UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

Case No. 99-22360

JOSEPH MATTHEW SETNICAR and
MARY ELIZABETH SETNICAR,

Chapter 7

Debtors.

CAROL HARTSON and
CHARLOTTE NELSON,

Plaintiffs,

v.

Adversary No. 99-2280

JOSEPH MATTHEW SETNICAR,

Defendant.

MEMORANDUM DECISION

The debtor, Dr. Joseph M. Setnicar, filed a petition for relief under chapter 7 of the Bankruptcy Code on March 12, 1999. The plaintiffs, Carol Hartson and Charlotte Nelson, brought this adversary proceeding against the debtor to except from discharge under 11 U.S.C. section 523(a)(2)(B) an unsecured obligation arising from the sale of the plaintiffs' real estate. A trial was held, followed by oral argument and post-trial briefs,[1] after which the court took the matter under advisement.

This court has jurisdiction under 28 U.S.C. section 1334(b), and this is a core proceeding

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[1]The court appreciates that Attorney Steuer's brief was written in the English language, although the court has been known to get by in German. For example, "steuer" translates as "tax" or "wheel," as in a ship's wheel. We are delighted that Mr. Steuer raised the language issue, as the court has so little opportunity to share its arcane knowledge.

under 28 U.S.C. section 157(b)(2)(I). This decision constitutes the court's findings of facts and conclusions of law pursuant to Fed. R. Bank. P. 7052.

BACKGROUND

The debtor, Joseph Setnicar, is a dentist by day and speculative real estate investor by night. At all times relevant to this matter, Dr. Setnicar, along with Dr. James Leaman, another dentist, Mark Mulvaney, a fellow investor, and Michael Imperl, a real estate broker, were equal members of a limited liability company, Villager at Nashota, LLC (the Villager). Most business matters were handled by Mr. Imperl.

The plaintiffs inherited a funeral home from their father in 1992 and subsequently marketed the property for sale. In March 1997, Michael Imperl submitted an offer from the Villager to purchase the plaintiffs' property pursuant to the following terms: payment of $100,000 cash at closing with an unsecured note for $200,000 at 6%, with monthly payments of $1,000 and all principal due in seven years. (Exhibit 110) The note was to be personally signed and guaranteed by the members of the Villager. The offer provided for a closing no later than May 15, 1997, and was contingent upon a financing of $225,000 for a term of not less than 20 years. The offer was also subject to the Villager obtaining rezoning for a fifteen bed C.B.R.F., a community-based residential facility for senior citizens. The need to finance the property for appropriate renovations was the reason for the lack of a mortgage to the sellers.

Michael Imperl advised Charlotte Nelson's attorney, Ronald Jaskolski, that the Villager had previously purchased other properties with similar terms. After further negotiations, the closing date was extended, the cash at closing was unchanged, an additional $27,000 promissory

note payable in 90 days after closing was agreed to, the interest rate was increased with the monthly interest payments over seven years adjusted accordingly, and the parties agreed that the "buyers shall provide financial declarations to the sellers, in writing, to verify net worth of at least $5,000,000." (Exhibit 110).

Ronald Gaura, one of the real estate brokers involved with the sale of the property, received the four members' personal financial statements from Mr. Imperl and delivered them to Mr. Jaskolski. The first pages of the combined statements indicated a total net worth among the four members and their respective spouses exceeding $9,600,000. (Exhibits 173, 174, 175, 176) Mr. Jaskolski forwarded the financial documents to Mrs. Nelson, who gave the statements to her sister, Carol Hartson. Mrs. Hartson subsequently passed the documents on to her own attorney, Mary Slattery.

The financial statement of Dr. Setnicar (Exhibit 173) listed the following relevant information:

> [Page 1]
>
> The following is submitted for the purpose of procuring, establishing and maintaining credit with you in behalf of the undersigned or persons, firms or corporations in whose behalf the undersigned may either severally or jointly with others execute a guaranty in your favor. The undersigned warrants that this financial statement is true and correct and that you may consider this statement as continuing to be true and correct until a written notice of a change is given to you by the undersigned.

ASSETS	IN EVEN $
Cash on hand and in banks	48,000
Marketable securities (see Sched. A)	2,000
Non-marketable securities (see Sched. B)	-
Securities held by broker in margin accounts	-
Restricted or control stocks	-
Partial interest in real estate equities (see Sched. C)	[blank]
Real estate owned (see Sched. D)	300,000
Loans receivable	48,000
Automobiles and other personal property	65,000

Cash value - life insurance (see Sched. E)	3,000
Other assets - itemize:	
Equity in Partnership	1,810,000
Equity in Proprietorship	675,000
Profit Sharing	44,000
Collectibles	3,000
TOTAL ASSETS	3,001,500
LIABILITIES	IN EVEN $
Notes payable to banks - secured	167,000
Notes payable to banks - unsecured	48,000
Due to brokers	-
Amounts payable to others - secured	-
Amounts payable to others - unsecured	-
Accounts and bills due	-
Unpaid income tax	-
Other unpaid taxes and interest	-
Real estate mortgages payable (see Sched. D)	115,000
Other debts - itemize:	
Charges	15,000
TOTAL LIABILITIES	345,000
NET WORTH	2,656,500
TOTAL LIAB. AND NET WORTH	3,001,500
Are all bad and doubtful assets excluded from this statement?	Yes
Additional assessments: $ --	
ANNUAL SOURCES OF INCOME	
Salary, bonus & commissions	220,000
Dividends	6,000
Real estate income	[blank]
Other income	-
Total	226,000

PERSONAL INFORMATION
Are you a partner in any other venture? Rental off. only

CONTINGENT LIABILITIES
Do you have any contingent liabilities? No
If yes, give details: [blank]
As endorser, co-maker or guarantor [blank]
On leases or contracts [blank]
Legal claims [blank]
Other special debt [blank]
Amount of contested income tax liens [blank]

GENERAL INFORMATION
Are any assets pledged? No
Are you defendant in any suits or legal actions? Yes
Personal bank accounts carried at: 1st Bank of Oconomowoc
Have you ever taken bankruptcy? Explain: No

[Page 2]

REAL ESTATE EQUITIES - SCHEDULE C		% OWN
Adell Whse.	50,000	33%
Horicon 1-8	30,000	25%
Manson Lake Home	75,000	33%
Darien Land	200,000	25%
Sturgeon Bay	40,000	25%
Fort Atkinson 5-8	75,000	25%
Nashotah Homes (4)	35,000	25%
2020 Cliff Alex - Waukesha (4)	19,000	25%
Stevens Point 6-8	150,000	25%
Dousman 1-4 + 1 CBRF (in process) + 2nd CBRF Lot	70,000	25%
Wauwatosa 2-6	50,000	25%
Saukville 40 Units	200,000	25%
Sullivan 22+ CBRF	125,000	25%
Milwaukee 12 Units	30,000	25%
Milton 2-2 Lots	35,000	25%
Muskego Land (33 acres)	80,000	33%
Mauston Multi-Level	150,000	25%
Stevens Point 8-8 Acres Multi Land	40,000	25%
Milwaukee 6 Unit	18,000	25%
Milwaukee 7 Unit	20,000	25%
Darien 3-8	75,000	25%
Milwaukee 8 Unit	12,000	25%
Milwaukee 6 Unit	8,000	25%
Milwaukee 32 Unit	90,000	25%
West Allis CBRF Lot	3,000	25%
Brookfield Condo	30,000	25%
Milton Multi Land	50,000	25%
Waukesha 1 Rental	15,000	25%
Melton 1 Rental	35,000	25%
TOTAL REAL ESTATE EQUITIES	1,810,000	

REAL ESTATE OWNED - SCHEDULE D
[blank]

LOANS RECEIVABLE
Total Notes Receivable 48,000

[Page 3]

SCHEDULE A - U.S. GOVERNMENTS AND MARKETABLE SECURITIES

No. of Shares or Face Value (Bonds)	Description	In Name Of	Market Value
3,000	Series EE Savings Bonds	Joseph & Mary	2,000

SCHEDULE B - NON-MARKETABLE SECURITIES
[blank]

SCHEDULE C - PARTIAL INTERESTS IN REAL ESTATE EQUITIES
SEE LIST

SCHEDULE D - REAL ESTATE OWNED

Description of Property and Improvements	Date Acquired	Title In Name Of	Cost	Market Value	Mortgage Amount	Mortgage Maturity
1409 Crystal Lake Dr.	1991	Joseph Mary	[ ]	300,000	115,000	2,021

SCHEDULE E - LIFE INSURANCE CARRIED, INCL. N.S.L.I. AND GROUP INSURANCE

Face Amount	Name of Company	Beneficiary	Cash Surrender Value	Loans
200,000	Northwestern Mutual Life	Mary	3,000	[ ]
450,000	Great West Life	Leaman & Sheild	Term	[ ]

SCHEDULE F - NAMES OF BANKS OR FINANCE COMPANIES WHERE CREDIT HAS BEEN OBTAINED

Name	Date	High Credit	Owe Currently	Secured or Unsecured
First Bank of Oconomowoc	8-91	200,000	153,000	Secured
Credit Midwest Bank	8-91	142,000	115,000	Secured
First Bank of Oconomowoc	8-96	50,000	48,000	Unsecured

The undersigned certifies that both sides hereof and the information inserted therein has been carefully read and is true, correct and complete, and may be verified where the bank deems necessary.

[Signature of Joseph M. Setnicar]

(Exhibit173, Personal Statement dated 9/1/97).

Mrs. Hartson testified that she was impressed by the net worth and income of Dr. Setnicar and the others. She looked at the homes of the members and the dental office of Drs. Leaman and Setnicar and was satisfied that these assets were consistent with those of successful and wealthy individuals. She also confirmed that the Villager was engaged in other construction activities.

Mrs. Hartson contacted the City of West Allis to confirm that the Villager had sought approval to build the C.B.R.F., and also confirmed with the city that the Villager had other similar projects underway (at least four such projects are on Dr. Setnicar's financial statement). Although she was not provided privileged information, Mrs. Hartson was able to confirm with West Allis Savings Bank that the Villager had submitted a request for a loan to construct the C.B.R.F.

Mr. Jaskolski, Mrs. Hartson and Mrs. Nelson all testified that they reviewed the financial statements of each member of the L.L.C. The first pages of the other members' statements, all dated September 1, 1997, disclosed the following net worth of the other members: $3,052,930 for James and Deborah Leaman (Exhibit 174); $2,759,000 for Mark and Jean Mulvaney (Exhibit 175); and $1,151,200 for Michael Imperl (Exhibit 176). At closing, Mr. Jaskolski requested confirmation from the members that his client and her sister would be paid. Dr. Setnicar was present at the closing and, like the other members, gave a general nod of assent.

The executed closing statement reflects two notes, one in the amount of $27,000 and the other in the amount of $175,000, with a balance paid to sellers, after adjustments, of $93,969.22. (Exhibit 56). Plaintiffs paid commissions of $6,000 each to Mr. Gaura, Mr. Guerino and Mr. Imperl.

At closing, the two notes were revised to reflect that the payments to the two plaintiffs were to be divided equally, with half of each payment paid directly to each. (Exhibits 57, 58) The $27,000 note provided for interest at the rate of 7% per annum, to be changed to 8% effective October 10, 1999 (although payable January 1, 1998). Both notes were executed in the name of Villager at Nashotah, LLC, by Joseph Setnicar, James Leaman, Mark Mulvaney and Michael Imperl, all designated as "borrower," with the same four individuals also executing personal

guarantees. The $175,000 note provided for monthly payments of the principal and interest to be paid commencing November 1, 1997, in installments of $1,020.83 each, with a final payment on October 1, 2004, of the outstanding principal balance plus accrued interest ($1,020.83 is monthly interest only at 7%). As with the other note, the interest rate was 7% per annum until October 10, 1999, and effective thereafter interest at the rate of 8% per annum.

After closing, approximately six interest payments were made to each of the plaintiffs on the $175,000 note, with no payments on the $27,000 note. Mrs. Nelson commenced an action in the Circuit Court of Waukesha County, Wisconsin, and on February 18, 1999, was awarded a judgment on her one-half interest in the two notes against Joseph Setnicar, Mark Mulvaney, James Leaman, Michael Imperl and Villager at Nashotah, LLC, for a total of $109,343.61. (Exhibit 183) Carol Hartson commenced an action in the same court on February 29, 1999, and by reason of the bankruptcy filings by Drs. Setnicar and Leaman, the judgment that was entered on April 30, 1999, was only against Michael Imperl, Mark Mulvaney and Villager of Nashotah, LLC, in the amount of $107,928.26.

The following additional, undisclosed liabilities of Dr. Setnicar, individually and as a member of the L.L.C., as of September 1, 1997, were established during the trial and were generally undisputed:

Wauwatosa Savings, Darien Property (Exhibit 22)	$1,120,000
Wauwatosa Savings, Sullivan Property (Exhibit 32)	1,176,000
M & I, second mortgage (Exhibit 2)	40,000
Dr. Sheild (Exhibit 158, Sched. F, p. 20)	483,000
Bando-McGlocklin (Exhibit 18)	210,000
Bank of Waunakee (Exhibit 20)	490,000
National Exchange Bank (Exhibit 37)	42,795

Dr. Setnicar was liable for additional contingent liabilities on personal guarantees of many of the

real estate purchases of the L.L.C., plus the guarantee to a supplier of construction materials, none of which was disclosed on his financial statement:

Hoida Lumber (Exhibits 39, 164)	300,000
West Allis Savings Bank, Fort Atkinson Property (Exhibit 8)	1,120,000
West Allis Savings, Saukville Property (Exhibits 31, 107)	1,300,000
M & I Mid-State Bank, Plover Property (Exhibit 148)	1,200,000
Ixonia State Bank (Exhibit 104)	304,000
Ixonia State Bank (Exhibit 10)	272,000
M & I Bank South Central (Exhibit 7)	405,000
First Bank of Oconomowoc (Exhibit 36)	200,000

Dr. Setnicar testified that the members of the Villager gave numerous personal guarantees, but that he never kept detailed records for himself. The Villager was experiencing a cash problem around the same time as the plaintiffs' closing. The Villager had defaulted on a loan to M & I Mid-State Bank and was in negotiations to restructure its debt repayment to Hoida Lumber. In September 1997, only one month before the closing on the plaintiffs' property, the Villager was only able to obtain needed short-term financing of $160,000 at a rate of 40% per annum, from Richard Dick (Exhibit 76).

Mrs. Hartson and Mrs. Nelson both testified that they would not have accepted the personal guarantee of Dr. Setnicar had his financial statement disclosed all of his substantial debts and contingent liabilities.

ARGUMENTS

All parties agree that there were material misrepresentations in the defendant's financial statement. The plaintiffs maintain that the misrepresentations were intentional on the part of the defendant, and they would not have closed the transaction had the actual facts been known or

disclosed. The plaintiffs relied upon the statements provided, and such reliance was reasonable under the circumstances.

The defendant alleges that he did not prepare the financial statements, and any mistake was inadvertent on his part. More importantly, he argues that the plaintiffs have not met the standard of reasonable reliance under section 523(a)(2)(B), in that they did not attempt to determine whether the information provided to them was accurate, and they did not read, understand or apply that information in making their credit decision.

DISCUSSION

Section 523(a)(2)(B) provides:

> (a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt --
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by --
> (B) use of a statement in writing --
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial 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[.]

11 U.S.C. § 523(a)(2)(B). These elements must be proven by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654 (1991). Exceptions to discharge must be liberally construed in favor of the debtor and strictly against the creditor. *In re Moore*, 219 B.R. 809, 812 (Bankr. E.D. Wis. 1998). In this case, some of the elements are more pivotal to the court's determination than others, but the court is satisfied that the plaintiffs have met the burden of proof as to all.

The use of a written financial statement.

There is no doubt that a written financial statement for the debtor was provided to the plaintiffs, and it was used to procure financing for the Villager. Thus, the initial requirement of subsection (B) was met.

Materially false statement.

The financial statement painted a substantially untruthful picture of Dr. Setnicar's financial condition. The debtor does not dispute this fact, although he does dispute culpability. Numerous contingent liabilities were not listed. *See In re Ross*, 180 B.R. 121 (Bankr. E.D. Va. 1994) (the debtor's unlisted personal guaranty/contingent liabilities, if called upon, had potential to drive debtor's net worth deeply into the negative, and was "materially false"). Viewed solely in the context of Dr. Setnicar's total assets and net worth, the overstatements are certainly substantial and material. Thus, the requirement of subsection (B)(i) is met.

The statement itself rendered an ongoing duty to disclose any changes in Dr. Setnicar's financial condition: "The undersigned warrants that this financial statement is true and correct and that you may consider this statement as continuing to be true and correct until a written notice of a change is given to you by the undersigned." (Exhibit173, Personal Statement dated 9/1/97) Numerous transactions took place during the month and a half between the date of the financial statement and the closing on the plaintiffs' property, but the debtor did not inform the plaintiffs or their attorneys, either orally or in writing, of the substantial increase in his liabilities, nor in the obvious cash flow problems evidenced by the Hoida Lumber judgment or the 40% interest loan.

At the closing, Attorney Jaskolski questioned whether or not the plaintiffs would get paid. This query further imposed a duty to disclose any information not previously presented which

related to the risk of Villager and the individuals not being able to pay the obligation when due. Dr. Setnicar made no effort to correct the disclosure.

Statement on which the creditor reasonably relied.

The Supreme Court's decision in *Field v. Mans*, 516 U.S. 59, 77, 116 S.Ct. 437, 447 (1995), made clear that reliance was "reasonable" under section 523(a)(2)(B) only if a prudent person in the creditor's position would have relied on the misrepresentation. The Seventh Circuit has determined that reasonableness depends on the circumstances. *Matter of Harasymiw*, 895 F.2d 1170, 1173 (7th Cir. 1990) (noting that the court's inquiry is not to judge the wisdom of the loan, but only to determine whether the creditor's reliance on the statement was reasonable).

Dr. Setnicar argues that the plaintiffs' reliance upon the statement was unreasonable because it was rife with mistakes and inconsistent with the other members' financial statements.[2] If a financial statement carries "red flags," that is, obvious indications that the statement may be false or that serious problems may jeopardize repayment, a reasonable lender must investigate further. Nevertheless, lenders do not have to hire detectives before relying on borrowers' financial statements. *See In re Morris*, 223 F.3d 548, 554 (7th Cir. 2000) ("While we understand that the concept of reasonable reliance does not generally require creditors to conduct an

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[2]Dr. Setnicar points out in his post-trial brief that in his statement, the balance sheet amount of $167,000 was inconsistent with Schedule F. Dr. Leaman's balance sheet inconsistently stated liabilities which were not corroborated by the schedules. Dr. Leaman's statement showed a loan receivable from Dr. Setnicar of $50,000, but there is no corresponding liability on Dr. Setnicar's statement. Similarly, Mr. Imperl's statement shows that Dr. Leaman owes him $2,000, but Dr. Leaman's statement shows no such liability. Dr. Leaman's signature page was dated 9/1/96. Mr. Imperl's statement indicates on the front page that he has pledged a $40,000 CD, which does not appear on his balance sheet. Mr. Imperl's Schedule F itemizes current obligations to banks or finance companies totaling $2,212,000, with each number being inconsistent with the liabilities on the balance sheet.

investigation prior to entering into agreements with prospective debtors, such a precaution could be the ordinarily prudent choice in circumstances where the creditor admits that it does not believe the representations made by the prospective debtor."); *Matter of Garman*, 643 F.2d 1252, 1260 (7th Cir. 1980) ("[A]lthough a creditor is not entitled to rely upon an obviously false representation of the debtor, this does not require him or her to view each representation with incredulity requiring verification."). The Villager and its members were not longstanding, trusted friends of the plaintiffs, which would cause the latter to be complacent about information presented on a financial statement; likewise, the plaintiffs had no prior dealings which would lead them to suspect the debtor and the other LLC members of chicanery. *See In re Morris*, 223 F.3d 548 (7th Cir. 2000); *Matter of Garman*, 643 F.2d 1252 (7th Cir. 1980); *In re Moore*, 219 B.R. 809 (Bankr. E.D. Wis. 1998). The court must then determine whether the flags on the financial statements were red enough to hold the plaintiffs to the level of scrutiny that the debtor argues is necessary to support an exception to discharge.

Typically, an institutional lender might order a credit report on its borrowers. Individuals may not be able to do so. Assuming the plaintiffs could procure a credit report for each of the members, no evidence was presented to show that it would have constituted the requisite "red flag." Credit reports generally contain information about where the subject works and lives, and how the subject pays bills. The report may show whether the subject has been sued, arrested or has filed for bankruptcy. But by and large, most businesses only report delinquent accounts to the credit agencies. Liabilities on which the Villager defaulted might not have made their way to Dr. Setnicar's statement. Since the vast majority of the contingent and direct liabilities of Dr. Setnicar had not yet been called upon, and were therefore not delinquent prior to the closing, those

additional debts may very well not have shown up on any credit check available to the plaintiffs. *See In re Alicea*, 230 B.R. 492, 503 (Bankr. S.D.N.Y. 1999) (holding that "the lender's access to other information regarding the debtor's financial condition is relevant"). Therefore, the individuals cannot be faulted for not ordering a credit report.

Almost all reported cases discussing reasonable reliance involve sophisticated lenders, either banks or sophisticated businesses. These lenders are not in the business of lending. Reasonableness turns on the totality of circumstances, usually the prior relationship between lender and debtor or "red flags" in the application. The court is satisfied that the precautions these plaintiffs took were reasonable for lenders in their position and with the resources and information available to them. While the debtor argues that they did not read or understand the financial statements, the court is persuaded that is not true, and it is certainly not what the plaintiffs testified to. They both contacted attorneys to assist them. The attorneys did not warn them off the transaction. The plaintiffs knew what net worth was, and in Dr. Setnicar's case it was shown in the balance summary at over $3,000,000. This was well in excess of the amount of debt they were owed. The plaintiffs understood a substantial income, $226,000 per year for Dr. Setnicar. Although the debtor argues that the plaintiffs relied only on the appearance of the houses and office, the court believes the plaintiffs' testimony that they would not have closed without having financial statements showing prosperous buyers. The external signs of wealth and success, the house and busy office, supported the debtor's apparent substantial net worth, and it does not matter that this inspection occurred before the financial statements were provided. Mrs. Hartson's investigation into the Villager's zoning and construction initiatives further bolstered the rosy picture on the financial statement.

The debtor's financial statement need not be the only factor in the sellers' decision, and it was a substantial factor in this total picture. *See In re Moore*, 219 B.R. at 813. The fact that other members also had financial statements showing substantial net worths does not mean the plaintiffs did not rely on Dr. Setnicar's statement. The material omissions on the financial statement far outweighed the few discrepancies in the statements and the failure of Dr. Setnicar's statement to interlock neatly with the others. The second and third pages of the debtor's statement still showed a substantial net worth. The plaintiffs might not have understood the entire financial statement, but they relied on what they did understand, and that reliance was reasonable. It would be unreasonable and unfair to allow the debtor to point to a few discrepancies that do not change the total picture presented by the debtor, and to use the plaintiffs' (and their attorneys') inattention to those details to obtain discharge of the debt. *See In re Gosney*, 205 B.R. 418, 421 (B.A.P. 9th Cir. 1996) (holding that "[t]he debtor[] cannot simply rely on minor clues of falsity in financial statements that on the whole have the appearance of being very complete and reliable and where [the creditor] took reasonable steps to inquire as to the creditworthiness of the debtor[]"). None of the "red flags" has much color - maybe a little blush here and there - and not enough to warrant any further investigation than was carried out by the plaintiffs. They have met their burden of proof under subsection (B)(iii).

That the debtor caused to be made or published.

In essence, Dr. Setnicar claimed that the incorrect financial statements were generated by Michael Imperl as part of the latter's grand nefarious scheme to swindle the other members of the Villager out of their hard earned money and to tarnish their reputations. There was no evidence presented, however, of any accurate financial statement that was prepared by Dr. Setnicar for the

purposes of obtaining the financing that he personally guaranteed. Although he was admittedly a dentist by trade and not a real estate investment professional, surely Dr. Setnicar would have known that an accurate personal financial statement was required for personally guaranteed financing. He was taking part in such transactions on a regular basis, especially around the time he closed on the plaintiffs' property.

If Dr. Setnicar had not generated the financial statement presented to the plaintiffs, he caused it to be made and recklessly allowed it to be used when it was obviously no longer accurate. Dr. Setnicar's denial of responsibility for the statement are implausible in light of the fact that certain information that would presumably not be known to Michael Imperl, i.e., the value of the debtor's home and mortgage, life insurance amounts and beneficiaries, and savings bonds, was included in the statement. *See In re Smith*, 242 B.R. 694 (B.A.P. 9th Cir. 1999) (holding that debtor "published" false statement with intent to deceive even though he may never have handed a copy of the statement to the creditor). It was crystal clear that Mr. Imperl would be using this personal information, and Dr. Setnicar tacitly allowed him to do so. One court has found that a debtor did not have to sign a personal financial statement submitted by his attorney in connection with a corporate loan, in order for the falsehoods on the statement to provide a basis for excepting the debtor's obligation from discharge. *In re Ross*, 180 B.R. 121 (Bankr. E.D. Va. 1994). In *Ross*, the debtor had directed the attorney to prepare the document before it was transmitted to the lender. The court found that the debtor had adopted the financial statements submitted by his attorney. *Id.* at127; *see also Water, Waste, & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998) (holding that agency law may impose personal liability upon L.L.C. members and managers, nothwithstanding the L.L.C. members' statutory grant of immunity from liability);

Collier on Bankruptcy, 15th Ed. Revised 523.08[2][a]. The first requirement of subsection (B)(iv) is satisfied.

With the intent to deceive.

The plaintiffs have established a general pattern of Dr. Setnicar's recklessness as to his dealings regarding the Villager's transactions and finances. He allowed others to make major financial decisions and to continue to take on enormous debt when the L.L.C was under water financially. He personally took part in the transactions that facilitated this reckless behavior.

A creditor can establish intent to deceive by proving reckless indifference to or reckless disregard of the accuracy of the information in the financial statement of the debtor. *In re Jones*, 88 B.R. 899, 903 (Bankr. E.D. Wis. 1988). Dr. Setnicar went to regular meetings concerning the Villager's business, but he kept no records. At trial, Dr. Setnicar could "not recall" many of the activities of the L.L.C., including those he was directly involved with. He took part in transactions involving hundreds of thousands of dollars of personal liability with the apparent concern of a person purchasing a shirt. Despite his protestations to the contrary, Dr. Setnicar had enough business savvy to know that accurate personal financial statements were required in order to obtain financing. Nevertheless, he let Mr. Imperl publish on his behalf personal financial statements without the slightest attention as to whether they were accurate or not. In fact, he had to have known the statements were inaccurate because he took part in numerous transactions, including a 40% interest loan, without signing an updated statement for the closing with the plaintiffs. Dr. Setnicar did not blindly trust Mr. Imperl; he cavalierly and recklessly disregarded the truth of what was being used in his name to induce the plaintiffs to part with their property on unsecured credit. This was not naivete; it was dishonesty and greed. Dr. Setnicar's testimony as

to his lack of awareness of Mr. Imperl's actions was unconvincing, to say the least. The plaintiffs have met their burden of proof for the second requirement of subsection (B)(iv).

CONCLUSION

Based on the foregoing, the debtor's liability to the plaintiffs is excepted from the debtor's discharge under 11 U.S.C. § 523(a)(2)(B). The dollar amount of the money judgment ordered by this court shall be consistent with the determination of liability by the state court. Plaintiffs shall submit a calculation of such damages, and the amount shall be determined by this court if the parties cannot agree. Costs are also awarded to the plaintiffs. *See* Local District Court Rule 9.01, et seq. A separate order for judgment consistent with this decision will be prepared by plaintiffs' counsel.

Dated at Milwaukee, Wisconsin, December 15, 2000.

BY THE COURT

Honorable Margaret Dee McGarity
United States Bankruptcy Judge