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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

Central Division

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In re	:	
MICHAEL L. DAVIES	:	Bankruptcy No. B-78-00723
Bankrupt	:	
RUTH THOMSEN	:	
Plaintiff	:	
vs	:	MEMORANDUM OF DECISION
MICHAEL L. DAVIES	:	
Defendant	:	

This matter was tried to the Court September 10, 1979. Kenneth M. Hisatake represented the plaintiff. David V. Meadows represented the defendant. Following the trial, the parties submitted additional memoranda to the Court addressing the question of the omission of material facts as actionable or not actionable under §17a(2) of the Bankruptcy Act. Now, upon the evidence and argument before the Court, the following decision is rendered which constitutes findings and conclusions as required by Rule 752, Federal Rules of Bankruptcy Procedure.

The plaintiff, Thomsen, loaned to the defendant, Davies, 20,000 troy ounces of .999 fine silver which were lost. Thereafter, in an attempt to recoup the loss from Thomsen, Davies borrowed \$5,000 to invest in the commodities market. This money was also lost. Finally, Davies borrowed an additional 1,000 troy ounces of silver from Thomsen to fund a microwave oven sub-distributorship calculated by Davies to regain all of the lost financial ground of Thomsen. This investment was also lost. At bottom is the question of whether the defendant's losses of the plaintiff's silver and money resulted in debts nondischargeable under §17a(2) of the Bankruptcy Act.

At the time of these transactions, the plaintiff, Thomsen, was a single woman inexperienced in silver transactions, commodity ex-

changes, and microwave oven sub-franchises. She was naive as to most business transactions. The defendant, Davies, was a founder and major shareholder in three closely held companies: Constitution Mint, Silver Bullion Exchange, and Canada Silver Marketing Company Ltd. (Canada Silver). He was at one time the President and Chairman of the Board of Silver Bullion Exchange and of Canada Silver. In addition to his interests in these companies, he did business as Provo Precious Metals. The parties met when Thomsen attended a meeting at which the advantages of investment in silver were told. She was later visited by Davies who sold her 20,000 ounces of fine silver. From the beginning, the parties' disparate positions and levels of claimed expertise led Thomsen reasonably to rely upon the representations and requests of Davies.

In June of 1974, Davies solicited from Thomsen the loan of her 20,000 troy ounces of silver. She was concerned about the wisdom of such a loan, but later, on or about June 12, 1974, agreed to the transaction after receiving assurances from Davies that the silver would be safe. She withdrew her silver from a perpetual storage vault carved in a nearby mountain and gave it to Davies. The loan was to bear 6 percent interest and was secured by real and chattel mortgages.

There is some cleavage in the testimony as to what information and assurances Davies gave Thomsen at the time the loan agreement was entered into. The defendant testified that he told Thomsen the silver would be used for inventory purposes. Thomsen claims that he said the silver would be used for display purposes. A third party, Clyde Sandgren, present at the signing of the agreement, remembered Davies assuring Thomsen that the silver would be safe and would not be disposed of, and the Court so finds.

The Court further finds that any explanation as to the use of the silver given by Davies was so insufficient as to lead a woman of Thomsen's experience and background to understand that her silver was for appearances and as window dressing inventory only and that it could be inspected from time to time at Constitution Mint in Provo. Davies' failure adequately to explain the intended use of the silver was not founded in malice and may simply

have been founded in a hope that the silver would be safe notwithstanding the significant risks to which it would be subjected. In any event, Davies knew for what purposes the silver was to be used and he knew of the significant risks of loss which existed. His failure to explain the intended use of the silver and the inherent risks in that use, constituted reckless disregard for the truth tantamount to intentionally false pretenses and false representations. This conclusion is underscored by the dependence of Thomsen upon Davies for her information and understanding concerning the transaction.

Almost from the beginning, the silver was used as rotating inventory, which is to say, for delivery to silver purchasers in order, presumably, to cover any temporary short silver position in which defendant or his related entities might find themselves. In effect, the Thomsen silver was sold to be replaced and resold in repeated transactions.

At the time of the loan, Davies knew that Constitution Mint was in a serious deficit position and was, in fact, short of silver needed to honor its commitments. While at least some of Thomsen's silver was used by Constitution Mint, it appears that Davies received the silver back intact and without loss to that entity. The short position of Constitution Mint, however, served to warn and apprise Davies of the risks which his use of Thomsen's silver raised.

By some time in the summer of 1974, Thomsen's silver was "rotating" between Provo, Utah and Calgary, Canada, perhaps in connection with Canada Silver's transactions. Davies still claimed to have control over the silver. According to the testimony of Davies, on December 31, 1974, the ownership of gold by Americans became lawful. The price of silver remained firm but transactions in silver for Davies and related entities dropped off dramatically. The apparent result was that Davies' short position in silver could no longer be satisfied out of revenues from new customers. There were no longer enough new purchases by Peter to pay Paul. Thomsen's silver was lost in Canadian transactions but, according to Davies,

Canada Silver was not liable for those losses. In any event, Canada Silver had been in a deficit position by the end of the year and went under completely soon after the silver was lost. Davies sold the whole company for \$1.

During the transactions in her silver, Thomsen inquired of Davies from time to time and with increasing concern as to the safety of her silver. She was assured that the silver was indeed safe although, by some time in the summer of 1974, Davies explained that the silver was in his "control" but was not present in any fixed place in Utah. The silver was rotating between Provo and Calgary. By the time Thomsen demanded with finality the return of her silver, it was gone.

Davies regreted the loss of the silver and in August of 1975 solicited and received a loan from Thomsen in the amount of \$5,000 for the purpose of speculating on the commodities exchanges in order to recoup her losses. Davies explained to Thomsen that he had been studying the commodities exchange markets, that he understood the markets, that he had made money in them and that he expected to be able to reimburse her for the loss of the silver through trading on the commodities exchanges. Actually, Davies' experience in the commodities markets was almost nil and his understanding of the markets was manifestly inadequate. The \$5,000 was placed in a "call account". He did not explain this to Thomsen, and when the call came, he did not have the money to cover her account. Accordingly, the entire \$5,000 was lost. The circumstances resulting in this loss constitute false pretenses and false representations.

In February of 1977, Davies proposed a final scheme for recouping Thomsen's losses. It involved the entrusting of 1,000 troy ounces of her remaining silver to Davies in order to establish a corporation and fund a microwave oven sub-distributorship in California and Alaska. Davies said this was the only way available to repay Thomsen's losses. He explained that Golden State Microwave had a readily available market, that she would receive shares in the corporation, and that her investment would insure the

success of the enterprise. Unfortunately, Davies had no experience in this area of endeavor, only 6 to 12 microwave ovens were sold and Thomsen's entire investment was soon dissipated. The circumstances surrounding this loan of 1,000 troy ounces constitute the obtaining of property by false pretenses and false representations.

Fixing the ultimate loss by Thomsen arising out of the foregoing transactions is a difficult matter given the fluctuating value of silver, certain recoveries made by Thomsen, including the return of 1,000 troy ounces of silver, and the lapse of time between the transactions and the date of this trial. After some discussion between counsel and the Court at the conclusion of trial and based upon the representations of counsel at that time together with all of the evidence before the Court, Thomsen's injury amounting to property obtained under the conditions of §17a(2) of the Act is valued at \$84,350 on April 4, 1978 together with interest thereon from that date at the rate of 8 percent per annum.

The Court finds and concludes, upon clear and convincing evidence and upon the law, that the defendant, Davies, obtained property from the plaintiff, Thomsen, in the amount of \$84,350 together with interest at 8 percent per annum from April 4, 1978, by false pretenses and false representations with intent to deceive, including the reckless and knowing omission of material facts under circumstances requiring disclosure. Accordingly, the obligation is nondischargeable.

DATED this 11 day of January, 1980.


Ralph R. Mabey
United States Bankruptcy Judge

RRM/bl