptcy Code was adopted. But the *Apte* court was well aware that *Field* required it to "look to the common law concept of fraud" in undertaking its analysis of the statute. 96 F.3d at 1324 (citing *Field*, 516 U.S. at 69). Whether its understanding of that concept was erroneous is a separate question that we cannot address as a three-judge panel. *Husky*, in turn, merely reiterated the standard from *Field* without elaborating in any way that would unsettle *Apte*. *See Husky*, 578 U.S. at 360 (noting that the Supreme Court "has historically construed" the statute's language by drawing on the common law). Thus, we conclude that *Apte* is not clearly irreconcilable with either of the decisions that Manion identified.

3. ***Duty to Disclose*****.** Manion next argues that he did not owe Kapitus a duty to disclose his company's loss of Anheuser-Busch as a client because that information was not basic or material to the loan transaction and Kapitus had no reasonable expectation of disclosure. "[A] party to a business transaction has a duty to disclose when the other party is ignorant of material facts which he does not have an opportunity to discover." *In re Apte*, 96 F.3d at 1324. Before adoption of the Bankruptcy Code, state courts routinely held that this standard was met where a significant part of a transaction's value turned on the information withheld and the information was of a kind that was difficult to independently ascertain. *E.g.*, *Musgrave v. Lucas*, 238 P.2d 780, 786 (Or. 1951); *accord Griffith v. Byers Constr. Co. of Kan.*, 510 P.2d 198, 203 (Kan. 1973); *Brooks v. Ervin Constr. Co.*, 116 S.E.2d 454, 458 (N.C. 1960).

Here, the information concerning Anheuser-Busch's business relationship with Manion's company was both material to the loan transaction and difficult for Kapitus to independently discover. At the time Manion submitted the loan paperwork, his company made most of its profits through its relationship with Anheuser-Busch. Accordingly, it went "to the basis, or essence, of the transaction, and [wa]s an important part of the substance of what [wa]s bargained for or dealt with," and it was material. Restatement (Second) of Torts § 551 cmt. j (A.L.I. 1977).

And Kapitus did not have an opportunity to discover the information because there is no indication that it could have discovered the information through ordinary due diligence. To the extent Manion argues that Kapitus had to either ask him about the relationship with Anheuser-Busch or reach out directly to Anheuser-Busch, his argument fails—if, as the bankruptcy court found, Kapitus had a reasonable expectation that Manion would disclose such information to it, then it was reasonable for Kapitus to assume that Manion had no such information to disclose and not investigate further.

4. *Effect of Misrepresentation*. Finally, Manion suggests that it was erroneous to analyze this case as a failure to disclose rather than as an affirmative misrepresentation because he had affirmatively notified Kapitus that "there ha[d] been no material adverse changes, financial or otherwise," in the "operation" of his business. A later misrepresentation, however, does not cure an earlier omission or merge the two possible wrongs. Under our circuit precedent, the nondisclosure of material facts to Kapitus, which reasonably expected disclosure, was "actual fraud," rendering the debt nondischargeable under § 523(a)(2)(A).

AFFIRMED.

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Manion v. Strategic Funding Source, Inc., No. 25-2507
FORREST, Circuit Judge, concurring:

The relationship between our decision in *Apte v. Japra (In re Apte)*, 96 F.3d 1319 (9th Cir. 1996), and the common law that Supreme Court precedent directs us to rely on when interpreting 11 U.S.C. § 523(a)(2)(A) is tenuous. *See, e.g.*, *Field v. Mans*, 516 U.S. 59, 69 (1995). In 1978, when § 523(a)(2)(A) was adopted as part of the Bankruptcy Code, it was well established that the tort of fraud required proof of both actual reliance and that reliance was justifiable. *See* Restatement (Second) of Torts §§ 537, 550 (A.L.I. 1977) (recognizing that "[o]ne party to a transaction who by concealment . . . intentionally prevents the other from acquiring material information" will only be held liable if the other party justifiably "relies on the misrepresentation in acting or refraining from action"). These requirements were repeatedly imposed by courts at that time. *E.g.*, *O'Shields v. S. Fountain Mobile Homes, Inc.*, 204 S.E.2d 50, 52 (S.C. 1974); *Sharp v. Idaho Inv. Corp.*, 504 P.2d 386, 396 (Idaho 1972); *see also S & F Supply Co. v. Hunter*, 527 P.2d 217, 221 (Utah 1974) (reaching a similar conclusion as a matter of statutory law).

Instead of drawing on the state of the common law during the relevant period, the *Apte* court relied on the Supreme Court's securities-law decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153–54 (1972), which held that reliance may be inferred where a failure to disclose resulted in a material fact being withheld, *In* *re Apte*, 96 F.3d at 1323. This was a strange borrowing, as *Affiliated Ute* did not rely on common law in reaching its holding. *See* 406 U.S. at 153–54.

Relying on *Affiliated Ute* inferred-reliance rule also creates practical difficulties. For one thing, it creates perverse incentives for plaintiffs to frame misrepresentation cases as omission cases: "[e]very fraud case based on material misrepresentation[] could be turned facilely into a material omissions case [to] . . . avoid the necessity of pleading and proving causation and reliance." *Beck v. Cantor, Fitzgerald & Co.*, 621 F. Supp. 1547, 1556 (N.D. Ill. 1985). It also results in debtors who never could have been sued under state law having their debts held nondischargeable in bankruptcy under our caselaw interpreting § 523(a)(2)(A). Congress, of course, can base nondischargeability on whatever it wants. But there is no reason to conclude that it meant to expand nondischargeability as broadly as *Apte* does when it used the words "actual fraud." *See* § 523(a)(2)(A).

While I agree that *Apte*'s reliance holding is not "clearly irreconcilable" with the Supreme Court's caselaw interpreting § 523(a)(2)(A), there is good reason to doubt the validity of this precedent. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). In an appropriate case, we should revisit whether a plaintiff must introduce proof of actual reliance before a debt can be adjudged nondischargeable for being procured through a fraudulent omission.

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VANDYKE, Circuit Judge, concurring.

I concur with the memorandum disposition. I write separately because this case illustrates well the problem with *Miller v. Gammie*'s "clearly irreconcilable" standard that I recently highlighted. *See Ariz. All. for Retired Ams. v. Mayes*, No. 22-16490, 2026 WL 2277101, at *22–25 (9th Cir. Aug. 7, 2026) (VanDyke, J., concurring in part and concurring in the judgment) (citation modified) (discussing how *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003), imposes too high a barrier to following more recent Supreme Court precedent). Here, Appellant Manion urged us not to follow *Apte v. Japra* (*In re Apte*), 96 F.3d 1319 (9th Cir. 1996), because it is inconsistent with more recent Supreme Court precedent: *Husky International Electronics, Inc. v. Ritz*, 578 U.S. 355 (2016). Manion is right that *Apte* is wrong and inconsistent with *Husky*. To determine the meaning of fraud under § 523(a)(2)(A), *Apte*'s inferred-reliance rule incorrectly borrowed from a decades-old Supreme Court securities-law decision rather than the common law the Supreme Court in *Husky* has more recently relied on. *See Husky Int'l Elecs.*, 578 U.S. at 360; *see also Field v. Mans*, 516 U.S. 59, 69 (1995). Judge Forrest's concurrence persuasively points out that not only is there "good reason to doubt the validity of" *Apte*, but also that it "creates perverse incentives for plaintiffs to frame misrepresentation cases as omission cases." But as Judge Owens also correctly remarked during oral argument in this case, *Miller*'s standard is so demanding that overcoming it requires "climb[ing] the highest hill in the world." Unfortunately for Manion today, our precedent is only "merely irreconcilable" with subsequent Supreme Court precedent, not "clearly" so. *Ariz. All.*, 2026 WL 2277101, at *22 (VanDyke, J., concurring in part and concurring in the judgment) (citation modified). *Miller*'s inappropriately high standard thus deprives Manion of what should be the ordinary operation of vertical stare decisis. It will continue to do so for other litigants until either an en banc panel of our court reconsiders it or the Supreme Court instructs us to stop privileging our own precedent over its subsequent guidance.

Miller places the burden of correcting our "merely inconsistent" precedent on the en banc process even when a three-judge panel recognizes that our court's prior decision is contrary to intervening Supreme Court direction. But en banc review is an extraordinary and institutionally costly mechanism. It requires a party willing and able to litigate the issue through another layer of briefing and argument *and* the investment of a majority of judges on our large and busy court who think our precedent is not just wrong but instead *so* wrong—and consequential—that fixing it is worthy of the extra workload.

Because *Miller* makes en banc review the only mechanism for correcting "merely inconsistent" conflicts between our circuit's precedent and intervening

Supreme Court authority, most disparities will go unfixed. All the stars may align for en banc review when the case concerns a politically salient issue, a high-profile constitutional right, or a question that affects an exceptionally large number of cases. But most legal errors manifest in less auspicious circumstances, and most cases don't present the headliner legal issues. The parties to each case almost always have a great deal at stake personally, but the questions they present have less significance in the broader legal landscape. There is consequently little reason for our entire court to expend the resources required to correct errors in the run-mill of cases through en banc review. Most litigants who can show only that our precedent is "merely inconsistent" with subsequent Supreme Court decisions, then, are simply out of luck. That should trouble everybody: a litigant who deserves to win under more recent Supreme Court precedent will instead lose under our inferior court's older precedent. How is that right?

What's more, *Miller* creates an unfortunate asymmetry. Two litigants can be equally entitled to the benefit of intervening Supreme Court precedent, yet only the one presenting what we deem to be a sufficiently important issue justifying the high transaction costs of en banc review has a chance to obtain it. The ordinary litigant with an ideologically innocuous or narrow grievance has little realistic ability to garner the attention necessary to secure en banc review. The result is that, while our court effectively nullifies Supreme Court precedent through *Miller*'s improperly onerous standard, everyday litigants like Manion are left suffering from wrong law simply because they have the misfortune of being in the Ninth Circuit.[1]

The availability of having the correct law applied to a dispute should not depend on whether the litigant happens to have an important enough case to garner the attention of our entire court. As I said in *Arizona Alliance*, our court should "modify our *Miller v. Gammie* rule to clarify that Supreme Court precedent controls whenever it is inconsistent with our own." 2026 WL 2277101 at *23 (VanDyke, J., concurring in part and concurring in the judgment). Doing so would allow litigants like Manion to benefit from recent Supreme Court direction without making rare en banc review the price of admission.

[1] While not relevant to this case, it also can't be ignored that this court has an obvious institutional incentive to maintain its rule that "requires[] our court to apply precedent that is irreconcilable with Supreme Court decisions as long as it is not 'clearly' so." *Ariz. All*, 2026 WL 2277101, at *25 (VanDyke, J., concurring in part and concurring in the judgment). We are, after all, a famously liberal circuit ultimately answering to a more conservative Supreme Court. This court frequently works hard "to avoid following the Supreme Court's instructions." *Knife Rts., Inc. v. Bonta*, 182 F.4th 797, 810 (9th Cir. 2026) (VanDyke, J., dissenting from the denial of rehearing en banc). *Miller*'s strictures provide us with a helpful mechanism for ensuring that recent Supreme Court decisions providing directly applicable legal reasoning sometimes remain no more significant in this circuit than a newspaper op-ed. Put differently, our *Miller* standard forces the Supreme Court to fix our incorrect precedents more directly and piecemeal instead of allowing the Court's reasoning in one case to correct our errant precedent whenever it directly applies.