

**UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa**

<b>In re</b>	:	<b>Case No. 98-5541-CH</b>
<b>ROBERT B. STAIB,</b>	:	
	:	
<b>Debtor.</b>	:	<b>Chapter 7</b>
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<b>NATIONAL BANK OF COMMERCE,</b>	:	<b>Adv. No. 00-20197</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>ROBERT B. STAIB,</b>	:	
	:	
<b>Defendant.</b>	:	
	:	

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**ORDER—COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT**

On April 17, 2001, trial was held on Plaintiff's Complaint to Determine Dischargeability of Debt. Attorney Dan Childers represented Plaintiff National Bank of Commerce; attorney Donald F. Neiman represented Defendant Robert B. Staib. At the conclusion of the trial, the court took the matter under advisement upon a briefing schedule. Post-trial briefs have been received, and the court now considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334 and order of the United States District Court for the Southern District of Iowa. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

## **FINDINGS OF FACT**

1. On December 28, 1998, Guaranty Bank and Trust Company (hereinafter Guaranty) filed an involuntary chapter 7 bankruptcy petition against Robert B. Staib (hereinafter Debtor).

2. Debtor organized an Iowa limited liability company named Advanced Aircraft Leasing, L.C. on April 9, 1997. Its principal place of business was Coralville, Johnson County, Iowa. In January of 1998, the business name changed to Iowa Jet Services, L.C (hereinafter Iowa Jet). Debtor and his wife Barbara L. Staib were the only members of Iowa Jet.

3. On April 16, 1997, Debtor signed an unlimited guaranty document with National Bank of Commerce of Memphis, Tennessee (hereinafter NBC). Through the document, Debtor agreed to “absolutely and unconditionally” guaranty payment of any and all indebtedness of Advanced Aircraft Leasing to NBC.

4. On October 29, 1998, NBC entered into four promissory notes and security agreements with Iowa Jet. NBC provided financing for and took security interests in four aircraft, a Cessna Citation II, a Cessna Citation III, a Piper Saratoga, and a Piper PA 31-350.

5. In acquiring the financing from NBC, Debtor provided personal financial statements on at least three occasions. The financial statements contained the following false statements:

(a) On the three statements, Debtor listed ownership of 620,800 shares, 645,200 shares, and 945,200 shares of UAL (United Airlines Corporation) stock with values of \$39,808,800.00, \$56,898,897.60, and \$61,438,000.00, respectively. In reality, he never owned more than approximately 120 shares of UAL stock.

(b) Debtor stated that he owned “116 pieces of 100 to 1600 year old museum quality ivory collected since the early 1800’s by H.J. Heinz.” He valued the collection at approximately \$53,000,000.00, \$55,000,000.00, and \$55,000,000.00 knowing that the value was significantly less. Debtor’s bankruptcy schedules stated that the collection was appraised at \$25,000.00.

(c) Debtor listed an anticipatory interest in “50% of family trusts to be inherited at a future date.” He valued that interest at \$19,000,000.00, \$24,000,000.00, and \$33,000,000.00 on the three statements, knowing that the value of the family trusts was significantly less. Debtor did not schedule any future interest in family trusts in his bankruptcy schedules.

6. Iowa Jet defaulted on the loan agreement, and NBC took action to acquire the collateral. The Iowa District Court for Linn County issued a writ of replevin granting NBC immediate possession of the aircraft along with all the logs and maintenance records on or before December 18, 1998.

7. Iowa Jet filed a voluntary petition for chapter 11 bankruptcy protection on December 21, 1998, and filed a motion asking the court to order NBC to turnover the aircrafts. The court denied the motion by order entered January 16, 1999.

8. Upon motion by NBC, the court lifted the automatic stay, and NBC sold the aircraft.

9. On April 13, 1999, Debtor was indicted on two counts of federal bank fraud under 18 U.S.C. § 1014 for allegedly providing a false financial statement and pledging a false stock certificate as security to Guaranty, a financial institution whose accounts are insured by the Federal Deposit Insurance Corporation.

10. On May 9, 1999, Debtor filed a motion to stay the hearing on the involuntary bankruptcy case until the criminal proceedings were resolved. Debtor claimed that issues in the involuntary case and the criminal case concerned the same subject matter, and the potential existed for Debtor to incriminate himself. The court approved a stipulated order staying the hearing on the involuntary case.

11. On March 27, 2000, the United States District Court for the Northern District of Iowa entered an order accepting Debtor's guilty plea to a violation of 18 U.S.C. § 1014, false statement to a federally insured financial institution.

12. On April 20, 2000, Debtor filed a motion with this court captioned "Alleged Debtor Staib's Motion To Transfer Jurisdiction In This Proceeding Or In The Alternative To Dismiss This Proceeding, To Continue The Hearing Scheduled For May 1, 2000 And For Expedited Hearing." The motion stated in part:

...As part of the sentencing of Staib, restitution to "victims" including Guaranty Bank & Trust will in all likelihood be required- both by the guilty plea agreement and law. See generally 18 U.S.C. [§§] 3663, 3663A, and 3664.... As part of pre-sentence proceedings a plan for such restitution must be developed...The powers

of the United States District Court in this restitution setting to protect the legitimate interests of Guaranty Bank and Trust are greater than those available in bankruptcy court. The restitution order is not subject to discharge in bankruptcy. The “victim” is represented by the United States. 18 U.S.C. [§] 3664(e). The District court will determine the loss and provide for its repayment in the sentencing context. 18 U.S.C. [§] 3664(f). The restitution order has res judicata effect. 18 U.S.C. [§] 3664(k).

The motion was signed by both criminal counsel and bankruptcy counsel for Debtor.

Debtor withdrew this motion after the United States District Court for the Northern District of Iowa denied a similar motion.

13. On April 26, 2000, NBC requested permission to join the involuntary bankruptcy petition. It identified Debtor’s guaranty of Iowa Jet’s debts as the basis for its claim.

14. On April 28, 2000, Debtor objected to NBC’s joinder. Debtor argued that NBC was fully compensated for the debt owed by Iowa Jet because the value of the aircraft, as determined by the bankruptcy court, exceeded the amount of the claim. He claimed that NBC’s disposition of the aircraft did not comply with Iowa Code § 654.9504, and the sale was not conducted in a commercially reasonable manner.

15. At a hearing held on June 2, 2000, the parties indicated that they were negotiating a settlement of the issues that occasioned the filing of the involuntary petition. They agreed and the court ordered, that if a motion to dismiss the petition pursuant to 11 U.S.C. § 303(j)(2) was not filed on or before July 6, 2000, then an order for relief under chapter 7 would be entered on July 7, 2000. Settlement was not reached, no motion to dismiss under § 303(j)(2) was filed, and accordingly, an order for relief was entered on July 7, 2000.

16. Debtor filed a motion to convert the case to chapter 11, and the court entered an order converting the case on August 1, 2000.

17. Debtor scheduled NBC on Schedule F – Creditors Holding Unsecured Nonpriority Claims and on his List of Creditors Holding 20 Largest Unsecured Claims. Debtor scheduled NBC’s claim as unliquidated in the amount of \$774,000.00.

18. On August 24, 2000, Debtor amended his schedules to indicate that NBC’s claim was disputed and not unliquidated.

19. On September 6, 2000, at a status hearing, Debtor orally moved to convert the case to chapter 7. The court entered an order converting the case.

20. On December 12, 2000, NBC filed a proof of claim in the amount of \$794,205.95. Debtor did not object to this claim.

21. On March 5, 2001, The United States of America filed a proof of claim in the amount of \$16,162,315.91 for restitution and \$20,000.00 for criminal fine. Included within the total amount of restitution was the provision that Debtor make restitution to NBC in the amount of \$774,000.00. Debtor did not object to this claim.

22. On December 22, 2000, NBC filed this adversary proceeding seeking a determination of the dischargeability of a debt.

### **DISCUSSION**

NBC asks the court to determine that Debtor’s liability for its claim should be excepted from discharge. NBC bases its claim on Debtor’s personal guaranty of loans acquired by Iowa Jet. It argues that Debtor provided false financial statements to induce it to accept his guaranty and loan money to his company. When Iowa Jet defaulted on the

loan, NBC enforced its security interest and sold the aircraft. NBC claims that the proceeds from the sale were insufficient to satisfy the original obligation and expenses. It attributes the resulting deficiency to Debtor's bad acts and argues that its claim should be excepted from discharge under 11 U.S.C. § 523(a)(2). Further, NBC claims that it was awarded restitution for damages arising from the above incident as a result of Debtor's guilty plea and subsequent conviction to criminal charges under 18 U.S.C. § 1014. NBC argues that the restitution is excepted from discharge under 11 U.S.C. § 523(a)(13).

Debtor does not dispute NBC's allegations that he supplied false financial statements. Rather, Debtor disputes NBC's contention that the value of the aircraft was insufficient to cover Iowa Jet's indebtedness. He argues that NBC has failed to show that the aircraft were sold in a commercially reasonable manner and that a deficiency exists. Debtor maintains that the United States District Court for the Northern District of Iowa left open the issue of restitution pending a determination of damages by this court.

For the following reasons, the court finds adequate evidence to support NBC's claims against Debtor. Further, the court determines that NBC's claims are excepted from discharge.

Prior to the 1994 amendments to the Bankruptcy Code, a creditor seeking to have a restitution award excepted from discharge would proceed under 11 U.S.C. § 523(a)(7). Section 523(a)(7) provides that "a fine, penalty, or forfeiture payable to or for the benefit of a governmental unit," subject to certain conditions, is excepted from discharge.

In Kelley v. Robinson, 479 U.S. 36 (1986), the United States Supreme Court considered whether restitution ordered in a Connecticut criminal case could be excepted

from discharge under § 523(a)(7). The Supreme Court began its analysis by proclaiming a “deep conviction that federal bankruptcy courts should not invalidate the results of state criminal courts.” Id. at 47. The Supreme Court determined that restitution was a rehabilitative penalty that forces a criminal defendant to confront the harm that his or her actions have caused. Id. at 49 n. 10. The criminal justice system operates for the benefit of society as a whole. Id. at 52. It is concerned with both punishment and rehabilitation of the offender. Id. The restitution obligation is based on the state’s obligation to protect its citizens and rehabilitate offenders by imposing a criminal sanction for those purposes. Id.

Although Kelley v. Robinson concerned restitution ordered in a state criminal case, the Eight Circuit determined that the Supreme Court’s rationale applied to restitution entered in a federal criminal case. United States v. Vetter, 895 F.2d 456, 459 (8th Cir. 1990). The 8th Circuit additionally held that restitution is excepted from discharge whether it is ordered before or after the bankruptcy proceeding is commenced. Id.

Congress amended the Bankruptcy Code in 1994 and removed any doubt that restitution ordered in a federal criminal proceeding is excepted from discharge. Section 523(a)(13) provides that a Debtor is not discharged from the “payment of an order of restitution issued under title 18, United States Code....” The new section has no effect upon the analysis used by courts when interpreting § 523(a)(7); rather it makes “double sure that restitution awarded as part of a federal criminal judgment cannot be discharged in bankruptcy....” In re Towers, 162 F.3d 952, 954 (7th Cir. 1998).



In this case, Debtor pleaded guilty to a violation of 18 U.S.C. § 1014. The United States District Court for the Northern District of Iowa entered judgment on December 14, 2000 and amended the judgment on February 14, 2001. The indicated reason for the amendment was “Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36).”

Under the heading Criminal Monetary Penalties the judgment provides that the defendant shall make restitution to certain named payees. Included in the list of payees is NBC. The district court found NBC’s loss to be \$774,000.00 and ordered restitution in the amount of \$774,000.00.

The court finds that the United States District Court for the Northern District of Iowa ordered Debtor to pay restitution under title 18 of the United States Code. This obligation to pay restitution is excepted from discharge under 11 U.S.C. § 523(a)(13).

It is important to note that paragraph (a)(13) is not listed in § 523(c)(1) and therefore, a creditor is not required to take affirmative action within a specified time in order that the obligation be excepted from discharge. To the extent that it bases its claim on the restitution order, NBC could disregard the bankruptcy proceedings and enforce its claim at a later time.

NBC also seeks to except its claim from discharge pursuant to 11 U.S.C. § 523. Section 523(a)(2) provides in relevant part that a debtor is not discharged from any debt:

- (2) for money, property, services, or an extension, renewal, or other refinancing of credit, to the extent obtained by—
  - (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition;
  - (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 the intent to deceive...

11 U.S.C. § 523(a)(2)(A) & (B).

“Since [§523(a)(2)(B)] covers only statements ‘respecting a debtor’s ...financial condition’ and subsection (A) excludes such statements, the subdivisions ‘are ... expressly mutually exclusive.’” First National Bank or Olathe, Kansas v. Pontow, 111 F.3d 604, 608 (8th Cir. 1997) (citing Barclays Am./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 877, n. 1 (8th Cir. 1985)). Since NBC bases its action on the written financial statements that Debtor provided in conjunction with his personal guaranty of Iowa Jet’s debt, the court will consider the proceeding to be brought under § 523(a)(2)(B).

The standard of proof under § 523 is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-287 (1991). It “is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate.” Smith v. United States, 557 F.Supp. 42, 51 (W.D. Ark. 1982) aff’d, 726 F.2d 428 (8th Cir.1984). The party with the burden of proof must provide evidence to prove his or her position is reasonably probable, not merely possible. Sherman v. Lawless, 298 F.2d 899, 902 (8th Cir. 1962). If the proven facts equally support each party's position, “the judgment must go against the party upon whom rests the burden of proof.” Id. The plaintiff must prove each element of § 523(a)(2)(B) to prevail. Pontow, 111 F.3d 604, 608 (8th Cir. 1997).

In this case, it is uncontroverted that Debtor provided NBC with materially false financial statements on at least three different occasions. The evidence shows that Debtor flagrantly misrepresented the number of shares of UAL that he owned. He also dramatically overvalued an ivory collection and an anticipatory interest in family trusts. Debtor presented NBC financial statements that overvalued his financial condition by many million dollars.

NBC reasonably relied on the financial statements in extending credit. Evidence presented at trial shows that NBC contacted at least two financial institutions concerning Debtor. Iowa Bank and Trust Company and Northern Trust Bank indicated that they were holding several hundred thousand shares of UAL stock for Debtor. Northern Trust Bank identified Debtor as a “good client.”

Finally, based on the evidence before the court, including Debtor’s conviction for violation of 18 U.S.C. § 1014, the court finds that Debtor intended to deceive NBC. He presented the financial statements to NBC to induce it to provide financing to Iowa Jet that it otherwise would not have provided.

Debtor does not dispute NBC’s allegations concerning the financial statements. Rather, he disputes the amount of damages that are owed. Debtor claims that the value of the four aircraft exceeded the amount of the loans that they secured. He argues that NBC did not dispose of the aircraft in a commercially reasonable manner. Debtor believes that no deficiency exists or that if there is a deficiency, it is a direct result of NBC’s failure to properly to dispose of the aircraft. In either instance, NBC should not be able to enforce a claim against Debtor based on his personal guaranty of Iowa Jet’s debt.

At the trial, NBC offered a summary of expenses related to Iowa Jet. Debtor objected to the admission of summary, arguing that he had requested to examine the original documents upon which the summary was based and NBC failed to make the documents available. See Fed. R. Evid. 1006. The court sustained the objection. After NBC concluded its presentation of case, Debtor declined to present any evidence.

Debtor alleges that throughout his criminal proceeding, he preserved his right to object to NBC's claim and contest the commercial reasonableness of the sale of the aircraft. After the United States Court for the Northern District of Iowa entered judgment in the criminal case, Debtor filed a Motion to Correct Judgment, which the court subsequently approved. The amended judgment now provides under the heading

Schedule of Payments:

Special instructions regarding the payment of criminal monetary penalties:

The manner in which the fine is paid shall be established upon dismissal of defendant's bankruptcy, if such fine is still outstanding. During the pendency of the defendant's bankruptcy, the priority of restitution payments and the amount and timing of such restitution payments shall be governed by the Bankruptcy Court in the administration of defendant's bankruptcy estate. Any additional restitution obligation outstanding upon dismissal of such bankruptcy shall be paid in the manner and priority determined by this court. Any payment made by any person that is also obligated to pay any amount underlying the restitution ordered herein shall operate to reduce defendant's restitution obligation that is set forth herein. The amount of restitution ordered herein shall be adjusted appropriately in the event that the Bankruptcy Court subsequently determines that such amount does not represent the correct amount of such payee's claim against the defendant.

Debtor's position is apparently that the district court only tentatively determined that NBC was damaged, and the amount of restitution ordered was an estimate.

Accordingly, the district court left it up to this court to make an actual determination of damages, if any, and it would adjust the restitution to reflect such determination. Debtor

views the district court order as something less than a final judgment and was not preclusive, at least as to the damage amount. He argues that the omission of the summary of expenses leaves NBC with no evidence of damages; therefore, the court should find that damages are zero. Presumably, Debtor would then return to the district court and ask for a modification of the restitution order denying restitution payable to NBC.

The court disagrees and finds that NBC has provided sufficient evidence of damages.

NBC presented the testimony of Billy Briggs (hereinafter Briggs), NBC's Executive Vice President, along with the amended judgment from the district court indicating that it found the amount of loss to NBC of \$774,000.00.

Notice was given to Debtor that NBC was going to sell the aircraft at private sale, and the date and time of sale was provided. Briggs testified concerning the sale of the aircraft and the market conditions at or about the time of the sale. Debtor was given the opportunity on two occasions to cross-examine this witness concerning the sale of the aircraft and offer proof concerning the sale of the aircraft.

The court accepts the testimony and judgment as proof that the aircraft were sold in a commercially reasonable manner and as to the amount of damages.

Further, when sentencing a defendant convicted of a violation of title 18, a court may order that the defendant make restitution to the victim. 18 U.S.C. § 3663(a)(1)(A). In making such a determination, the court must necessarily determine the amount of loss sustained by the victim that resulted from the offense. 18 U.S.C. § 3663(a)(1)(B)(i)(I).

In a title 18 case, where the offense is committed by fraud or deceit, restitution is mandatory. 18 U.S.C. § 3663A(a)(1) & (c)(1)(A)(ii).

The procedure for the issuance of a restitution order is outlined in 18 U.S.C. § 3664. “In each order of restitution, the court shall order restitution in the full amount of each victim’s losses as determined by the court...” 18 U.S.C. § 3664(f)(1)(a). If there is any dispute about the proper amount of restitution, the government must demonstrate the amount of the loss sustained by the preponderance of the evidence. 18 U.S.C. § 3664(e).

The United States District Court for the Northern District of Iowa made a determination of the loss sustained by NBC that was caused by Debtor’s offense. Debtor was given an opportunity to dispute the amount of the loss. Briggs testified that he appeared at the sentencing hearing, testified, and was cross-examined by Debtor’s counsel. Based on the district court’s finding of loss to NBC of \$774,000.00, it is apparent that the government carried its burden of demonstrating the amount of loss.

A sentence that imposes restitution constitutes a final judgment regardless of whether the sentence can be corrected, modified, appealed, amended or adjusted. 18 U.S.C. § 3664(o). Various code sections enumerated in § 3664(o) provide that the order can be modified. Therefore, the fact that the special instructions of the order state that the district court retains the right to adjust the restitution does not affect its finality for the purposes of this proceeding.

Further, the court has not considered the restitution order’s finding of loss preclusive to the determination of damages under 11 U.S.C. § 523(a)(2)(B). Debtor had adequate opportunity to conduct discovery and prepare to litigate this action. The

complaint was filed on December 22, 2000, and trial was held on April 11, 2000. Debtor did not file a motion to continue this trial, nor did he did not file any motions to compel discovery. Based on his complacency, the court determines that Debtor felt prepared to proceed to trial.

This court does not believe that the district court's amended order envisioned a rerun of the sentencing hearing where Debtor once again objected to NBC's summary of expenses, then offered no evidence of his own. Rather, the district court was concerned that the restitution order be based on losses that directly resulted from the criminal conduct. See United States v. Lomow, 2001 WL 1078746 at \*5 (9th Cir ). If Debtor felt that NBC's damages were less than stated in the order, Debtor had the opportunity, and the duty to provide evidence rebutting NBC's evidence of damages.

The court's position in this matter is bolstered by the procedural history of this case. Over the course of the involuntary proceeding, Debtor has been reluctant to comply with various creditors' discovery requests. He refused to submit to depositions based on his perception of possible incrimination. He caused the bankruptcy proceeding to be stayed so that the district court could address the criminal case, which involved issues "identical" to those presented in the bankruptcy. Debtor then attempted to transfer jurisdiction of the bankruptcy case to the district court because of its greater powers to protect potential victims by ordering restitution. According to Debtor, such restitution was nondischargeable, and the order would have "res judicata effect."

Debtor opposed NBC's joinder as a petitioning creditor, claiming that the sale of the aircraft was not conducted in a commercially reasonable manner, so no deficiency

could be enforced against the guaranty. Debtor continued to resist the involuntary petition, arguing that it lacked a sufficient number of petitioning creditors. However, Debtor subsequently acceded to the bankruptcy after settlement fail to materialize. Debtor then resurrected his objection to NBC's claim by filing amended schedules identifying the claim as disputed.

The foregoing events evince a willingness by Debtor to attempt to manipulate the bankruptcy proceedings. The court views Debtor's refusal to vigorously conduct discovery and provide evidence as another attempt at manipulation.

For all the foregoing reasons, the NBC's claim will be excepted from discharge under § 523(a)(2)(B). NBC will receive judgment in the amount of \$774,000.00.



**ORDER**

IT IS THEREFORE ORDERED as follows:

1. The restitution ordered paid by Robert B. Staib, to National Bank of Commerce of Memphis, Tennessee, in the United States District Court for the Northern District, case number 1:99CR00030-001, brought under 18 U.S.C. § 1014 is excepted from discharge under 11 U.S.C. § 523(a)(13).
2. The debt claimed by National Bank of Commerce of Memphis, Tennessee under the personal guaranty by Robert B. Staib for loans made to Iowa Jet is excepted from discharge under § 523(a)(2)(B).
3. National Bank of Commerce of Memphis, Tennessee will have judgment for \$774,000.00.

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RUSSELL J. HILL, JUDGE  
U.S. BANKRUPTCY COURT