



1           Within a year, Mr. Brewster had withdrawn the entirety of the \$25,000 allotted. He had  
2 made some payments on the loan, but his shrinking business could not support the debt and  
3 eventually filed for bankruptcy. Schedules and statements supplied by Mr. Brewster during the  
4 bankruptcy proceedings revealed that the representations he made during the telephonic application  
5 were drastically overstated. M & I claims that had it known of the true financial condition of  
6 Debtor's business, it would never had made the loan. According to M & I, Mr. Brewster knowingly  
7 created false pretenses to obtain the loan, and as a result moves for summary judgement as to their  
8 nondischargeability. Mr. Brewster disputes that he intended to obtain the loan through false  
9 pretenses, but instead provided accurate information to the best of his ability and recollection.  
10

## 11           **II. Facts**

12           M & I submitted a transcript of the telephonic application which contains Mr. Brewster's  
13 representation that in 2007, his business grossed \$196,000 and his net income was \$62,000. In the  
14 transcript, Mr. Brewster specifically stated "my personal take home was probably somewhere in  
15 the - around 62. I don't have all that paperwork here with me."  
16

17           Mr. Brewster's Statement of Financial affairs reveal that his actual income in 2007 was  
18 \$2778. Mr. Brewster claims, when estimating his take home pay, he mistakenly gave a gross profit  
19 figure. Debtor's 2007 tax returns, filed before the loan application occurred, confirm both a gross  
20 profit of \$65,216, and a net income of \$2778.

21           Both parties agree that (1) Mr. Brewster neither submitted nor received written material  
22 during the loan process; (2) the documents detailing the loan arrived along with pre printed checks  
23 Mr. Brewster simply filled out and signed to activate the loan and receive the money; (3) Mr.  
24 Brewster is a personal guarantor on the loan; and (4) Mr. Brewster made three payments before  
25 defaulting.

## 26           **III. Analysis**

27           *A) Were Debtor's Statements required to be in writing?*  
28

1 Section 523(a)(2)(A) provides that loans obtained by false pretenses or false representations  
2 are not dischargeable. However, statements respecting the debtor's financial condition are required  
3 to be in writing under § 523(a)(2)(B). "Financial condition" is a narrowly construed term that  
4 means a statement of "an entity's overall financial health and not a mere statement as to a single  
5 asset or liability." See *In re Pollina*, 31 B.R. 975, 978 (D.N.J. 1983) (holding that  
6 misrepresentations of merchandise liens of a jewelry store were not statements of financial  
7 condition, but misrepresentations as to the net worth of the company likely would have been).

8 As an initial matter, the Court notes that M & I's own credit agreement requires all  
9 materials to be in writing so as to "[P]rotect you (borrowers) and us (lenders) from  
10 misunderstanding or disappointment." (Affidavit Exhibit 1 ¶ 13). Nevertheless, M & I argues that  
11 written documentation is unnecessary even though its own loan agreement requires all  
12 correspondence to be in writing.

13 Here, Defendant's representations regarding gross and net profit are statements of financial  
14 condition. M & I's argument that because net income is a single line item on an income statement  
15 it is thus a representation of a single "asset" is unpersuasive. By definition, gross and net profit are  
16 calculated figures that represent each and every transaction of a business and thus cannot be  
17 representations of the status of a single asset. M & I urges the court follow the reasoning of *In Re*  
18 *Ollinger*, but there the court specifically states "'financial condition' denotes either a representation  
19 of a person's overall 'net worth or a person's overall ability to generate income.'" *In Re Ollinger*,  
20 160 B.R. 1004 (Bankr. S.D. Ind. 1993)(emphasis added). As a matter of law, under § 523(a)(2)(A)  
21 a statement of profitability is required to be in writing.

22 Thus, the Court *sua sponte* awards summary judgment in favor to Mr. Brewster as to the  
23 question of where Mr. Brewster's statement was one of financial condition. Though Mr. Brewster  
24 has made no motion for summary judgment, "if one party moves for summary judgment and, at the  
25 hearing, it is made to appear. . . that there is no genuine dispute respecting a material fact essential  
26 to the proof of movant's case ... the court may *sua sponte* grant summary judgment to the non-  
27 moving party." *Cool Fuel Inc. V. Connell*, 685 F.2d 309, 311 (9th Cir. 1982). M & I was  
28 specifically given an opportunity at the hearing to more fully defend its argument, but merely

1 reiterated the position of the motion. M & I has had a “full and fair opportunity to ventilate the  
2 issues in the motion” but fails as a matter of law. *Maitland v. Mitchell*, 44 F.3d 1431 , 1439 (9th  
3 Cir. 1995).

4 *B) Mr. Brewster’s Intent*

5 Courts have held that when a misrepresentation of a financial condition need not be in  
6 writing if the debtor knew or should have known of his prospective inability to perform. *In re*  
7 *Barrack*, 217 B.R. 598 (9th Cir. BAP, 1998). If surrounding facts indicate Mr. Brewster had a  
8 positive intent not to perform, it is his fraudulent intent, and not his representations, that allow  
9 action to continue under 523(a)(2)(A). *Id.* At 604.

10 Though the *Barrack* rule does provide an exception to the statutory requirement, the  
11 primacy of the issue of intent makes summary judgment inappropriate. *See S.E.C. v. Seaboard*  
12 *Corp.*, 677 F.2d 1297 (9th Cir. 1982) (holding that “where intent is a primary issue, summary  
13 judgment is generally inappropriate.”) Because “differing views of the parties’ intent will raise  
14 genuine issues of material fact” summary judgment against Mr. Brewster based solely on a  
15 transcript of a telephonic loan application is inappropriate. *Maffei v. Northern Ins. Co.*, 12 F.3d 892,  
16 898 (9th Cir.1993). Here, a finding of fraudulent intent is a fact intensive issue necessitating trial,  
17 and therefore M & I’s motion is denied.

18 *C) Justifiable Reliance*

19 Though neither party has raised the issue, under *In re Kirsch*, 973 F.2d 1454 (9th Cir. 1992).  
20 a creditor must *justifiably* rely on the representations of the debtor (holding that an attorney creditor  
21 could not justifiably rely a Debtor’s representation of clear title because he was well aware he could  
22 obtain a title report).

23 At trial M & I will have the burden of proof as to its reliance on Mr. Brewster’s statements  
24 and that such reliance was justifiable. *Id.* at 1458. It is notable that M & I allowed Debtor to take  
25 out a sizeable loan without any verification; a simple request for a W-2 would have revealed  
26 Debtor’s misrepresentations. M & I’s requirement that all loan terms be in writing indicates its  
27 awareness of the dangers of oral representations. Though the Court does not decide the issue of  
28

1 justifiable reliance, it places an additional hurdle before M & I, if a claim of fraudulent intent is to  
2 succeed.

3 **IV. Conclusion**

4 Though the term “financial condition” is not specifically defined by § 523(a)(2), a statement  
5 of ‘net income’ falls within the definition developed by the courts. Because Debtor’s statements  
6 were required to be in writing, M & I’s claim is only actionable upon a showing of fraudulent intent  
7 and is thus inappropriate for summary judgment. Accordingly, M & I’s motion for summary  
8 judgment is denied and summary judgment will entered in favor of Mr. Brewster affirming his  
9 representations were statements of financial condition.

10 The remaining fraudulent intent claim will be set for a Rule 16(b) conference by separate  
11 order.

12 Counsel for Debtor is to submit a form of order.

13  
14  
15 **So ordered.**

16 DATED: August 24, 2010

17  
18   
19 CHARLES G. CASE II  
20 UNITED STATES BANKRUPTCY JUDGE

21 **COPY** of the foregoing mailed by the BNC and/or  
22 sent by auto-generated mail to:

23 M&I BANK, FSB  
24 c/o Folks & O'Connor, PLLC  
1850 N. Central Ave #1140  
Phoenix, AZ 85004

25 EUGENE F. O'CONNOR, II  
26 FOLKS & O'CONNOR, PLLC  
1850 N. CENTRAL AVE., #1140  
27 PHOENIX, AZ 85004,  
Attorneys for M & I

28 JOHN HENRY BREWSTER

1 JERI LOUISE BREWSTER  
8624 E. ONZA CIRCLE  
2 MESA, AZ 85212,  
Debtors  
3

4 ILLER M HARDY  
LAW OFFICES OF ILLER HARDY PLLC  
202 E. MCDOWELL RD., STE 165  
5 PHOENIX, AZ 85004,  
Attorneys for Debtors  
6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28