

JUL 12 2006

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. WW-05-1218-KrSR  
 )  
 CHRISTOPHER SCOTT WIRKKALA, ) Bk. No. 04-23707-KAO  
 )  
 ) Adv. No. 05-01081-KAO  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 CHRISTOPHER SCOTT WIRKKALA, )  
 )  
 Appellant, ) **MEMORANDUM<sup>1</sup>**  
 v. )  
 )  
 FIRST MUTUAL BANK, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Argued and Submitted on March 24, 2006,  
at Seattle, Washington

Filed - July 12, 2006

Appeal from the United States Bankruptcy Court  
for the Western District of Washington at Seattle

Honorable Karen A. Overstreet, Chief Bankruptcy Judge, Presiding.

Before: KIRSCHER,<sup>2</sup> SMITH, and RUSSELL,<sup>3</sup> Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Ralph B. Kirscher, Chief United States Bankruptcy Judge for the District of Montana, sitting by designation.

<sup>3</sup> Hon. Barry Russell, Chief United States Bankruptcy Judge for the Central District of California, sitting by designation.



1 Pursuant to a "Small Business Credit Line Agreement" dated  
2 November 5, 1999, theWirks Network, Inc. was issued a line of  
3 credit with a limit of \$35,000.

4 According to a property settlement agreement dated November  
5 11, 1999 and filed in Washington state court on November 19, 1999  
6 ("Settlement Agreement"), Debtor voluntarily agreed to quitclaim  
7 all of his interest in three pieces of real property, including  
8 the 2nd Street Property. The only real property Debtor retained  
9 under the Settlement Agreement was a condominium valued at  
10 \$170,000. Thus, the net effect of the Settlement Agreement was  
11 to reduce Debtor's gross real estate holdings by \$2,400,000.  
12 Notwithstanding provisions in the loan documents requiring  
13 disclosure of any change in Debtor's financial condition, Debtor  
14 did not advise the Bank of the transfer of property to his former  
15 spouse.

16 theWirks Network, Inc. drew money from the line of credit.  
17 The Bank does not allege that Debtor used the money taken against  
18 the line of credit for anything other than in connection with  
19 theWirks Network, Inc. Debtor indicated that theWirks Network,  
20 Inc. began struggling with the "'dot.com' crash" and the events  
21 of September 11, 2001, and was eventually administratively  
22 dissolved in December of 2002. Debtor used the remaining capital  
23 in theWirks Network, Inc. to pay down the balance on the line of  
24 credit but, after the corporate dissolution, theWirks Network,  
25 Inc. still owed the Bank in excess of \$13,000. Debtor  
26 subsequently filed a personal bankruptcy in 2004.

27 The Bank filed a complaint against Debtor on February 17,  
28 2005, seeking a determination that Debtor's personal guaranty on

1 the balance owed on the line of credit should be excepted from  
2 Debtor's discharge pursuant to 11 U.S.C. § 523(a)(2)(B).<sup>4</sup> Debtor  
3 filed an answer to the Bank's complaint on March 18, 2005,  
4 denying all allegations set forth in the Bank's complaint. Bank  
5 proceeded to file its motion for summary judgment on April 13,  
6 2005. On that same date, Bank also filed a "Notice of Motion and  
7 Hearing on Summary Judgment," noticing a hearing on Bank's  
8 summary judgment motion for May 6, 2005, at 9:30 a.m., and  
9 further providing Debtor notice that the deadline for filing a  
10 response to the motion for summary judgment was May 2, 2005.  
11 Bank's motion for summary judgment was accompanied by a  
12 declaration of Ron Miller, who declared that:

13 First Mutual approved The Wirks Network's loan  
14 application based on the representations Christopher  
15 Wirkkala made in his personal financial statement as to his  
16 assets and liabilities.

17 \* \* \*

18 First Mutual would not have approved The Wirks  
19 Network's loan application had it known that Christopher  
20 Wirkkala would be transferring away all his claimed real  
21 estate, except his \$170,000 condominium unit, ten days after  
22 submitting the loan application and financial statement.

23 Debtor timely filed, on April 27, 2005, a combined "Response  
24 and Opposition to First Mutual's Motion and Hearing on Summary  
25 Judgment; Request for Motion of Counter-Summary Judgment in Favor  
26 of Defendant; [and] Request for Reschedule of Counter-Summary  
27 Judgment Hearing." The last sentence of this pleading reads:  
28 "[T]his response respectfully requests the hearing of May 6 be

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<sup>4</sup> Unless otherwise indicated, all Code, chapter and section references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005).

1 rescheduled as Mr. Wirkkala will be traveling for business."

2 Attached to Debtor's response was a document entitled "Mr.  
3 Wirkkala's Counter-Motion for Summary Judgment" ("Counter  
4 Motion"). In the Counter Motion, Debtor stated under penalty of  
5 perjury that his "net worth was arguably understated when  
6 [theWirks Network, Inc.] applied for and received the line of  
7 credit." The statement was premised on an uncertified copy of an  
8 undated "Private Placement Memorandum." The author and target  
9 audience of the memorandum were not identified. Debtor further  
10 declared that:

11 I was told that "even the car I was driving was enough for  
12 the loan." The inexperienced, albeit unprofessional, bank  
13 employees at First Mutual were joking that my Porsche was  
14 worth more than twice the line of credit and suggested the  
15 Corporation take a larger business loan. While these  
16 comments may have been made in jest however unprofessional,  
17 it goes to show that my car was enough for the loan, much  
18 less the other assets I owned and truthfully disclosed on  
19 the application[.] . . . That said, the business could have  
20 gotten a larger line of credit or loan[.]

21 \* \* \*

22 [theWirks, Network, Inc.] was more than credit-worthy  
23 with the collateral to support this line of credit; I was  
24 more than credit-worthy with the collateral to support this  
25 line of credit. First Mutual verbalized this to me over and  
26 over, still, they communicated that the application needed  
27 to be reviewed and analyzed by their underwriting department  
28 before the line of credit could be issued.

29 Bank filed a reply to Debtor's response on May 5, 2006,  
30 arguing, in part, that Debtor's professional requirements were  
31 not grounds for continuance of the hearing. Bank also maintained  
32 that Debtor had "known about this motion since April 13, and has  
33 had since then to make alternate traveling arrangements."  
34 Additionally, Bank filed a Second Declaration of Ron Miller,  
35 wherein he again declared that: "The Wirks Networks['] credit

1 line application was approved based on Wirkkala's representations  
2 regarding his real estate assets. His personal financial  
3 statement reflects that he owned \$2,570,000 in real estate  
4 assets, with liabilities of only \$440,000, for a net real estate  
5 holding of \$2,130,000. First Mutual made its decision to approve  
6 the Wirks Networks' loan application based on that real estate,  
7 not the value of Wirkkala's automobiles or stock in the Wirks  
8 Networks."

9 The bankruptcy court proceeded with the May 6, 2005, summary  
10 judgment hearing. Debtor did not attend. At the conclusion of  
11 the hearing, the bankruptcy court granted the Bank's motion and  
12 formally denied Debtor's request for a continuance of the  
13 hearing.<sup>5</sup> The denial of the request was memorialized by a  
14 handwritten notation on the "Order Granting Motion for Summary  
15 Judgment" entered May 6, 2005 ("May 6 Order"). The May 6 Order  
16 also reflects the court's conclusion that there was "no genuine  
17 issue of material fact and that [the Bank was] entitled to  
18 judgment as a matter of law declaring [Debtor's] debt  
19 non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(B)."<sup>6</sup>

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21 <sup>5</sup> In the hearing transcript from May 6, 2005, Judge  
22 Overstreet explained:

23 Well, I'm going to deny - - I already - - [Debtor] was  
24 already advised that his motion for a continuance was  
denied[.]

25 \* \* \*

26 And I will say on the record that I believe [Debtor]  
27 called my secretary yesterday and advised her that he was  
not going to appear today.

28 <sup>6</sup> That same Order denied Debtor's cross motion for fees.  
The issue of fees was not addressed by Debtor in his Statement of  
Issues to be Presented on Appeal filed with the Panel.

1 On May 20, 2005, Debtor filed a notice of appeal with  
2 respect to the May 6 Order. The Bank filed a motion to dismiss  
3 the appeal as untimely. We denied the motion to dismiss because  
4 a final judgment had not yet been entered and we remanded the  
5 matter to the bankruptcy court with instructions to enter a  
6 judgment fully and finally disposing of the adversary proceeding.  
7 A final judgment was entered by the bankruptcy court on October  
8 7, 2005.

### 9 ISSUES

10 1. Did the bankruptcy court abuse its discretion by denying  
11 Debtor's request for a continuance of the hearing on the Bank's  
12 motion for summary judgment?

13 2. Did the bankruptcy court err in granting summary  
14 judgment to the Bank, and holding, as a matter of law, that  
15 Debtor's debt to the Bank was nondischargeable under 11 U.S.C.  
16 § 523(a)(2)(B)?

### 17 STANDARD OF REVIEW

18 The bankruptcy court's findings of fact are reviewed under  
19 the "clearly erroneous" standard and its conclusions of law de  
20 novo. Neilson v. United States (In re Olshan), 356 F.3d 1078,  
21 1083 (9th Cir. 2004); Martin v. Kane (In re A & C Properties),  
22 784 F.2d 1377, 1380 (9th Cir. 1986) (citations omitted). A  
23 bankruptcy court's summary judgment order is reviewed de novo.  
24 Paulman v. Gateway Venture Partners III, LP (In re Filtercorp,  
25 Inc.), 163 F.3d 570, 578 (9th Cir. 1998). Similarly, whether the  
26 debt owed to the Bank under Debtor's personal guaranty is  
27 nondischargeable is a mixed issue of law and fact reviewed de  
28 novo. See Murray v. Bammer (In re Bammer), 131 F.3d 788, 792

1 (9th Cir. 1997) (en banc). The decision to grant or deny a  
2 request for a continuance "lies within the broad discretion of  
3 the trial court" and "will not be disturbed on appeal absent  
4 clear abuse of that discretion." United States v. Flynt, 756 F.2d  
5 1352, 1358 (9th Cir. 1985), amended on other grounds, 764 F.2d  
6 675 (9th Cir. 1985). Clear abuse of discretion will only be  
7 found where, upon review of all relevant factors, the decision to  
8 deny the request was arbitrary or unreasonable. Id.

### 9 DISCUSSION

10 A court may take judicial notice of proceedings in the same  
11 case. Additionally, "[a]n appellate court can properly take  
12 judicial notice of any matter of which the court of original  
13 jurisdiction may properly take notice.'" Nev-Cal Elec. Sec. Co.  
14 v. Imperial Irr. Dist., 85 F.2d 886, 905 (9th Cir. 1936) (quoting  
15 Varcoe v. Lee, 180 Cal. 338, 343, 181 P. 223, 225 (1919)).  
16 Consistent with the foregoing, the Ninth Circuit, in O'Rourke v.  
17 Seaboard Surety Co . (In re E.R. Fegert, Inc.), 887 F.2d 955, 958  
18 (9th Cir. 1989), held that it was not improper for an appellate  
19 court to take judicial notice of underlying records.  
20 Accordingly, we may properly take judicial notice of all  
21 pleadings filed in the underlying Adversary Proceeding.

22 **Did the bankruptcy court abuse its discretion by denying**  
23 **Debtor's request for a continuance of the May 6, 2005,**  
**hearing on the Bank's motion for summary judgment?**

24 It is well-settled that trial courts have broad discretion  
25 in the regular management of their own calendars. See, e.g.,  
26 Agcaoili v. Gustafson, 844 F.2d 620, 624 (9th Cir. 1988) ("A  
27 trial court has the power to control its own calendar.");  
28 Mediterranean Enterprises, Inc. v. Ssangyong, 708 F.2d 1458, 1465



1 (9th Cir. 1983) ("The trial court possesses the inherent power to  
2 control its own docket and calendar."); United States v. Gay, 567  
3 F.2d 916, 919 (9th Cir. 1978), cert. denied, 435 U.S. 999, 98  
4 S.Ct. 1655, 56 L.Ed.2d 90 (1978) (district court has broad  
5 discretion as an aspect of its inherent right and duty to manage  
6 its own calendar).

7 The Ninth Circuit has adopted four factors to consider when  
8 determining whether a trial court's denial of a motion for a  
9 continuance constitutes an abuse of discretion: (1) the  
10 appellant's diligence in its efforts to ready its defense prior  
11 to the date beyond which a continuance is sought; (2) whether the  
12 continuance would have served a useful purpose if granted; (3)  
13 the extent to which granting the continuance would have  
14 inconvenienced the court, opposing parties, and witnesses; and  
15 (4) the amount of prejudice suffered by the appellant due to the  
16 denial of the continuance. United States v. Flynt, 756 F.2d at  
17 1359; Armant v. Marquez, 772 F.2d 552, 556 (9th Cir. 1985), cert.  
18 denied, 475 U.S. 1099 (1986). "[T]he weight given to any one  
19 [factor] may vary from case to case. At a minimum, however, in  
20 order to succeed, the appellant must show some prejudice  
21 resulting from the court's denial." Armant, 772 F.2d at 556-57  
22 (citations omitted).

23 We find that the bankruptcy court did not abuse its  
24 discretion in denying Debtor's request for a continuance. In  
25 opposition to the request, Bank argued that although Debtor had  
26 known about the May 6 hearing since April 13, he had made no  
27  
28

1 effort to make alternate travel arrangements.<sup>7</sup>

2 Given the vagueness of the request, the lack of any showing  
3 by Debtor that he made every effort to ready his defense prior to  
4 the date beyond which a continuance was sought, the lack of any  
5 articulated prejudice to Debtor, and the fact that the Bank  
6 appeared at the hearing ready to proceed with its witnesses, we  
7 cannot find that the court's exercise of discretion in denying  
8 the request was arbitrary, unreasonable, or otherwise abusive.

9 **Did the bankruptcy court err in granting summary judgment to**  
10 **the Bank and holding, as a matter of law, that Debtor's debt**  
11 **to the Bank is non-dischargeable under 11 U.S.C.**  
12 **§ 523(a)(2)(B)?**

13 Summary judgment is governed by FED. R. BANKR. P. 7056. Rule  
14 7056, incorporating FED. R. CIV. P. 56(c), states that summary  
15 judgment "shall be rendered forthwith if the pleadings,  
16 depositions, answers to interrogatories, and admissions on file,  
17 together with the affidavits, if any, show that there is no  
18 genuine issue as to any material fact and that the moving party  
19 is entitled to judgment as a matter of law." "The proponent of a  
20 summary judgment motion bears a heavy burden to show that there  
21 are no disputed facts warranting disposition of the case on the  
22 law without trial." Younie v. Gonya (In re Younie), 211 B.R.  
23 367, 373 (9th Cir. BAP 1997) (quoting Grzybowski v. Aquaslide "N"  
24 Dive Corp. (In re Aquaslide "N" Dive Corp.), 85 B.R. 545, 547

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25 <sup>7</sup> According to both Debtor and the Bank, Debtor filed his  
26 request for a continuance on May 5, one day prior to the hearing.  
27 However, we could find nothing in the record referencing the  
28 request other than that made in responsive pleadings filed by  
Debtor on April 27, 2005, and the court's statement at the May 6  
hearing that Debtor had contacted the court by telephone the day  
before to advise that he would be appearing at the hearing.

1 (9th Cir. BAP 1987)). The manner in which this burden is proven  
2 depends on which party has the burden on a particular claim or  
3 defense at the time of trial.

4 If the moving party will bear the burden of persuasion at  
5 trial, that party must support its motion with credible  
6 evidence—using any of the materials specified in Rule  
7 56(c)—that would entitle it to a directed verdict if not  
8 controverted at trial. Such an affirmative showing shifts  
9 the burden of production to the party opposing the motion  
10 and requires that party either to produce evidentiary  
11 materials that demonstrate the existence of a “genuine  
12 issue” for trial or to submit an affidavit requesting  
13 additional time for discovery. If the burden of persuasion  
14 at trial would be on the non-moving party, the party moving  
15 for summary judgment may satisfy Rule 56’s burden of  
16 production in either of two ways. First, the moving party  
17 may submit affirmative evidence that negates an essential  
18 element of the nonmoving party’s claim. Second, the moving  
19 party may demonstrate to the Court that the nonmoving  
20 party’s evidence is insufficient to establish an essential  
21 element of the nonmoving party’s claim.

22 Celotex Corp. v. Catrett, 477 U.S. 317, 330-34, 106 S.Ct. 2548,  
23 2557, 91 L.Ed.2d 265 (1986) (Brennan dissent) (citations  
24 omitted). See also Nissan Fire & Marine Ins. Co., Ltd. v. Fritz  
25 Companies, Inc., 210 F.3d 1099, 1102-06 (9th Cir. 2000)  
26 (discussing burdens for withstanding summary judgment).

27 When seeking summary judgment, the moving party must  
28 initially identify those portions of the record before the Court  
which it believes establish an absence of material fact. T.W.  
Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n., 809 F.2d  
626, 630 (9th Cir. 1987). If the moving party adequately carries  
its burden, the party opposing summary judgment must then “set  
forth specific facts showing that there is a genuine issue for  
trial.” Kaiser Cement Corp. v. Fischback & Moore, Inc., 793 F.2d  
1100, 1103-04 (9th Cir. 1986), cert. denied, 469 U.S. 949 (1986);  
Fed. R. Civ. P. 56(e). See also Frederick S. Wyle Prof’l. Corp.

1 v. Texaco, Inc., 764 F.2d 604, 608 (9th Cir. 1985) ("the opponent  
2 must affirmatively show that a material issue of fact remains in  
3 dispute"). That is, the opponent cannot assert the "mere  
4 existence of some alleged factual dispute between the parties."  
5 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct.  
6 2505, 2510, 91 L.Ed.2d 202 (1986). Moreover, "[a] party opposing  
7 summary judgment may not simply question the credibility of the  
8 movant to foreclose summary judgment." Far Out Prods., Inc. v.  
9 Oskar, 247 F.3d 986, 997 (9th Cir. 2001).

10 To demonstrate that a genuine factual issue exists, the  
11 objector must produce affidavits which are based on personal  
12 knowledge and the facts set forth therein must be admissible in  
13 evidence. Aquaslide, 85 B.R. at 547. All reasonable doubt as to  
14 the existence of genuine issues of material fact must be resolved  
15 against the moving party. Liberty Lobby, 477 U.S. at 247-48, 106  
16 S.Ct. at 2509. However, "[d]isputes over irrelevant or  
17 unnecessary facts will not preclude a grant of summary judgment."  
18 T.W. Elec. Serv., 809 F.2d at 630 (citing Liberty Lobby, 477 U.S.  
19 at 248, 106 S.Ct. at 2510). "A 'material' fact is one that is  
20 relevant to an element of a claim or defense and whose existence  
21 might affect the outcome of the suit. The materiality of a fact  
22 is thus determined by the substantive law governing the claim or  
23 defense." Id.

24 If a rational trier of fact might resolve disputes raised  
25 during summary judgment proceedings in favor of the nonmoving  
26 party, summary judgment must be denied. T.W. Elec. Serv., 809  
27 F.2d at 630; Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,  
28 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 202 (1986).

1 Thus, the Court's ultimate inquiry is to determine whether the  
2 "specific facts" set forth by the nonmoving party, viewed along  
3 with the undisputed background or contextual facts, are such that  
4 a rational or reasonable jury might return a verdict in its favor  
5 based on that evidence. T.W. Elec. Serv., 809 F.2d at 631. In  
6 the absence of any disputed material facts, the inquiry shifts to  
7 whether the moving party is entitled to judgment as a matter of  
8 law. Celotex, 477 U.S. at 323, 106 S.Ct. at 2552-53.

9 With regard to the particular matter at issue,  
10 § 523(a)(2)(B) excepts from discharge debt for money obtained by  
11 the use of a written statement concerning a debtor's (or  
12 insider's) financial condition. The statute reads:

13 (a) A discharge under section 727, 1141, 1228(a), 1228(b),  
14 or 1328(b) of this title does not discharge an individual  
debtor from any debt-

15 \* \* \*

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

18 \* \* \*

19 (B) use of a statement in writing-  
20 (i) that is materially false;  
21 (ii) respecting the debtor's or an insider's financial  
condition;  
22 (iii) on which the creditor to whom the debtor is liable for  
such money, property, services, or credit reasonably relied;  
and  
23 (iv) that the debtor caused to be made or published with  
intent to deceive[.]

24 The Ninth Circuit has reworded these requirements as follows:

25 (1) a representation of fact by the debtor,  
26 (2) that was material,  
27 (3) that the debtor knew at the time to be false,  
28 (4) that the debtor made with the intention of deceiving the  
creditor,  
(5) upon which the creditor relied,  
(6) that the creditor's reliance was reasonable,  
(7) that damage proximately resulted from the  
representation.

1 Siriani v. Northwestern Nat'l Ins. Co., of Milwaukee, Wis. (In re  
2 Siriani), 967 F.2d 302, (9th Cir. 1992); In re Gertsch, 237 B.R.  
3 160, 167 (9th Cir. BAP 1999) (adopting the elements required  
4 under the companion section 523(a)(2)(A), with the additional and  
5 obvious requirement that the alleged fraud stem from a false  
6 statement in writing); Candland v. Insurance Co. of N. Am. (In re  
7 Candland), 90 F.3d 1466, 1469 (9th Cir. 1996); Avco Fin. Services  
8 of Billings v. Kidd (In re Kidd), 219 B.R. 278, 282 (Bankr. D.  
9 Mont. 1998); In re Osborne, 257 B.R. 14, 20 (Bankr. C.D. Cal.  
10 2000).

11 In discussing the difference between §§ 523(a)(2)(A) and  
12 523(a)(2)(B), the Supreme Court instructs that § 523(a)(2)(B)  
13 applies where the debt at issue "follows a transfer or extension  
14 induced by a materially false and intentionally deceptive written  
15 statement of financial condition upon which the creditor  
16 reasonably relied." Field v. Mans, 516 U.S. 59, 66, 116 S.Ct.  
17 437, 133 L.Ed.2d 351 (1995). On the issue of materiality, a  
18 financial statement that leaves "any discrepancy" between the  
19 overall impression left by the statement and the endorser's true  
20 financial status gives rise to a material falsehood for purposes  
21 of § 523(a)(2)(B). North Park Credit v. Harmer (In re Harmer),  
22 61 B.R. 1, 5 (Bankr. D.Utah 1984) (citing cases); accord Texas  
23 Am. Bank, Tyler, N.A. v. Barron, (In re Barron), 126 B.R. 255  
24 (Bankr. E.D. Texas 1991) (citing cases). A "long line of cases"  
25 has held that in a personal financial statement, the "omission,  
26 concealment, or understatement of any of [a] debtor's material  
27 liabilities constitutes a 'materially false' statement." Harmer,  
28 61 B.R. at 5.

1           Moreover, even if a debtor does not know of inaccuracies  
2 contained in a written financial statement, the Ninth Circuit has  
3 held that reckless disregard for the truth satisfies the  
4 knowledge element of § 523 and its predecessor. Anastas v.  
5 American Sav. Bank (In re Anastas), 94 F.3d 1280, 1286 (9th Cir.  
6 1996). See also Knoxville Teachers Credit Union v. Parkey, 790  
7 F.2d 490, 492 (6th Cir. 1986) (gross recklessness to the truth  
8 also satisfies the fourth element of intention of deceiving).

9           By completing the Business Application and the PFS, Debtor  
10 clearly made written representations of material fact concerning  
11 his and an insider's (theWirks Network, Inc.) financial  
12 condition. Less clear, however, is Bank's satisfaction of the  
13 remaining elements: that Debtor made a representation he knew to  
14 be false at the time he made it; that Debtor made the  
15 representation with the intent to deceive Bank; and that Bank  
16 reasonably relied on the representation to its detriment.

17           Even though Debtor and his spouse separated on September 14,  
18 1998, more than one year prior to the date Debtor completed the  
19 Application and PFS, and even though Debtor wrote in his Reply  
20 Brief that the division of marital property in a divorce  
21 proceeding is not taken "lightly," Bank failed to show that  
22 Debtor knew or should have known, as of November 1, 1999, that he  
23 would be transferring on November 11, 1999, his right, title and  
24 interest in real estate valued at \$2,400,000 to his former  
25 spouse. In fact, the record provides no indication as to when  
26 Debtor and his former spouse began negotiating the division of  
27 their marital estate. Bank even in its complaint at paragraph  
28 ("¶") 4.3, references at the time Debtor submitted the PFS, that

1 his wife and he were separated. Did such disclosure raise an  
2 inquiry concerning a possible division of marital assets  
3 affecting Debtor's ability to repay any loan? Bank does not  
4 address this factual issue. Debtor further states in his Counter  
5 Motion, at ¶ 2.1.1, that he "truthfully disclosed on the [loan]  
6 application" his assets. For all we know, the negotiations  
7 between Debtor and his former spouse could have been started and  
8 completed between November 1st and November 11th of 1999.  
9 Debtor did not offer a confession of deceitful intent.  
10 Therefore, it was incumbent upon the Bank to offer undisputed  
11 facts sufficient to permit the bankruptcy court and this Panel to  
12 infer Debtor's intent as of November 1, 1999. Bank's evidence  
13 relating to when Debtor knew what he would receive through the  
14 Property Settlement Agreement is speculative at best. Bank's  
15 failure to provide adequate factual evidence to establish  
16 Debtor's intent on November 1, 1999, precludes entry of summary  
17 judgment.

18 Similarly, we are not convinced that Debtor's real estate  
19 holdings factored into the Bank's decision to issue theWirks  
20 Network, Inc. a line of credit in the sum of \$35,000. The  
21 dialogue between the bankruptcy court and counsel for the Bank at  
22 the May 6, 2005, hearing reflects the bankruptcy court's concern  
23 with the reliance issue. However, attorney argument is not  
24 admissible in evidence and therefore not relevant. United States  
25 v. Velarde-Gomez, 224 F.3d 1062, 1073 (9th Cir. 2000); Exeter  
26 Bancorporation v. Kemper Securities Group, Inc., 58 F.3d 1306,  
27 1312 n.5 (Statements of counsel are not evidence and do not  
28 create issues of fact), citing United States v. Fetlow, 21 F.3d



1 243, 248 (8th Cir. 1994), cert. denied, 513 U.S. 977, 115 S.Ct.  
2 456, 130 L.Ed.2d 365 (1994). Bank, in its Reply Brief, did  
3 acknowledge Debtor's denial of any intent to deceive Bank.

4 Bank submitted affidavits that Bank personnel would not have  
5 issued a line of credit to theWirks Network, Inc. had Bank  
6 personnel known that Debtor was contemplating transferring all  
7 his real estate holdings, except a \$170,000 condominium, within  
8 days of signing the Application and PFS. See Candland, 90 F.3d  
9 at 1470 (holding that a statement is materially false if it  
10 "would affect the creditor's decision[-]making process").  
11 "Lenders do not have to hire detectives before relying on  
12 borrowers' financial statements. . . . [W]e have noted that,  
13 when there is evidence of materially fraudulent statements,  
14 little investigation is required for a creditor to have  
15 reasonably relied on the representations." Gertsch v. Johnson &  
16 Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160, 170 (9th Cir.  
17 BAP 1999) (citations and internal quotation marks omitted); see  
18 also La Trattoria, Inc. v. Lansford (In re Lansford), 822 F.2d  
19 902, 904 (9th Cir.1987). We note that Bank submitted a  
20 declaration signed by Ron Miller, who is a collection supervisor,  
21 but who fails to affirm any personal knowledge as the originating  
22 loan officer or as an underwriting department member of what  
23 transpired during the negotiation, drafting and signing of the  
24 loan documentation between the Bank and Debtor. Is Mr. Miller  
25 able to state upon personal knowledge what the originating loan  
26 officer or the underwriting department relied upon when approving  
27 the loan? See RUSSELL, BANKRUPTCY EVIDENCE MANUAL, 1999 Ed., §§ 602.1  
28 and 602.2.

1 Contrary to the declarations submitted by Bank, Debtor  
2 maintains that Bank personnel told him that his Porsche was  
3 enough to secure the loan and also suggested that he take a  
4 larger business loan because his car was worth more than twice  
5 the line of credit. Debtor, however, proceeds to concede that  
6 the same Bank personnel also told Debtor that the Application  
7 would need to be reviewed and analyzed by the Bank's underwriting  
8 department before the line of credit could be issued. After  
9 review and analysis, Bank issued theWirks Network, Inc. a \$35,000  
10 line of credit. The alleged statements made by Bank personnel  
11 raise doubt as to whether the Bank did indeed rely on Debtor's  
12 real estate holdings at the time it issued a line of credit to  
13 theWirks Network, Inc. Bank's evidence is insufficient to permit  
14 this Panel to conclude that Bank relied on Debtor's real estate  
15 holdings in issuing the line of credit.

#### 16 **CONCLUSION**

17 The bankruptcy court did not abuse its discretion when it  
18 denied Debtor's request for a continuance of the May 6, 2005,  
19 hearing on the Bank's motion for summary judgment. Although  
20 Debtor clearly made written representations of material fact  
21 concerning his and an insider's financial condition, Bank failed  
22 to prove the other elements required under § 523(a)(2)(B) that:  
23 Debtor made a representation he knew to be false at the time he  
24 made it; Debtor made the representation with the intent to  
25 deceive Bank; and Bank reasonably relied on the representation  
26 to its detriment, and thus, the bankruptcy court erred by  
27 granting summary judgment in favor of Bank.

28 Accordingly, the decision of the bankruptcy court is

1 AFFIRMED, in part, and REVERSED, in part.

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