

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

In re: John David Lindsey, Debtor

**Case No.: 5:10-bk-70801
Ch. 7**

Trans Lease, Inc.

Plaintiff

v.

Adv. Proc. No.: 5:10-ap-07090

John David Lindsey

Defendant

OPINION AND ORDER

Before the Court is a *Complaint to Determine Dischargeability of a Debt* filed by Trans Lease, Inc. [Trans Lease] on July 21, 2010, against the debtor, John David Lindsey. Lindsey filed an *Answer to Complaint to Determine Dischargeability of Debt* on July 6, 2010. In its complaint, Trans Lease asserts that Lindsey produced a materially false financial statement with the intent to deceive or mislead Trans Lease into extending credit to Lindsey's entity, JDL Leasing, LLC [JDL]. The debt was personally guaranteed by Lindsey. Prior to the bankruptcy, the debt went into default for missed payments, and Trans Lease repossessed and liquidated the collateral. In its complaint, Trans Lease claims a deficiency in the amount of \$554,215.83. Trans Lease argues that the debt owed to Trans Lease as a result of Lindsey's personal guaranty is a non-dischargeable debt pursuant to 11 U.S.C. § 523(a)(2)(B). The Court held a trial on February 22, 2011. At the conclusion of the trial, the Court took the matter under advisement.

The Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1334(b) and 157. This is a core proceeding that the Court may hear and determine pursuant to 28 U.S.C. § 157(b)(2)(I). This Opinion contains findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. For the reasons set forth below, the Court finds that Lindsey's obligation to Trans Lease is dischargeable, and the relief sought in the complaint is denied.

FACTUAL BACKGROUND

Trans Lease asserts in its complaint that it is a “business enterprise” that finances the purchase of large commercial vehicles such as dump trucks through “lease arrangements.” On April 2, 2008, JDL, an entity owned by Lindsey, submitted a credit application to MHC Financial Services [MHC] to finance several dump trucks. Lindsey’s personal financial statement, dated April 2, 2008, was included with his application to MHC. MHC declined to finance the transaction. The same financial statements of JDL that had been submitted to MHC, which included Lindsey’s personal financial statement, were then sent with an application for credit to Trans Lease. Trans Lease approved the credit application and agreed to purchase the dump trucks and lease them to JDL. The lease agreement between JDL and Trans Lease was consummated in October 2008 for the lease of 18 dump trucks with a lease term of 60 months. The dump trucks were delivered to JDL in the latter part of 2008. After default on the payments, Trans Lease repossessed the dump trucks on March 17, 2010. The dump trucks were subsequently sold, resulting in a deficiency principal balance of slightly more than \$554,000.00. Trans Lease contends that Lindsey’s personal financial statement of April 2, 2008, materially overstated his income as well as his total assets and materially understated his expenses. Trans Lease also contends it relied on Lindsey’s financial statement in entering into the lease agreement and extending JDL credit.

Lindsey’s financial statement is summarized below, in relevant part:

1. The financial statement is dated April 2, 2008, and is on a form from “First Security Bank, Rogers, Arkansas.” The form reads that it is the personal financial statement of “John David Lindsey, John David Lindsey Dev LLC.”
2. Under the “Income and Expense for year ending” section, Lindsey stated he has \$2,100,000.00¹ in “Income from Estates and Trust.”
3. Under the “Income and Expense for year ending” section, the

¹ The monetary amounts listed on the financial statement do not include dollar signs; however, the Court will use dollar signs when referencing any monetary amounts.

amounts of “Interest Paid,” “Insurance Premiums,” and “Contracts Payable (VISA, M/C, Sears . . .)” are blank.

4. Under the “Income and Expense for year ending” section, Lindsey stated he had \$5000.00 in “Mortgage Rental Payments.”
5. In Section I, under “Liabilities,” Lindsey stated he had \$25,903,000.00 in “Real Estate Mortgages Payable” and \$4,500,000.00 in “Notes Due to Banks.” The second page of the financial statement reflects loans on various land, rental business, development property and partnerships.
6. On the second page of the financial statement, under “Partnerships,” Lindsey stated he had \$52,435,529.00 in equity in the “JDL Trust.”

Additional relevant background information includes testimony from Brian Eschmann, president of Trans Lease, concerning Lindsey being from a “prominent family in Northwest Arkansas.” Trans Lease searched the website of Lindsey & Associates—Lindsey’s father’s large realty firm in Northwest Arkansas—and found that Lindsey held a relatively high administrative position. Lindsey went to work for his father in 1995 as a broker after getting a degree in business from the University of Arkansas. Lindsey subsequently owned and operated a dirt business (Stephens Red Dirt Farm, Inc.), a trucking business (Northwest Arkansas Truck Services, LLC), JDL, and Lindsey Contracting, LLC. Lindsey was also a part-owner in several other real estate partnerships and LLCs. Accordingly, Lindsey’s background was in real estate, construction, and hauling along with commercial and residential real estate development.

ANALYSIS

Section 523 (a)(2)(B) of the bankruptcy code provides, in relevant part, that a discharge under 11 U.S.C. § 727 “does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained, by . . . 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). Trans Lease, as the objecting creditor, has the burden of proving each of the elements by a preponderance of the evidence. *First Nat'l Bank of Olathe, Kansas v. Pontow*, 111 F.3d 604, 608 (8th Cir. 1997) (citing *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991); *Rosen's, Inc. v. Ghery (In re Ghery)*, 393 B.R. 209, 215 (Bankr. W.D. Mo. 2008)). “Exceptions to discharge must be ‘narrowly construed against the creditor and liberally against the debtor, thus effectuating the fresh start policy of the Code.’” *Fairfax State Sav. Bank v. McCleary (In re McCleary)*, 284 B.R. 876, 883 (Bankr. N.D. Iowa 2002) (quoting *Caspers v. Van Horne (In re Van Horne)*, 823 F.2d 1285, 1287 (8th Cir. 1987)).

The Court finds as uncontroverted that Lindsey incurred a debt for money by using a statement in writing—Lindsey's financial statement—and that this statement related to Lindsey's financial condition. Therefore, these requirements of § 523(a)(2)(B) have been met. The remaining three issues before the Court are whether the evidence supports a finding that (1) Lindsey's financial statement was materially false; (2) Lindsey caused the financial statement to be made or published with the intent to deceive; and (3) Trans Lease's reliance on the financial statement statement was reasonable.

Materially False

Lindsey's financial statement that was submitted to Trans Lease is a materially false statement if it “paints a substantially untruthful picture of a financial condition by a misrepresentation of the type which would normally affect the decision to grant credit.” *Agribank v. Webb (In re Webb)*, 256 B.R. 292, 296 (Bankr. E.D. Ark. 2000) (quoting *Meyer v. Dygert (In re Dygert)*, 2000 WL 630833, at *8 (Bankr. D. Minn. May 11, 2000)). Based on a review of Lindsey's financial statement and other evidence admitted

at trial, the Court finds that the financial statement is a materially false statement. The information provided on Lindsey's financial statement results in a substantially untruthful picture of Lindsey's financial condition, and the misrepresentations are of the type that would normally affect a creditor's decision to grant credit. Specifically, Lindsey's financial statement is false regarding Lindsey's income and liabilities. It also omits information about Lindsey's financial condition.

First, the Court finds that Lindsey's statement that the \$2,100,000.00 listed in his financial statement as "Income from Estates and Trusts" is materially false. Lindsey testified at trial that the \$2,100,000.00 was not truly "income," but rather was money that he had borrowed from his father to pay his debts as they became due. Lindsey testified that, in a general sense, he had considered it as income to him. The misperception of Lindsey's financial condition created by claiming the \$2,100,00.00 as income is compounded by Lindsey's failure to list the obligation to his father anywhere on the financial statement. A creditor reviewing the financial statement would conclude that Lindsey had additional income of \$2,100,000.00 instead of a debt in that amount. Lindsey testified that he began borrowing money from his father approximately one year before April 2, 2008, the date of the financial statement, and he considered the money income even though he acknowledged that at some point he would have to repay his father. Lindsey said that although he treated the money as income, he admitted that "in an accounting form, that was a mistake. It should have been, I guess . . . I don't know, a loan or something." At some point, Lindsey's father made Lindsey provide more formal documentation of the debt with promissory notes in order to be fair to Lindsey's other siblings.

Lindsey's financial statement is also false because Lindsey stated he had \$5,000.00 in "Mortgage/Rental Payments." Lindsey admitted the figure should have been annualized and listed as \$60,000.00, and he stated that the incorrect figure was "an honest mistake." Although the \$5,000.00 figure is incorrect, the Court would be reluctant to find that the financial statement was *materially* false based upon this

misrepresentation alone for several reasons. First, the Court finds that Lindsey's testimony regarding his mistake is credible. In fact, \$5,000.00 was his monthly mortgage payment, so the figure is correct to that extent. Second, the size of the loan is relatively large compared to the difference between the incorrect \$5,000.00 figure and the correct \$60,000.00 figure. Third, the loan was commercial as opposed to a personal consumer loan. However, the incorrect \$5,000.00 figure is an additional false statement on the financial statement that supports this Court's conclusion that the financial statement, as a whole, is a materially false statement.

Other information requested on the financial statement was obviously incomplete as reflected by the blanks for the "Interest Paid," "Insurance Premiums," and "Contracts Payable (VISA, M/C, Sears . . .)" entries. In response to why he left these entries blank, Lindsey testified that he "tried to represent the numbers as best [he] knew how," that he tried to give every creditor everything that he could think of, and that the reason for the blanks was a "lack of attention to detail." Lindsey's actions resulted in an incomplete financial statement, and, therefore, an inaccurate picture of his financial condition.

Finally, Trans Lease argued at trial that Lindsey's financial statement was also false because it misrepresented Lindsey's equity in a trust. Lindsey stated on his financial statement that he had \$52,435,529.00 in equity in "the JDL Trust."² However, there is no evidence that Lindsey's statement of equity in the JDL Trust was false. Lindsey executed the JDL Trust as the grantor and co-trustee in 1994 at his father's request when Lindsey was "finishing up" college. The trust had a spendthrift provision as well as other provisions limiting the accessibility of the funds. Specifically, the trust provided that when Lindsey reached forty years of age, he was to receive one-half of the remaining assets. Lindsey testified he was thirty-seven years old when he "made an application" to Trans Lease. Lindsey testified he obtained the \$52,435,529.00 figure during a conversation in 2005 or 2006 with his brother. Lindsey's brother was using that number

² The proper name was the "John David Lindsey Irrevocable Trust."

on financial statements that he was preparing in an effort to finance some apartments.

There is no evidence in the record to show that the \$52,435,529.00 figure Lindsey put on his financial statement was incorrect or inaccurate at the time. However, Trans Lease effectively argued that the financial statement is materially false because it represents that the value of the trust was somehow immediately accessible for use in paying debts. However, that is not indicated on the financial statement. The statement refers to the asset as a “trust.” It does not say “cash.” An experienced lender should know that when something is in trust, it might not be readily accessible or its accessibility might be qualified.

Furthermore, Lindsey had been receiving and was entitled to distributions from the net income from the trust no less than quarter annually. According to the trust, when he reached age forty, Lindsey would be entitled to receive one half of the trust assets. In that regard, Lindsey would have had at that time sufficient assets to satisfy the guarantee on this particular debt to Trans Lease. At the time of the trial, Lindsey had reached the age of forty. In sum, there is not sufficient evidence before the Court to show that Lindsey’s statement regarding the JDL Trust was inaccurate.

Although the Court finds that the listing of the value of the JDL trust was not a false statement, the financial statement was inaccurate and incomplete. Because of the inaccurate and incomplete nature of Lindsey’s financial statement, the Court concludes that Lindsey’s financial statement is a materially false statement under § 523(a)(2)(B).

Intent to Deceive

Trans Lease must also prove that Lindsey caused the materially false statement—the financial statement—to be made or published with the intent to deceive. 11 U.S.C. § 523(a)(2)(B). The form used for the financial statement was a form from First Security Bank. Initially, the form was filled out by Lindsey to obtain credit from MHC, or other lenders before MHC, but not to obtain credit from Trans Lease. Regardless, Lindsey

adopted the form by agreeing to let Trans Lease use it when it was sent to Trans Lease from MHC. *See Capital City Bank & Trust v. Kroh (In re Kroh)*, 88 B.R. 987, 994 (Bankr. W.D. Mo. 1988). Therefore, the Court finds that Lindsey caused the financial statement to be published to Trans Lease.

However, the Court does not find that Lindsey completed the financial statement with an intent to deceive Trans Lease. An intent to deceive under § 523(a)(2)(B) “can be proven from the surrounding circumstances, if it is shown the debtor acted with a reckless indifference to or reckless disregard of the accuracy of financial information submitted to the creditor. . . . Factors to consider include the debtor's intelligence and experience in financial matters and whether there was a clear pattern of purposeful conduct.” *Southeast Neb. Coop. Corp. v. Schnuelle (In re Schnuelle)*, 441 B.R. 616, 624 (B.A.P. 8th Cir. 2011). Intent to deceive does not require the debtor to have a “malignant heart.” *Agribank v. Webb (In re Webb)*, 256 B.R. 292, 297 (Bankr. E.D. Ark. 2000) (citing *Texas Am. Bank, Tyler, N.A. v. Barron (In re Barron)*, 126 B.R. 255, 260 (Bankr. E.D. Tex. 1991)). Rather, it focuses on objective facts and circumstances. *Id.* “[M]ere unsupported assertions of honest intent do not overcome the natural inferences derived from the admitted facts.” *Id.*; *Rosen's, Inc. v. Ghere (In re Ghere)*, 393 B.R. 209, 215 (Bankr. W.D. Mo. 2008). Because direct evidence of such intent is often absent, it may be inferred from the circumstances. *Ghere*, 393 B.R. at 215.

Lindsey left several items on his financial statement *blank* and incomplete (instead of affirmatively saying “none” or “zero”), and these actions are evidence that Lindsey prepared the statement in a cavalier and hurried manner. While Lindsey prepared the financial statement in a relatively cavalier fashion and without attention to detail, the Court finds that he possessed neither an intent to deceive nor a reckless indifference to or reckless disregard of the accuracy of financial information submitted to Trans Lease. Lindsey testified that he had “used the bottom part of that financial statement, had for sixteen years, had given the same document to every bank for personal expenses.” He added, “I never summarized down there for any bank, for any creditor, ever, in seventeen

years, what my global expenses were. I never did that for any bank. I put my personal expenses there.” The incomplete nature of the financial statement may have been satisfactory for the purposes of Lindsey’s lenders that preceded Trans Lease. Although some of the information on the financial statement regarding his income and liabilities was inaccurate and he left some information blank, the Court finds credible Lindsey’s assertions of honesty and testimony that he tried to give creditors the information requested. Because there is not sufficient evidence to prove beyond a preponderance of the evidence that Lindsey possessed the requisite intent in allowing the financial statement to be submitted to Trans Lease, the Court finds that the intent element of § 523(a)(2)(B) has not been met.

Reasonable Reliance

The final element that Trans Lease must prove is that Trans Lease reasonably relied on Lindsey’s financial statement. Eschmann was asked at trial “was there reliance on this financial statement for the purposes of extending that credit?” He answered “absolutely.” Therefore, the question becomes whether that reliance was reasonable as contemplated by § 523(a)(2)(B). In addition to the intent to deceive element, Trans Lease also fails upon this element. The Court finds that Trans Lease did not reasonably rely upon Lindsey’s financial statement when it executed the lease agreement with and extended credit to JDL.

The financial statement contains a number of errors and omissions, which with relatively little effort in review would have reflected a different financial picture of Lindsey.

According to the Eighth Circuit Court of Appeals,

“[t]he reasonableness of a creditor’s reliance, in our view, should be judged in light of the totality of the circumstances.” *Coston v. Bank of Malvern (In re Coston)*, 991 F.2d 257, 261 (5th Cir. 1993) (en banc). Among other things, a court may consider “whether there were any ‘red flags’ that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and whether even minimal investigation would have revealed the inaccuracy of the debtor’s representations.” *Id.*

Sinclair Oil Corp. v. Jones (In re Jones), 31 F.3d 659, 662 (8th Cir. 1994). However, this is not to say that a lender is required to perform an independent investigation of every financial statement. To do so would require that a lender presume that “every borrower who provides a financial statement is dishonest.” *Rosen’s, Inc. v. Ghere (In re Ghere)*, 393 B.R. 209, 215 (Bankr. W.D. Mo. 2008) (quoting *First Nat’l Bank of Olathe, Kansas v. Pontow*, 111 F.3d 604, 608 (8th Cir. 1997)).

The standard under § 523(a)(2)(B) is “reasonable reliance,” not the lesser standard of “justifiable reliance.” According to the law stated above, to determine whether Trans Lease reasonably relied on Lindsey’s financial statement, the Court must consider whether there were any red flags in Lindsey’s financial statement that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate and whether even minimal investigation would have revealed the inaccuracy of Lindsey’s representations. In this case there were no less than six red flags, which, with relatively minimal effort, would have alerted an ordinarily prudent lender to the possibility that the representations in the financial statement were inaccurate.

Red Flag #1

The financial statement is made in the name of “John David Lindsey, John David Lindsey Dev, LLC.” One cannot determine based on that “name” what part of the assets belong to John David Lindsey “the human being” (as characterized in the trial) as opposed to “John David Lindsey Development LLC.” Based solely on a review of the financial statement, virtually all of the assets could belong to either Lindsey, the human being, or John David Lindsey Development, LLC, the company. By the same token, all of the debts, income, and expenses could likewise belong to Lindsey or John David Lindsey Development, LLC. When asked whether this discrepancy raised any “red flags” with Trans Lease, Brian Smith, vice-president of Trans Lease, testified as follows:

Smith: We knew that John David Lindsey would be—be behind that, as well, with his—with his guarantee. So that we didn’t necessarily need a guarantee from JDL Development

LLC, since we had Lindsey going on personally.

Attorney for Lindsey: Did you assume that the balance sheet included assets owned by Lindsey individually and assets owned by [JDL] Development LLC?

Smith: We figured it would include both.

Attorney for Lindsey: Did you ever make any effort to separate the two out?

Smith: No, ma'am.

It is unclear, and unknown from a review of the financial statement, as to whom these assets and obligations belong, and Trans Lease admitted it did not make any effort to separate the assets. The debt was guaranteed by Lindsey the human being, and *not* John David Lindsey Development, LLC. It was incumbent upon Trans Lease to find out who owned or owed what. Trans Lease apparently did not care.

Red Flag #2

The financial statement shows the JDL Trust with a value of \$52,435,529.00. As previously stated, this amount of value is in a "trust" and is listed under the "equity" column. Even an inexperienced commercial lender should realize that this may not be accessible cash. Trusts are peculiar instruments which can have various reservations and qualifications, as was indeed the situation in the present case. A simple review of the trust would reflect whether there was a spendthrift provision that made the trust assets unavailable to execution, attachment, or garnishment by creditors of the beneficiary Lindsey. The trust had other qualifications as well, even though the actual assets were in the trust and half of the assets would be available to Lindsey at age forty, approximately three years after he prepared the financial statement. Trans Lease failed to request a copy of the trust or even ask Lindsey about the terms of this trust.

Red Flag #3

Even though the financial statement itself requires the attachment of Lindsey's two most recent tax returns, no tax returns were attached or provided to Trans Lease. Moreover, no tax returns were ever requested by Trans Lease. At trial, Eschmann explained why Trans Lease did not request tax returns: "we'd prefer to look at the financial statements that paint a picture of truly what's going on within the business." While Trans Lease may have preferred to look at financial statements, the fact that no tax returns were attached is a red flag because the omission should have alerted Trans Lease to the possibility that the figures on the financial statement were not accurate.

Red Flag #4

Even though the financial statement shows real estate mortgages in the amount of nearly \$26,000,000.00, notes due to banks in the amount of \$4,500,000.00, and other loans for various land, rental business, and development property, the amount of "Interest Paid" is left blank. Trans Lease never inquired as to how much the interest or payments were on those loans.

Red Flag #5

At trial, Smith testified that Trans Lease ran credit reports on Lindsey. The reports reflected a credit rating in the 600 range. Smith said that based on an A-F scale, with "A" being the best credit and "A" being 725 and above, that Trans Lease considered Lindsey's credit record of 607 to be a "D." Stated otherwise, according to Trans Lease, Lindsey's credit rating was relatively poor. Based on its assessment of Lindsey's credit score, Trans Lease should have been alerted to the possibility that Lindsey's financial condition as represented on his financial statement was not accurate.

Red Flag #6

Lindsey's annual income is listed at \$3,458,520.00, but the corresponding annual expenses are less than \$100,000.00. Although the huge disparity between Lindsey's income and expenses may not be a "red flag" by itself, when considered with the other

“red flags” on the financial statement, the representation appears inaccurate.

Despite the above-listed “red flags,”³ Eschmann testified that it was reasonable for Trans Lease to rely on Lindsey’s financial statement. However, the failure of Trans Lease to make further inquiry into the “red flags” substantiates that it was not relying—and was certainly not reasonably relying—on Lindsey’s personal financial statement. Based on the testimony and other evidence presented at trial, the Court finds that Trans Lease did not reasonably rely on Lindsey’s financial statement in granting the loan to JDL. Trans Lease relied almost exclusively on the credit worthiness of JDL and on the information it received regarding Lindsey being part of a prominent Northwest Arkansas family and his position in his family’s successful company. In response to a question at the trial about whether anyone at Trans Lease said “we ought to look at the trust, we ought get an income statement, we ought to get tax returns from John David,” Smith responded that “it’s not really customary to within our industry.” However, Smith testified that Trans Lease requested references from several of JDL’s previous lenders. MHC Financial, Arvest Bank, and First Security Bank reported no missed payments, and CAT Financial reported that JDL “was a very good customer and had a good payment history.” Regarding Trans Lease’s reliance on Lindsey’s position in his family’s company, Eschmann testified that Trans Lease researched Lindsey on the internet and described what Trans Lease found—

You go to the home page of the Website, and Jim is pictured on the left, and John David is pictured on the right, and it says that he’s currently holding the post as general manager of Lindsey and Associates. And you say, wait, this is beyond in polite support of the—of father’s company. This is—he’s the guy calling the shots at father’s company. He’s in a prominent position in a company that is prominent and successful

³ Although not a “red flag,” the Court finds interesting that Trans Lease did not question why Lindsey’s loan application was declined by MHC. While there is no testimony that Trans Lease knew MHC declined the loan, Trans Lease was aware that it was MHC that transferred Lindsey’s application, including his financial statement, to Trans Lease. If Trans Lease knew that MHC declined the loan, this knowledge should have placed Trans Lease on notice that there could have been some issue or problem with Lindsey’s credit or ability to repay a loan.

throughout Arkansas. Obviously . . . [Lindsey's father] had developed a significant net worth. It's reasonable to believe there's this sort of net worth sitting behind John David Lindsey on his personal financial statement.

Trans Lease's actions in this case are similar to the creditor's actions in the *Harris* case decided by Judge Audrey Evans in 2007. *Twin City Bank v. Harris (In re Harris)*, 360 B.R. 267 (Bankr. E.D. Ark. 2007). Judge Evans found the bank did not rely on the debtors' financial statement or other written representations in extending credit to the debtors and that such reliance would not have been reasonable "in light of how little information was actually requested and the nature of the financial information regarding the Debtors that the Bank did actually possess." *Id.* at 272. In *Harris*, the debtors had a personal relationship with the bank's president who was familiar with the family background. Further, the bank did not require the debtors to submit any personal financial returns, did not run credit reports, and did not request additional information on certain expenses even though the information the bank did have raised serious questions about the strength of the debtors' financial condition.

In addition to the red flags and Trans Lease's reliance on Lindsey's personal background, there was other evidence that reflected Trans Lease did not rely on Lindsey's financial statement. First, no one from Trans Lease ever *spoke* to Lindsey about anything until after the loan had been approved. However, Smith did testify that Trans Lease spoke with the CFO of JDL Leasing. Also, despite the fact that Trans Lease considered Lindsey's credit score to be poor, Trans Lease accepted Lindsey as a guarantor and extended credit to JDL. This is additional evidence that Trans Lease was not greatly relying on Lindsey's credit worthiness in extending JDL credit. Eschmann also testified that after considering Lindsey's credit history, references, and work history and "putting that together into a formula," Trans Lease was "comfortable taking the relative exposure on the equipment in the event of default as—as credit risk." Smith testified that Lindsey's financial statement was a "safety net" for the leases and that Trans Lease "look[s] harder at the company, and at what they—what they provide, as far as cash

flow.” The Court finds that Trans Lease’s focus in granting the loan was on JDL and JDL’s ability to pay the loan.

Not only was the credit rating for JDL good, but the fact that JDL had been in this business for a period of years and appeared to be doing well otherwise was considered by Trans Lease to support the conclusion that JDL would be in a good position to make the lease/purchase payments. Smith said Trans Lease consulted personally with JDL creditors CAT Financial, Arvest, First Security Bank, and John Deere Credit Corp., who all gave good reports on JDL. Smith confirmed Trans Lease also relied on JDL financials, which reflected that the net worth of JDL increased each year from 2005 to 2007, up to \$1,800,000.00, with a strong cash flow and payments made on time. Further, Smith testified that with the information they had, Trans Lease would have been willing to make a loan of up to \$2,000,000.00 *solely* to JDL. So Trans Lease would have made a loan to JDL of up to \$2,000,000.00 without *any* “safety net” provided by the guarantee of Lindsey personally. Eschmann testified that Trans Lease was a “collateral based lender,” and here they had “new equipment” with full warranties. The Court finds, therefore, that not only was JDL the primary obligor, but also that Trans Lease was looking to JDL to satisfy the obligation.

Eschmann also testified that the Lindsey’s revolving debt balances were “not too bad.” Eschmann explained that Lindsey’s credit score was probably low as a result of him having so many mortgages. In fact, with the decline of the real estate market in Northwest Arkansas at that time, the amount of Lindsey’s mortgages and the obligation of Lindsey’s real estate developments *did* have a negative impact on Lindsey’s businesses and his ability to make payments when they became due. This ultimately resulted in Lindsey’s chapter 7 filing. In other words, the fact that Lindsey had obligations incidental to all these mortgages was a real financial problem for him. Why the mortgage obligations were somehow discounted by Trans Lease further confirms that Trans Lease was not very concerned about Lindsey’s personal financial statement.

Eschmann explained that Trans Lease did not ask for a copy of the trust or the tax returns, stating that normally customers are reluctant to provide “trust documents” and that tax returns are not as helpful as financial statements. The Court finds that Trans Lease was not relying upon “the trust” or its relative accessibility to it. If it was relying on the trust at all, it could have, at a minimum, asked Lindsey about his accessibility to the trust funds. Trans Lease represents itself as a sophisticated lender. Eschmann said that normally Trans Lease does not obtain trust instruments. This disinterest by Trans Lease in these documents is further evidence that Trans Lease did not rely on the documents in making the decision to lend to JDL. The trust reflected a substantial portion of the total amount of assets shown on the financial statement. Trans Lease not only failed to have the trust guarantee the debt, Trans Lease also failed to even request a copy of the trust and made absolutely no inquiry about its terms. This is evidence that Trans Lease was simply not reasonably relying on the financial statement with regard to the equity listed in the JDL Trust.

Eschmann testified that there is no “magic” formula that one can rely upon in making large loans. If so, that is all the more reason for a lender to inquire as to the many “red flags” that were obvious on the face of Lindsey’s financial statement and implies that Trans Lease was not really relying very much, if at all, on the financial statement and merely collected it as a matter of course in doing business.

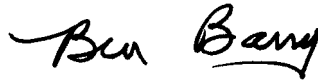
All of the foregoing provides for a conclusion that Trans Lease’s real reliance in granting this loan was based upon a combination of the value of the collateral with warranties, plus JDL’s credit rating, JDL’s “track record” and history in business, net worth and cash flow, along with Lindsey’s general reputation. In sum, the Court finds that Trans Lease did not rely on Lindsey’s financial statement, and even if it did, such reliance would have been unreasonable in the light of the red flags discussed above.

CONCLUSION

In considering the totality of the circumstances, this Court finds that Lindsey did not cause the financial statement to be made or published with the intent to deceive and that Trans Lease did not reasonably rely on the financial statement provided to it by Lindsey under § 523(a)(2)(B). Therefore, because Trans Lease failed to carry its burden by a preponderance of the evidence as to the elements of intent to deceive and reasonable reliance under § 523(a)(2)(B), Lindsey's obligation to Trans Lease is dischargeable and the relief sought in the complaint is hereby denied.

IT IS SO ORDERED.

April 28, 2011



DATE

BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: Jill R. Jacoway, attorney for the debtor
Theresa L. Pockrus, attorney for Trans Lease
John T. Lee, chapter 7 trustee
U.S. Trustee