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FILED  
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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ALISICA DAVIS-BROWN,  
Debtor.

Case No. 17-21719-C-7

BMW BANK OF NORTH AMERICA  
Plaintiff,

Adv. Pro. No. 17-02052

v.

ALISICA DAVIS-BROWN,  
Defendant.

OPINION

Before: Christopher M. Klein, Bankruptcy Judge

Timothy J. Silverman, Scheer Law Group, Newport Beach, CA, for  
BMW Bank of North America

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

A bank's blind reliance on financial ratios does not qualify as "reasonable reliance" on a false financial statement for purposes of excepting a debt from discharge under 11 U.S.C. § 523(a)(2)(B)(iii) when it has information inconsistent with the credit application presented through an automobile dealer.

BMW Bank of North America wants a default judgment for \$46,041.96 to be entered and excepted from discharge. But the fact of default does not compel a court to enter judgment. Federal Rule of Civil Procedure 55(b)(2), as incorporated by Federal Rule of Bankruptcy Procedure 7055, requires a plaintiff to establish facts sufficient to warrant the relief sought.

1 BMW Bank urges that it "reasonably relied" on a financial  
2 ratio in its lending algorithm despite red flags signaling bad  
3 information and urges that there is no relevance to what was  
4 known by the dealer who generated and presented the defendant's  
5 inaccurate financial statement based on customer input.

6 BMW Bank has three problems in this case. First, BMW Bank  
7 has not carried its default judgment burden to establish  
8 reasonable reliance. Nor has it carried its burden to establish  
9 proximate cause for its loss. And, the BMW dealer's obvious  
10 manipulation in preparing and presenting the putatively false  
11 statement undermines proof of intent to deceive.

12 After extensive default judgment proceedings, including  
13 multiple hearings, live testimony, briefs, and more briefs, this  
14 court is not persuaded BMW Bank has carried its burden of proof.

15 BMW Bank, declining further opportunity to prove its case  
16 and preferring to appeal a dismissal, the default judgment motion  
17 will be DENIED and the adversary proceeding DISMISSED.

18  
19 Facts

20 On March 7, 2015, the debtor defendant traded in a model  
21 year 2013 BMW motor vehicle and purchased a used 2014 BMW from  
22 Weatherford BMW in Berkeley, California.

23 Payments on the 2013 BMW being traded in had been current  
24 throughout the 17 months the debtor had owned the vehicle.

25 The purchase price of the 2014 BMW was \$35,079.65, to which  
26 was added the \$6,509.94 deficiency occasioned by her trade-in of  
27 a 2013 BMW for \$20,000.00 (on which she owed \$26,509.94), plus  
28

1 taxes and fees bringing the total financed amount to \$46,263.71.<sup>1</sup>

2 The terms were 60 monthly payments of \$645.29 at 2.9% annual  
3 interest, followed by a \$11,862.00 balloon payment needed to  
4 squeeze the monthly payment into the debtor's ostensible ability  
5 to pay. In other words, BMW Bank knew from the outset, from the  
6 fact that a balloon payment was necessary, that the debtor lacked  
7 the income to pay the debt within 60 months.

8 BMW Bank nevertheless chose to take from Weatherford BMW an  
9 assignment of the account "without recourse."

10 The credit application, apparently produced on the dealer's  
11 computer with assistance by its sales and finance personnel, is  
12 incomplete and internally contradictory in at least six respects,  
13 all of which invited scrutiny about the debtor's ability to pay  
14 the debt being undertaken.<sup>2</sup>

15

16 <sup>1</sup>The Motor Vehicle Retail Installment Contract is BMW  
17 Exhibit 1.

18 <sup>2</sup>The incomplete Credit Application on the form designated as  
19 "(REV 2/09) CaE00016" (BMW Exhibit 3) has at least six  
20 deficiencies:

21 First, Section A (Information Regarding Applicant) is self-  
22 contradictory. The "Nearest Relative Not Living With Applicant"  
23 is given as her mother, at the same address as the debtor.

24 Second, Section C (Asset and Debt Information) is  
25 incomplete. Her residence is designated as rented for \$200 per  
26 month but omits the identity and address of the landlord.

27 Third, the credit accounts box is checked as "open" but left  
28 blank is required information regarding "credit type," "company  
29 name," "address," "balance," "high," and "monthly payments."

30 Fourth, the spaces are blank for "present vehicle financed  
31 by/leased by," "account no.," "address," and "monthly payments."  
32 The "Bank Reference" names a credit union but leaves blank the  
33 designation of "account no.," "branch address," and "balance."

34 Fifth, also blank is the insurance information "previous  
35 insurance company or agent," "where vehicle will be garaged,  
36 "policy number," and "losses in the past 5 years?"

37 Sixth, the required designation of the applicant's capacity

1 The application's section for "Asset and Debt Information,"  
2 is not credible to the naked eye.<sup>3</sup> No assets are listed. No  
3 debts are listed. No bank accounts are identified. Monthly rent  
4 of only \$200 was accepted without confirmation from the landlord.

5 The person agreeing to pay \$46,263.71 for the 2014 BMW was a  
6 54-year-old housing desk clerk with an annual salary of \$26,400.<sup>4</sup>

7 Although she initialed the line regarding her gross income  
8 from employment, she did not initial the subsequent lines listing  
9 Social Security of \$1,400 and total monthly income of \$3,600.<sup>5</sup>

10 The credit application ends with a notation that it would be  
11 presented to four named financial institutions, of which  
12 plaintiff was listed first as "BMWFS-Dublin, Ohio."<sup>6</sup>

13 \_\_\_\_\_  
14 (individual, community, or joint) is not checked.

15 <sup>3</sup>The "Asset and Debt Information" comprises more than one-  
16 third of the form with the instruction "List all debts" and "use  
17 a separate page if necessary," is nearly blank. The sole item of  
18 financial information provided in Section C (Asset and Debt  
19 Information) is "Rent \$200" without the required identification  
20 of landlord. The two form lines for credit accounts are blank.  
The two form lines for "Present vehicle financed by/leased by"  
are blank. The required "Bank Reference" line names a credit  
union but omits the required identification of account, branch  
address, and balance.

21 <sup>4</sup>Credit application Section A indicates that the debtor was  
22 54 years old and employed as a "desk clerk" for "2 yrs 10 mos"  
23 with "gross monthly income from employment" of \$2,200, which  
figure she initialed.

24 <sup>5</sup>Section A, below the initialed line for employment income,  
25 has lines that are not initialed for: "amount of other monthly  
26 income and sources" in which appears "Social Sercutiyy [sic]  
\$1,400;" and (2) "total monthly income" of "\$3,600."

27 <sup>6</sup>Although plaintiff's counsel asserted that the debtor  
28 signed the application under penalty of perjury, not so. The  
Credit Application form does not require an attestation. The  
debtor signed under the line that she "acknowledges receipt of a  
copy of this credit statement." However, the lack of an

1 BMW Bank obtained a credit report before agreeing to finance  
2 the transaction. The credit report was inconsistent with her  
3 statement of income and revealed she also was paying \$434/month  
4 for a Toyota vehicle and had other accounts in collection.<sup>7</sup>

5 BMW Bank's witness testified at the evidentiary hearing that  
6 it relied solely on a debt-income ratio. That ratio was  
7 satisfied by income of \$3,600/month, but not \$2,200/month. He  
8 added that BMW Bank does not pay serious attention to the credit  
9 report that it obtains to put in the file. He asserted that this  
10 approach is standard practice in the automobile finance industry.  
11 The implications of the need for a balloon payment were not  
12 considered. He concluded that BMW Bank would have rejected the  
13 financing if the monthly debt-income ratio was not satisfied -  
14 i.e., if rent was higher than \$200 or income less than \$3,600.

15 After the trade-in, after two timely \$645.29 payments were  
16 made to BMW Bank, the 2014 BMW was declared a total loss  
17 following an accident and payments ceased.<sup>8</sup>

18  
19 \_\_\_\_\_  
20 attestation does not disqualify a credit application as a  
"statement" for purposes of § 523(a)(2)(B)(iii).

21 <sup>7</sup>The Experian Credit Report was introduced in evidence  
during this court's evidentiary hearing as Hearing Exhibit 9.  
22 That March 7, 2015, credit report confirmed her \$26,400/year  
23 employment. It indicated that she had two accounts in collection  
and six open current accounts. The six open current accounts  
24 called for monthly payments of \$1,136. The open current accounts  
25 included one with Toyota Motor Credit for \$24,465 with monthly  
payments of \$434 that had been current for 11 months and one with  
26 BMW Financial Services for the 2013 BMW being traded in with  
monthly payments of \$560 that had been current for 17 months.

27 Exclusive of the payments for the BMW being traded in, the  
March 7 credit report revealed monthly payments of \$576,  
including the \$434 for the Toyota.

28 <sup>8</sup>The Loan Payment History is BMW Exhibit 8.

1           Although BMW Bank says that the insurer denied coverage  
2 because the vehicle was wrecked by an unauthorized driver, no  
3 evidence is proffered to support that assertion. No copy of  
4 policy or of a clause permitting denial of coverage in favor of  
5 the lienor for the value of the vehicle. No communication from  
6 insurer. Nothing. Nor does BMW Bank explain why, as lienor and  
7 loss payee, it did not pursue the insurer.

8           Rather, BMW Bank seeks the full remaining \$46,041.96 unpaid  
9 contract amount from the debtor (including the \$6,509.94  
10 attributable to trade-in vehicle loan) on the theory that in the  
11 trade-in of the 2013 BMW for a 2014 BMW after 17 timely payments,  
12 the debtor was fraudulently acting as a straw buyer for her  
13 "boyfriend" who wrecked it after making two monthly payments.<sup>9</sup>  
14 That theory also implies that she had been a straw buyer in  
15 acquiring the traded-in 2013 BMW.

16           Two years after the trade-in at issue in this adversary  
17 proceeding, the debtor filed chapter 7 bankruptcy case No. 2017-  
18 21719 on March 16, 2017, without counsel.

19           In the petition, schedules, and statements, the debtor  
20 stated that she is married and living separately, employed as a  
21 desk clerk at a housing facility in San Francisco at a rate of  
22 \$2,253.33 per month, and had resided for at least three years at  
23 a rental in Vallejo, California, at monthly rent of \$1,050.

24           Seizing upon the differences between income and rent as  
25 stated in the 2015 credit application and in the 2017 bankruptcy  
26

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27           <sup>9</sup>Complaint, ¶ 20 ([insurer denied coverage because] "her  
28 boyfriend was driving the vehicle at the time it was in an  
accident and was totaled. Plaintiff suspects the Debtor  
purchased the vehicle for her boyfriend and his use....").

1 filing, BMW Bank commenced this action.

2

3 Procedure

4 The adversary proceeding was filed April 5, 2017, seeking a  
5 money judgment for the full unpaid contract amount of \$46,041.96  
6 to be excepted from discharge under §§ 523(a)(2)(A) and (B).

7 Default was entered when the debtor did not respond, after  
8 which BMW Bank requested default judgment for the full contract  
9 price and an exception to discharge on a theory of fraud.

10 BMW Bank has abandoned its generic fraud theory under  
11 § 523(a)(2)(A) and elected to rely on a false financial statement  
12 theory under § 523(a)(2)(B).

13 This court proceeded with the required independent review  
14 under Civil Rule 55(b)(2) to determine for itself whether the  
15 requested default judgment is warranted in law and fact. Fed. R.  
16 Civ. P. 55(b)(2), incorporated by Fed. R. Bankr. P. 7055.

17 Incredulous about BMW Bank's allegation that it was gulled  
18 into the transaction by debtor's statements about her finances,  
19 this court required BMW Bank to prove entitlement to the relief  
20 requested. After three hearings in which BMW Bank relied on  
21 various forms of written declarations, there was an evidentiary  
22 hearing at which its witness testified. Further supplemental  
23 briefing followed the evidentiary hearing.

24 When this court announced orally on the record that it was  
25 not yet persuaded to enter default judgment and offered BMW Bank  
26 yet another opportunity to prove its case, BMW Bank stated its  
27 wish to appeal without presenting further proof and requested  
28 preparation of this formal decision denying the motion for

1 default judgment and dismissing the adversary proceeding.

2

3 Jurisdiction

4 Jurisdiction is founded on 28 U.S.C. § 1334(b). This is a  
5 core proceeding that a bankruptcy judge may hear and determine.  
6 28 U.S.C. § 157(b)(2)(I). If it may ever be determined to be a  
7 proceeding that a bankruptcy judge may not hear and determine as  
8 of right, the plaintiff is nevertheless has agreed that it may be  
9 heard and determined by a bankruptcy judge.

10

11 Analysis

12 A missing link affecting a causation issue is at the heart  
13 of the problem. BMW Bank omits all evidence regarding the role  
14 of the BMW dealer as intermediary in the financing transaction.  
15 Yet, it is inescapable that the BMW dealer manipulated the trade-  
16 in deal in a manner that created inquiry notice of the true  
17 facts. The 17-month history of timely payments on the 2013 BMW  
18 so blinded BMW Bank and the BMW dealer to the debtor's patent  
19 inability to pay that the credit application was treated as a  
20 mere formality upon which there was not actual reliance and  
21 belies the debtor's intent to deceive.

22

23 I

24 Default judgment procedure in bankruptcy courts is governed  
25 by Federal Rule of Civil Procedure 55(b), which applies in  
26 adversary proceedings and contested matters by virtue of Federal  
27 Rule of Bankruptcy Procedure 7055. Fed. R. Civ. P. 55(b),  
28 incorporated by Fed. R. Bankr. P. 7055 & 9014(c).

1 Under Rule 55(b), federal trial courts have an independent  
2 duty to exercise discretion and assure themselves that the  
3 default judgments they enter are correct in law and fact. 10A  
4 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND  
5 PROCEDURE § 2685 (4th ed. 2019).

6 In discharge of that duty, a court may conduct hearings to  
7 establish the truth of any allegation by evidence. Fed. R. Civ.  
8 P. 55(b)(2)(C). In other words, a court need not uncritically  
9 accept a plaintiff's version of the facts. That occurred here.

10  
11 II

12 The matrix for analysis of plaintiff's theory of the case is  
13 § 523(a)(2)(B), which requires proof of a materially false  
14 statement regarding the debtor's financial condition on which the  
15 victim's reliance was "reasonable," not merely "justifiable."  
16 Lamar, Archer & Cofrin, LLP v. Appling, \_\_\_ U.S. \_\_\_, \_\_\_, 138  
17 S.Ct. 1752, 1763 (2018).

18 Where there is a false statement concerning financial  
19 condition, § 523(a) provides:

20 (a) A discharge under section 727 ... of this title does  
21 not discharge an individual debtor from any debt -...

22 (2) for money, property, services, or an extension,  
renewal, or refinancing of credit, to the extent obtained by  
...

23 (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

24  
25  
26  
27 (iv) that the debtor caused to be made or  
published with intent to deceive;

28 11 U.S.C. § 523(a)(2)(B) (emphasis supplied).

1 In contrast, where the fraud involves a false statement  
2 other than a false statement concerning financial condition, the  
3 reliance element is "justifiable" reliance other than  
4 "reasonable" reliance. 11 U.S.C. § 523(a)(2)(A); Field v. Mans,  
5 516 U.S. 59, 77 (1995).<sup>10</sup>

6 As the Supreme Court explained in Field v. Mans and again in  
7 Appling, Congress endeavored to balance potential misuse of  
8 financial statements by debtors and by creditors in order to  
9 moderate the burden on individuals who submitted false financial  
10 statements, not because lies about financial condition are less  
11 blameworthy than others, but because the relative equities might  
12 be affected by practices of consumer finance companies, which  
13 sometimes have encouraged such falsity by their borrowers for the  
14 very purpose of insulating their own claims from discharge.  
15 Appling, 138 S.Ct. 1763-64; Field v. Mans, 516 U.S. at 76-77.<sup>11</sup>

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16  
17 <sup>10</sup>A nondischargeable "actual fraud" need not always involve  
18 a false representation. Husky Int'l Elecs., Inc. v. Ritz, \_\_\_  
19 U.S. \_\_\_, 136 S.Ct. 1581, 1589-91 (2016).

20 <sup>11</sup>The mischief lies in the practice described in the House  
21 Report on the Bankruptcy Reform Act of 1978:

22 It is a frequent practice for consumer finance companies  
23 to take a list from each loan applicant of other loans or  
24 debts that the applicant has outstanding. While the  
25 consumer finance companies use these statements in  
26 evaluating the credit risk, very often the statements are  
27 used as a basis for a false financial statement exception to  
28 discharge. The forms that the applicant fills out often  
have too little space for a complete list of debts.  
Frequently, a loan applicant is instructed by a loan officer  
to list only a few or only the most important of his debts.  
Then, at the bottom of the form, the phrase "I have no other  
debts" is either printed on the form, or the applicant is  
instructed to write the phrase in his own handwriting.

H.R. Rep. No. 95-595, pp. 130-31, U.S. CODE CONG. & ADMIN. NEWS

1 This case smacks of a creditor strategy to obtain financial  
2 statements that are designed more for the purpose of snaring the  
3 borrower than for making a responsible business decision.

4 The BMW credit application form invited the inaccuracies  
5 about which BMW Bank now complains. The BMW dealer's personnel  
6 plainly were complicit in preparing the document and in tailoring  
7 the numbers to satisfy BMW Bank's financial ratios.

8 In addition, as noted in Field v. Mans, § 523(a)(2)(B) also  
9 requires proof of causation, which concept overlaps with the  
10 requirement of materiality. 516 U.S. at 78.

11  
12 III

13 The facts are assessed through the prism of § 523(a)(2)(B)  
14 with a view to reasonable reliance, materiality, and causation.

15  
16 A

17 Weatherford BMW had an opportunity to sell a 2014 BMW for  
18 \$35,000 to an existing customer with a spotless 17-month record  
19 of current payments on the 2013 BMW being traded in.

20 That 17-month history of timely payments imparted confidence  
21 that the new loan would similarly be timely performed.

22 But there was a problem. The customer's annual income from  
23 her desk-clerk job, coupled with the fact that she was also  
24 paying for a \$24,465 Toyota, was not adequate to support a  
25 \$46,263.71 automobile loan.

26  
27 \_\_\_\_\_  
28 1978, pp. 5787, 6091 (1977) (footnote omitted), quoted, Field v.  
Mans, 516 U.S. at 77 n.13, and Appling, 138 S.Ct. at 1763-64.

It is noteworthy that Justice Scalia, who decried references  
to legislative history, did not do so in Field v. Mans.

1           The dealer's solution for meeting BMW Bank's financial ratio  
2 for lending had two parts. First, fudge her finances by ignoring  
3 its own rules by not providing the landlord information required  
4 to verify the improbable amount of \$200/month rent in the San  
5 Francisco market, and accepting a financial statement that was  
6 otherwise incomplete, internally inconsistent and vague. In that  
7 typed statement (filled out on a computer), somebody  
8 interlineated an unsigned and uninitialed handwriting adding  
9 \$1,400/month in Social Security income.

10           Second, having shoehorned all the monthly credit possible  
11 into the debtor's income and expenses by fudging numbers and  
12 still being unable to make payments that would fully amortize the  
13 loan in 60 months, the transaction added a balloon payment of  
14 \$11,862.00 at month 61 to make the numbers "work" for purposes of  
15 the lending algorithm.

16           It is apparent that this engineering must have occurred with  
17 connivance by the BMW dealer who knew the rules of the game. But  
18 BMW Bank provides zero evidence regarding events at the BMW  
19 dealership. Rather, BMW Bank treats the debtor as dealing  
20 directly, i.e. bilaterally, with BMW Bank at arm's length without  
21 any input by the BMW dealer. That defies credulity; the BMW  
22 dealer was at center stage, helping to craft a credit application  
23 that would meet lending criteria.

24           Since BMW Bank has the burden to prove the relevant  
25 circumstances, its complete omission of evidence regarding the  
26 dealer constitutes a failure of proof, even under the lenient  
27 standards of default judgments.

28

1 B

2 The first hurdle is the question whether BMW Bank really  
3 relied on the credit application - i.e., whether the alleged  
4 misstatement in the credit application was material.

5 The fact of reliance is a mixed question of law and fact in  
6 which facts predominate, thereby committing the primary decision  
7 to the trial court subject to appellate review for clear error.  
8 See U.S. Bank, N.A., Tr. v. Village at Lakeridge, LLC, \_\_\_ U.S.  
9 \_\_\_, 138 S.Ct. 960, 966-67 (2018).

10 BMW Bank claims that it based its lending decision solely on  
11 the nominal financial ratio reported in the credit application as  
12 prepared with the assistance of the BMW dealer.

13 BMW Bank admits that it also obtained an Experian credit  
14 report.<sup>12</sup> Although it proffers a declaration asserting that the  
15 credit report actually was scrutinized, no sentient banker could  
16 have construed the credit report as supporting the accuracy of  
17 the credit application.

18 And, BMW Bank admits it ignored the corollary to the fact  
19 that the transaction needed an \$11,862.00 balloon payment at  
20 month 61 in order to make the deal "work": absent a prospect for  
21 the debtor's finances to improve, no sentient banker would have  
22 believed she probably will be able to pay such a sum.

23 Regardless of whether it may be "justifiable" for an  
24 automobile financier to rely on statements in a credit  
25 application that are contradicted by a credit report, it is not  
26 "reasonable" to rely without at least making a searching inquiry.

27

28 <sup>12</sup>Supplemental Decl. in Support of Motion for Entry of  
Default Judgment, ¶¶ 6-7 & 15-17.

1 There was no such inquiry in this case.

2

3 C

4 The next hurdle is reliance. In order to be excepted from  
5 discharge under § 523(a)(2), the debt for the BMW vehicle must  
6 have been "obtained by" fraud. 11 U.S.C. § 523(a).

7 BMW Bank contends that the financial ratios of 60 percent  
8 debt to income and 35 percent payment to income derived from the  
9 credit application were what caused it to approve the loan.<sup>13</sup>  
10 That is not credible.

11 The credible explanation for this transaction is that the  
12 business decision was made because of the 17-month history of  
13 timely payments on the 2013 BMW that was being traded in. The  
14 requirement that there be in the file a credit application  
15 showing the requisite financial ratios was treated by BMW Bank  
16 and the BMW dealer as a formality. Window dressing is not fraud.

17 It does not follow from the mere presence in the file of an  
18 inaccurate credit application and a contradictory credit report  
19 that the debt was "obtained by" false financial statement fraud.  
20 BMW Bank's witness testified that anything below the required  
21 financial ratios would be "automatically denied."<sup>14</sup>

22 If the financial ratios computed from the credit application  
23 had genuinely been material to the loan decision, then there  
24 would have been scrutiny in light of the credit report and an  
25 effort to explain the apparent contradictions. BMW Bank has  
26

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27 <sup>13</sup>Id., ¶¶ 10-11.

28 <sup>14</sup>Id., ¶ 11.

1 proffered no evidence to establish that the contradictory credit  
2 application and credit report "caused" it to make the loan.

3 Nor has BMW Bank proffered evidence probative of intent to  
4 deceive as required by § 523(a)(2)(B)(iv). The circumstantial  
5 evidence of the 17-month payment history on the 2013 BMW being  
6 traded in is more probative of the dynamics of the lending  
7 decision and is more consistent with lack of intent to deceive.

8 Indeed, the determinative factor, upon which BMW Bank  
9 relied, was the existence of that 17-month payment history, not  
10 statements in the credit application.

11  
12 D

13 The next mystery is why BMW Bank quietly acquiesced in the  
14 insurance company's decision to decline coverage for the damage  
15 to the vehicle when it supposedly was totaled.

16 It merely says that the "vehicle was in an accident and was  
17 deemed a total loss by the insurance carrier" and that the  
18 insurer denied the claim because the debtor's boyfriend was  
19 driving the vehicle.<sup>15</sup>

20 No evidence is presented regarding follow-up with the  
21 insurance company. Why did the insurer decline coverage to the  
22 lienor? What protest did BMW Bank make? Why damages of \$46K  
23 when the purchase price was \$35K, which means the insurance claim  
24 for the value of the vehicle was probably less than \$35K?

25  
26  
27  
28 

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<sup>15</sup>Decl. in Support of Motion for Entry of Default Judgment,  
¶ 18.

1 E

2 Proximate causation for BMW Bank's loss also must be  
3 established. The established pattern of nineteen consecutive  
4 timely payments on the two BMW vehicles in question is probative  
5 of cause.<sup>16</sup> The primary reason the financing by BMW Bank of the  
6 second vehicle occurred was the record of timely payments.

7 BMW Bank's theory is that the debtor was acting as straw  
8 buyer for her boyfriend.<sup>17</sup> That theory is difficult to gainsay.  
9 But it also suggests that the actual cause of the loss was  
10 something other than a false financial statement. The pattern of  
11 satisfactory timely payments, including for the first two months  
12 after the transaction, suggests that the payments would have  
13 continued for the full contract period if only the vehicle had  
14 not been destroyed in an accident more than two months after the  
15 credit transaction in question.

16 The accidental destruction of the vehicle is an intervening  
17 unanticipated cause. BMW Bank has not carried its burden to  
18 establish what loss, if any, was proximately caused by the  
19 putative false financial statement.

20  
21 Conclusion

22 BMW Bank alleges that it was deceived into making the  
23 original loan because the credit application in its file had been  
24

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25 <sup>16</sup>As two prongs of § 523(a)(2) implicate the tort of  
26 intentional misrepresentation, proximate cause is a relevant  
concept. See Grogan v. Garner, 498 U.S. 279, 283-90 (1991).

27 <sup>17</sup>Id., ¶ 19 ("Because the Debtor discloses ownership of two  
28 other Toyota vehicles in her schedules despite having no claimed  
dependents, BMW suspects that the Debtor may have purchased the  
vehicle for her boyfriend who regularly drove it.").

1 manipulated to show a required financial ratio.

2 The evidence supports the inference that the business  
3 decision to make the loan was based primarily on the 17-month  
4 history of payment on the BMW being traded-in.

5 BMW Bank disclaims any responsibility to compare the credit  
6 report with the incomplete and facially improperly-prepared  
7 credit application. It makes no effort to account for the role  
8 of the BMW dealer in the transaction, which, at a minimum,  
9 included willful ignorance.

10 As to the amount of the loss, BMW Bank does not explain why  
11 it passively accepted the denial by the insurer of coverage for  
12 the collision damage to the vehicle. Nor does it establish  
13 proximate cause or otherwise explain why the proper measure of  
14 damage should be \$46,263.71 for a vehicle purchased for  
15 \$35,079.65 and wrecked after two timely payments were made.

16 All of these are matters as to which BMW Bank has not  
17 carried its burden of proof despite having been afforded multiple  
18 opportunities by the court to do so.

19 The motion for entry of default judgment will be denied. In  
20 view of BMW Bank's expressed desire to have final judgment so  
21 that it may have an opportunity to appeal, the denial is with  
22 prejudice and the adversary proceeding will be dismissed.

23  
24 December 18, 2019

25   
26 United States Bankruptcy Judge  
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**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

- Timothy J. Silverman  
Scheer Law Group, LLP  
85 Argonaut, Suite 202  
Aliso Viejo, CA 92656
  
- Alisica Bonita Davis-Brown  
1944 Sutter Street  
Vallejo, CA 94590