Dated: July 07 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 04-33023
	)	
Ronald Ashley McMaster,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 04-3302
	)	
First Federal Bank of the Midwest,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Ronald Ashley McMaster,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The matter before the court is Defendant Ronald Ashley McMaster 's ("Debtor") Motion for Summary Judgment. After reviewing the motion, the response filed by Plaintiff First Federal Bank

of the Midwest ("Plaintiff"), and the briefs, affidavits, and deposition transcripts submitted in support of the motion and the response,[1] the court will grant the motion.

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and the general order of reference entered in this district. Plaintiff seeks a determination that a debt it claims is owed to it by Debtor is nondischargeable in Debtor's chapter 7 bankruptcy case. Actions to determine dischargeability are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I). Plaintiff also seeks a money judgment for the amount of the debt it claims is nondischargeable, including punitive damages and attorney's fees. In the Sixth Circuit, bankruptcy courts are authorized to determine the amount of a debtor's liability as part of an action to have a debt determined nondischargeable. *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 966 (6th Cir. 1993).

UNDISPUTED MATERIAL FACTS

In the fall of 2002, William C. Davis ("Davis") arranged for Debtor to borrow $200,000 from Plaintiff to be used to fund the working capital needs of Continental Capital Corporation ("CCC"), of which Debtor was a director. Davis was the president of CCC, and also served as a financial advisor to Debtor. In connection with the loan, Davis provided Plaintiff with a copy of Debtor's 2001 financial statement, which was prepared in part from information provided by Debtor, who reviewed and signed the financial statement. Debtor testified that Davis was implicitly authorized to give a copy of the financial statement to Plaintiff, but that there was no express authorization; indeed, Debtor testified that he never communicated with a representative of Plaintiff until the transaction was consummated and did not even know that Davis had provided documents to Plaintiff. The financial statement includes stock interests in a number of entities that were not publically traded. The values of these entities are the basis for Plaintiff's claim against Debtor. In preparing the financial statement, Debtor did not confirm the accuracy of stock values provided by Davis, but several of the stock values represented the amounts paid for the stock and a schedule

[1] Although virtually none of the documents submitted in connection with Plaintiff's motion were properly authenticated, *see, e.g.*, *United States v. Billheimer*, 197 F. Supp. 2d 1051, 1058 n.7 (S.D. Ohio 2002); *see also* Fed. R. Evid. 901-903, neither party has objected to the documents submitted by the other party, so the court will consider all such documents. *See Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 89 (6th Cir. 1993).

attached to the financial statement disclosed the purchase prices of all of the stocks. In several instances, Debtor's investments represented minority positions, and some of the companies in which he invested had histories of losses and/or had no history of public trading to establish stock values. Also in connection with this loan, Davis provided Plaintiff with an unsigned copy of Debtor's 2000 income tax return. On or about October 11, 2002, Debtor signed a promissory note evidencing his obligation to repay the $200,000 loan and, presumably, the funds were advanced to CCC. Plaintiff's Vice President of Commercial Lending, John Kantner, testified that Plaintiff reviewed the financial statement and tax return, assumed their accuracy, and proceeded with the loan based on them.

On or about November 14, 2002, CCC directly borrowed the sum of $250,000 from Plaintiff. According to Plaintiff, Debtor executed a Commercial Guaranty, personally guaranteeing repayment of Plaintiff's loan to CCC. Debtor has testified that his signature on the document is a forgery. Debtor's spouse made one or more payments on the November 14, 2002, loan, but those payments stopped when Debtor became aware of the forgery. There is no evidence that any additional personal financial information or documentation was provided to Plaintiff in connection with the alleged guaranty; nor is there any evidence that the financial statement and tax return previously provided were reviewed in connection with this transaction.

On or about January 16, 2003, Debtor signed a second promissory note payable to Plaintiff, this one in the amount of $50,000. Again, the funds were to be used by CCC as operating capital. No new personal financial information or documentation was requested by or given to Plaintiff in connection with this loan, although Davis referred Plaintiff to the financial statement and tax return previously provided. Plaintiff did not re-review those documents in connection with the $50,000 loan.

On April 16, 2004, Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code. Plaintiff timely filed the complaint initiating this adversary proceeding, which seeks a judgment for damages suffered as a result of credit extended in reliance on Debtor's 2001 financial statement and 2000 tax return and attorney's fees, and a determination that the liability is nondischargeable under § 523(a)(2)(B) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(B). After discovery, Debtor filed the motion for summary judgment presently before the court, along with exhibits including the 2001 financial statement and excerpts of deposition transcripts. Plaintiff has filed a memorandum in opposition to the motion and two supporting affidavits, as well as excerpts

of deposition transcripts and exhibits thereto. Debtor filed a reply brief in support of his motion, also with exhibits.

LAW AND ANALYSIS

Introduction

Rule 56(b) of the Federal Rules of Civil Procedure, which applies in this adversary proceeding through Rule 7056 of the Federal Rules of Bankruptcy Procedure, authorizes a defendant to move for summary judgment. "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c). " When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(e). The Supreme Court has clarified the application of these provisions in the context of a motion for summary judgment by a defendant:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 2552 (1986).

> If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's

> position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986).

Plaintiff contends that Debtor's obligation to it is nondischargeable under 11 U.S.C. § 523(a)(2)(B), which provides, in pertinent part:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . use of a statement in writing—
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> (i) that is materially false;
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> (ii) respecting the debtor's or an insider's financial condition;
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> (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 intent to deceive . . . .

Plaintiff must prove all of the elements of this cause of action by a preponderance of the evidence. *Giant Eagle, Inc. v. Monus (In re Monus)*, 294 B.R. 707, 713 (Bankr. N.D. Ohio 2003); *see Grogan v. Garner*, 498 U.S. 279, 286, 112 L.Ed.2d 755, 111 S.Ct. 654 (1991). The failure of Plaintiff to prove any one of the above elements of § 523(a)(2)(B) will result in dismissal of the dischargeability complaint. *Insouth Bank v. Michael (In re Michael)*, 265 B.R. 593, 597 (Bankr. W.D. Tenn. 2001).

Debtor has shown an absence of evidence to support each element of the claim, requiring Plaintiff to make a showing of sufficient evidence on each element upon which the finder of fact could reasonably find for Plaintiff. Examining the parties' arguments and the record on each element of the claim, the court concludes that Plaintiff has not presented sufficient evidence as to the elements of material falsity, intent to deceive, reliance as to the second and third loan transactions, and the existence of a debt for which Debtor is liable on the direct loan to CCC to survive summary judgment and go to trial.

Materially False Written Statement Respecting Debtor's Financial Condition

The financial statement and tax return submitted on Debtor's behalf clearly constitute statements in writing respecting Debtor's financial condition. *See Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 90 (6th Cir. 1993). Nor is there any genuine issue that Debtor made the writings, since he signed the financial statement and does not deny signing the tax return when it was filed, even though he may not have personally prepared them or provided all the information contained in them. *See*, *e.g.*, *Bellco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997). Plaintiff has not submitted any evidence showing that the tax return was false in any respect. Rather, Plaintiff's falsity argument focuses on valuation of Debtor's stock interests in corporations that are not publically traded. However, Plaintiff has not provided the court with sufficient evidence from which it could conclude that the stock valuations were false when made. Plaintiff has submitted evidence that the financial statement's stock valuations may have been questionable, but not that they were, in fact, untrue.

Plaintiff makes two arguments in support of falsity. Plaintiff first argues that the stocks were "basically worthless" when Debtor filed his bankruptcy petition in April 2004, based on the schedules of assets filed in his chapter 7 bankruptcy case. (Memo. in Opp'n to Def.'s Mot. for Summ. J., at 6.) In making this argument, Plaintiff is implicitly asking the court to do two things. First, Plaintiff has not separately submitted Debtor's bankruptcy schedules as part of the summary judgment record in this adversary proceeding. Plaintiff apparently assumes that the court will take judicial notice of Debtor's schedules in underlying chapter 7 Case. No. 04-33023 under Rule 201 of the Federal Rules of Evidence. While this is a dangerous assumption to make, *see In re Hilliard Development Co.*, 238 B.R. 857 (Bankr. S..D. Fla. 1999)(court refuses to take judicial notice when counsel fails to supply court with documents from court files or put them in evidence), it is generally accepted that a bankruptcy judge may take judicial notice of the bankruptcy court's records, *In re Hickman*, 151 B.R. 125, 128 (Bankr. N.D. Ohio 1993); *but see In re Leslie*, 181 B.R. 317, 322 (Bankr. N.D. Ohio 1995)(debtor's assertions in schedules could not be ascertained with certainty and were therefore not subject to judicial notice). For purposes of deciding Debtor's motion, the court will take judicial notice of the filing and the contents of Debtor's Schedule B of Personal Property in Case. No. 04-33023 without the necessity of separate authentication in the record of this adversary proceeding. It is appropriate for the court to do so, as it is referred to as Exhibit 10 in the

excerpts from Debtor's deposition submitted in opposition to the motion. [Doc. #29, Ex. A]. Moreover, Debtor can hardly be said to be unaware of the Schedule B or its contents.

Second, Plaintiff is also asking the court to treat the Schedule B as evidence of value of the stocks listed and to infer from those valuations that the substantially higher valuations on the financial statement were false. For purposes of the motion, the court will treat Debtor's statement of value in his schedules as an evidential admission of a party opponent under Fed. R. Evid. 801(d)(2) that may be explained, *In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr. N.D. Ill. 1985), not as a conclusive judicial admission, *Litzler v. Sholdra (In re Sholdra)*, 270 B.R. 64, 68 (Bankr. N.D. Tex. 2001).

Debtor's stock interests fall into two general categories, entities he selected for investment and entities Davis recommended and sold to him. Debtor's unrefuted testimony is that he relied on Davis for establishment of the valuations for the second set of entities (e.g. Active Leisure, Americus Communications, Eclipse, Inc., USA Democracy, IVES, Inc., Continental Capital Merchant Bank and CCC). The financial statement clearly displays both a cost of purchase and a market value for these investments, however, the only material difference between the cost and the market value set forth on the financial statement is for the Americus investments. On the bankruptcy Schedule B, all of the Davis entities are lumped together with a "Current Market Value" identified as "unknown," but also with a "Total cost of $852,892.67," which matches the total cost shown on the financial statement. As to these entities, the identification of "Current Market Value" as unknown as of April 16, 2004, is insufficient evidence to permit a finding that the values on the financial statement dated December 31, 2001, are false, let alone materially false. Plaintiff has also failed to provide any evidence that Debtor's identified cost of these investments is not as stated on both the financial statement and the Schedule B.

Debtor's own investments (e.g. Solar Cells, Spectra Group, Glasstech, NWO Venture Fund and McMaster Motor) are also shown on the financial statement at both cost and market value. With one material exception, the cost and the market value are the same, making it eminently clear to any reviewer the basis for the valuation. The material exception is McMaster Motor. On the financial statement, Debtor shows an interest of 295 shares with a cost of zero and a market value of $2,950,000. This compares to Debtor's bankruptcy Schedule B, which shows a "Current Market Value" of $10,000 for 1475 shares, plus an option to purchase. On the bankruptcy Schedule B,

Debtor shows 2000 shares of Glasstech stock as having an unknown "Current Market Value," compared to a cost of purchase/market value on the financial statement of $92,500. He shows his total Solar Cells investment with a value of less than $10,000 on his bankruptcy Schedule B, compared to a cost to purchase/market value on the financial statement of $250,000. The Spectra Group investment is shown on bankruptcy Schedule B as having a "Current Market Value" of approximately $17,000, compared to a cost to purchase of $106,200 and a market value of $120,000 on the financial statement. The NWO Venture Fund is not listed on Debtor's Schedule B, while the cost/market value is listed on the financial statement as $90,000.

As to the Glasstech stock, as with the Davis investments, the identification of "Current Market Value" as unknown as of April 16, 2004, is insufficient evidence to permit a finding that the values on the financial statement dated December 31, 2001, are false, let alone materially false. Nor has Plaintiff provided any evidence whatsoever that Debtor's cost to purchase his interest in Glasstech was not $92,500 as stated on the financial statement.

As to the NWO Venture Fund, there is nothing appearing on the Schedule B, Debtor having testified that it closed out between preparation of the financial statement and the bankruptcy filing. [Plaintiff's Exhibits in Support of Memorandum in Opposition, Doc. #29, Ex. A, p. 90]. Debtor has provided no evidence whatsoever of the falsity of that value on the financial statement.

The essence of Plaintiff's case is thus Debtor's interests in McMaster Motors, Spectra and Solar Cells and the significantly lower valuations appearing on the financial statement compared to the bankruptcy Schedule B. The question before the court is whether the Schedule B is sufficient evidence from which a jury could find by inference that the earlier valuations dated December 31, 2001, or even as of the fall of 2002, are false. The court finds that it is not. The time difference between the December 31, 2001, date of the financial statement, and again even fall of 2002, and April 16, 2004, is material. While the schedules are evidence of the stocks' value at the time the bankruptcy petition was filed, they are not proof of the value of the stocks on the date – more than two years earlier – as of which time the financial statement was issued or even a year and a half earlier when Davis gave the financial statement to Plaintiff. Plaintiff seeks to overcome this material temporal problem by arguing broadly that the valuations were different "despite no change in the operations of the companies." [Memorandum in Opposition, Doc. #28, p.6]. However, Debtor's actual testimony in the record as to each company simply does not support this very broad

argumentative statement and fails to provide enough connection to allow a finding through retrojection that the earlier values were false based on the lesser later values.

As to Spectra, Debtor's deposition testimony makes it clear that he does not know whether the state of the business was the same or worse as of the two dates. [Motion for Summary Judgment, Doc. #21, Ex. B, pp. 82-85].

As to Solar Cells, Debtor makes it clear that there were significant changes in the business in the interim, including Solar Cells becoming part of another entity called First Solar along with its partner True North. [Motion for Summary Judgment, Doc. #21, Ex. B, pp. 78-82]. A compound question about Solar Cells' relative operating performance is ambiguously asked and answered as follows:

> Q. Did the operation or had the operating performance of the company changed in the interim? It was still–throughout that time period was still experiencing losses--
> A. Yes.
> Q. –because it was in development mode?
> A. You're talking about Solar Cells?
> Q. Yes.
> A. Or First Solar. Solar Cells. I guess it's kind of hard to talk about Solar Cells when it was part of First Solar, but even as part of First Solar I think First Solar was selling product but I think it was burning money faster than it was making it.

[*Id.* at p. 82]. The general statement that the company never generated earnings and has always been in development mode [Id. at 80] does not add up to the broad statement "despite no change in operations" or to evidence sufficient for a jury to find falsity of the December 31, 2001, financial statement value.

As to McMaster Motors, the difference in stated values between the financial statement and Schedule B is starkest. Again, however, the evidence [see Plaintiff's Exhibits in Support of Memorandum in Opposition, Doc. #29, Ex. A, pp. 89-90] is too vague to support an inference, combined with Schedule B, that the December 31, 2001, value is false. Debtor's testimony about McMaster Motors between the two time periods is as follows:

> Q. All right. Going to–as of that time, though, the company was still in development mode.
> A. Yes.
> Q. It still is?
> A. Yes.
> Q. And is the company yet to generate any earnings?
> A. Right, still in development mode.

Q. So it has not generated--
A. It has not generated--
Q.–and experiencing since its inception operating losses.
A. Yes.

[*Id.* at p. 90]. The facts that the company is still in development mode and still experiencing operating losses at both relevant time frames is too general for a trier of fact to infer that nothing had changed and that the earlier value must therefore be false.

More significantly, as to McMaster Motors, Debtor testified that he derived the December 31, 2001, market value of $2,950,000 for his 295 shares based on a private offering of $10,000 per share that occurred in "roughly" October of 2001. [*Id.* at 89-90]. Debtor has also provided an affidavit further substantiating that such a private placement at $10,000 per share did occur during this time frame. [Reply to Plaintiff's Memorandum in Opposition, Doc. # 34, Ex. A (Affidavit of David Kuhl)]. Plaintiff refers in its brief in opposition to this "supposed private placement." [Memorandum in Opposition, Doc. #28, p.7]. However, Plaintiff has offered no evidence whatsoever that this private placement did not occur, and therefore no evidence that Debtor's basis for the "market value" presented on the financial statement dated December 31, 2001, was false.

Beyond the Schedule B, Plaintiff's second argument in support of falsity is that some of the valuations were based on Debtor's cost to acquire various of the stocks, as clearly disclosed to Plaintiff in the financial statement. A panel of the Sixth Circuit faced a similar argument in *Michigan National Bank v. Newman (In re Newman)*, 7 F.3d 234 (6th Cir. 1993) (unpublished table decision), *available at* 1993 WL 328035, in which the creditor/plaintiff argued that a financial statement was false because it used replacement cost instead of fair market value to value certain assets. The bankruptcy court held that the plaintiff had failed to prove the falsity of the statement, and the district court and the Sixth Circuit agreed:

> When a creditor requests information regarding personal assets from a debtor, the creditor is generally only interested in "fair market value" in order to determine whether sufficient equity exists to be able to recover from the debtor in the event of a default. Replacement cost, historical cost, and other valuation methods are generally not useful to the creditor; these have little relation to an asset's liquidation value, the primary concern of a creditor. However, valuing an asset at its replacement cost is not *per se* a false valuation, because an asset may have a fair market value equal to its replacement cost. So, it is not a deductive truth that [the debtor]'s use of replacement cost resulted in a false valuation. The court correctly found that without

> identification of the allegedly overvalued assets, it could not determine that the financial statement was in fact false, because the statement might have been true, albeit accidentally, depending on what the assets being valued were.
>
> Similarly, [the debtor]'s recklessness in valuation is not a guarantee that the statements were false. Making a statement of value without knowing the actual value of an object is not necessarily a false statement; it is only false if the guess is wrong. To carry the burden of proof, a creditor may not rely on generalized probabilities that a debtor's use of replacement value is wrong.

Id., 1993 WL 328035, at *2-*3. That is precisely what Plaintiff has done in this case, i.e., attempted to "rely on generalized probabilities that [the D]ebtor's use of [historical cost] value is wrong." Accordingly, Plaintiff has not submitted evidence as to the falsity of the financial statement and tax return on which a fact finder could reasonably find for Plaintiff and Debtor is entitled to summary judgment for this reason alone.

Debt Obtained by Written Statement: Reliance

"The reliance element of a § 523(a) claim has two components: actual reliance and reasonable reliance." *Bomis v. Nat'l Union Fire Ins. Co.*, 25 F.3d 1047 (6th Cir. 1994) (unpublished table decision), *available at* 1994 WL 201885, at *3 (citing *Bank One, Lexington, N.A. v. Woolum (In re Woolum)*, 979 F.2d 71, 75-76 (6th Cir. 1992)). Thus, the first question the court must answer is "did the bank actually rely on the written statements." *Woolum*, 979 F.2d at 75.

Actual Reliance

The court rejects Debtor's position that there is no genuine issue that Plaintiff did not actually rely on the financial statement and tax return. John Kantner, Plaintiff's Vice President of Commercial Lending testified that the initial loan was made "based on" those documents, and there is no direct evidence to the contrary. Although Timothy Harris testified that he probably would have voted to approve the loan if the stock values had been omitted completely from the financial statement, Harris was only one member of the loan committee and did not have the authority to approve such a loan by himself. Moreover, what Mr. Harris would have done under a hypothetical set of facts does not refute Kantner's testimony about what Plaintiff actually did under the actual facts.

Thus, Plaintiff has introduced sufficient evidence of actual reliance insofar as the original, $200,000 loan is concerned to go to trial on that issue. However, Plaintiff has not introduced any evidence that it reviewed the financial statement or tax return in connection with the $250,000 loan to CCC, allegedly guaranteed by Debtor, or the $50,000 loan to Debtor, or any evidence that those extensions of credit were made in reliance on other materially false written statements provided by or on behalf of Debtor. *See, e.g., Bank of Miami v. Espino (In re Espino)*, 48 B.R. 232, 234-35 (Bankr. S.D. Fla. 1985) (bank failed to establish that it relied on financial statements in making loans when statements were given in connection with other loans and statements were not reviewed or relied upon in making loans in question), *aff'd*, 806 F.2d 1001 (11th Cir. 1986). Plaintiff again relies on Kantner's testimony to show evidence of actual reliance as to the $50,000 loan, which was made more than three months later in January, 2003. The testimony is as follows:

Q. All right. So there was a second occasion then with a request of $50,000 to be loaned to Dr. McMaster for contribution to Continental Capital. That occurred sometime after the original $200,000; is that correct?

A. I believe so, yes.

Q. Okay. Do you recall a specific request from Mr. Davis for that application?

A. It was a very similar conversation, Dr. McMaster is willing to do another $50,000 for working capital for our company, he'll lend it back to the company again. Can you do another 50 in addition to the 200 you've already done?

Q. And did that go again to Mr. Allen for review?

A. Correct.

Q. And was there any independent review of any financial information from Dr. McMaster for this $50,000 loan?

A. It was fairly close and we had just reviewed the other, it was from our perspective, fairly simple to look at another $50,000, look at what we had just recently done to determine the ability to assume another $50,000 in debt with us.

Q. And the conclusion was he did?

A. He did.

Q. Did anyone request any additional information form either Mr. Davis or Dr. McMaster regarding his personal financial condition between the first loan and the second loan?

A. No, I don't believe so.

[Motion for Summary Judgment, Doc. #21, Ex. D, pp. 83-84.] While Kanter avoided a direct answer to the question about independent review of Debtor's financial information for the second direct loan, his response amounts to a no. Rather, the bank relied on its own prior lending decision made a quarter earlier. The court does not find that this testimony is sufficient to support a factual finding of actual reliance on Debtor's financial statement in making the second direct loan.

Kantner's testimony is even more vague as to actual reliance involving the loan to CCC allegedly guaranteed by Debtor. Responding to a question as to how Plaintiff came to the decision to loan $250,000 to CCC, Kantner testified that "I think we reviewed the 250 to Continental Capital based on the information we were provided and the guarantors' information that was provided to us at that time... [*Id.* at p. 86.] The court likewise does not find that this testimony is sufficient to support a factual finding of actual reliance on Debtor's financial statement in making the loan allegedly guaranteed by Debtor.

Reasonableness of Reliance

Debtor contends that Plaintiff's reliance on the documents in making the $200,000 direct loan was not reasonable, because Plaintiff did not conduct its own investigation into the facts stated on the documents and did not comply with its own policies or guidelines with respect to what information and documentation should be obtained in connection with loans like this one. The Sixth Circuit has explained the burden on this issue as follows: "The reasonableness requirement was intended to incorporate prior case law into the current Bankruptcy Act. As such, it cannot be said to be a rigorous requirement, but rather is directed at creditors acting in bad faith." *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1166 (6th Cir. 1985); *accord*, *e.g.*, *Woolum*, 979 F.2d at 76; *Knoxville Teachers Credit Union v. Parkey*, 790 F.2d 490, 492 (6th Cir. 1986). In the latter case, the Sixth Circuit adopted the following statement from *Northern Trust Co. v. Garman (In re Garman)*, 643 F.2d 1252, 1258 (7th Cir. 1980):

> Although some of the mentioned cases do, in fact, refer to "reasonable" or justifiable reliance as a requirement under § 17(a)(2), they do not require the court, as was done in the present case, to undertake a subjective evaluation and judgment of a creditor's lending policy and practices. These cases simply stand for the proposition that reasonableness is circumstantial evidence of actual reliance; that is, dischargeability shall not be denied where a creditor's claimed "reliance" on a "financial statement" would be so unreasonable as not to be actual reliance at all.
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> * * * * * *
>
> [I]t is not the court's duty under § 17(a)(2) to second guess a creditor's decision to make a loan or to set loan policy for the creditor.
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> * * * * * *
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> The present issue for the court is simply whether the bankrupt obtained credit, or a renewal, through the creditor's reliance on a materially false financial statement

> containing information apparently sufficient to obtain an accurate picture of the debtor's financial condition with regard to a reasonable decisional factor in the loan decision, filed by the debtor with the intent to deceive the creditor. The creditor need establish only its reliance in fact, although its claims to reliance cannot be so unreasonable as to defeat a finding of reliance in fact. Given this reliance, the court, with the benefit of hindsight, should not base its decision regarding discharge on whether it would have extended the loan.

Parkey, 790 F.2d at 492 n.2; *see Woolum*, 979 F.2d at 76. "The determination of reasonableness is to be made by evaluating all the facts and circumstances of the case." *Parkey*, 790 F.2d at 492 (citing *Martin*, 761 F.2d at 1166).

Considering all the undisputed material facts, the court disagrees with Debtor that there is no genuine issue that Plaintiff acted reasonably in relying on the financial statement without undertaking independent investigation. Plaintiff did actually examine the documents and there is no evidence that Plaintiff purposely solicited false financial statements. *See First Nat'l Bank v. Sansom (In re Sansom)*, 224 B.R. 49, 55 (Bankr. M.D. Tenn. 1998). The documents were not "facially erroneous" and did not contain "obvious inadequate information." *Syracuse Sav. Bank v. Weiner (In re Weiner)*, 86 B.R. 912, 915-16 (Bankr. N.D. Ohio 1988); *accord, e.g.*, *In re Branham*, 126 B.R. 283, 292 (Bankr. S.D. Ohio 1991) ("This Court agrees that it is reasonable for a creditor to assume that the financial statement is accurate when it is complete and contains no apparent inconsistencies."). While Plaintiff may have had some obligation to investigate the differences between the purchase prices and stated market values for some of the stocks, the court cannot say that such an obligation alone makes Plaintiff's reliance unreasonable as a matter of law. In short, the court cannot say that Plaintiff's reliance on the financial statement and tax return was "so unreasonable as not to be actual reliance at all." While it may be that, with hindsight, Plaintiff would not or should not have made the loan in reliance on the documents, the court cannot base its decision regarding discharge on a "second guess" of Plaintiff's decision to make the loan. Plaintiff's evidence is sufficient, at least, to raise a genuine issue of material fact on this element as to the first loan of $200,000 extended in October 11, 2002.

Debtor Causing Statements to Be Made or Published with Intent to Deceive

The language of the element of proof contained in subsection (a)(2)(B)(iv) has two integral parts, first, that the Debtor caused the statement to be made or published and, second, that the

Debtor intended to deceive by producing the statement. *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 783 (Bankr. E.D. Tenn. 2003).

As to the first part, "[t]he debtor may supply the creditor with the statements directly, or the creditor may obtain them indirectly from another source." *Id.* (citing 4 Collier on Bankruptcy ¶ 523.08[1][e][i] (Lawrence P. King ed., 15th ed. Rev 2002)). As discussed above, there is no question that Debtor issued the financial statement. Debtor signed it after it was prepared for him by Davis. Although Debtor did not expressly authorize Davis to give Plaintiff the financial statement and tax return and was not aware that he had done so until after the fact, Debtor also testified that he implicitly authorized Davis to do so. The court finds that this is sufficient proof to at least create a genuine issue of fact as to the requirement that Debtor have made or published the statement, or caused it to be made or published, to Plaintiff. *See FDIC v. Reisman (In re Reisman)*, 149 B.R. 31, 38 (Bankr. S.D.N.Y. 1993) (debtor is responsible for agent providing financial statements to creditor while acting within scope of agency, even if debtor was not aware that statements had been provided to creditor). Thus, to the extent Debtor acted with the requisite fraudulent intent, it was not vitiated by Davis' role as Debtor's broker or intermediary in arranging the loans.

As to the "intent" part of the element, the Sixth Circuit has held that "[t]he standard . . . is that if the debtor either intended the statement to deceive the Bank or acted with gross recklessness, full discharge will be denied." *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1167 (6th Cir. 1985); *accord, e.g.*, *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 90 (6th Cir. 1993); *Bank One, Lexington, N.A. v. Woolum (In re Woolum)*, 979 F.2d 71, 73 (6th Cir. 1992); *Knoxville Teachers Credit Union v. Parkey*, 790 F.2d 490, 491-92 (6th Cir. 1986). Intent to deceive may be inferred from the circumstances surrounding the transactions. *Fifth Third Bank v. Collier (In re Collier)*, 231 B.R. 618, 623 (Bankr. N.D. Ohio 1999). An inference of gross recklessness arises where no effort is made to verify the accuracy of the written statement, or where there was no reasonable basis to conclude that the statement was accurate. *Copeland*, 291 B.R. at 783.

Although Debtor admitted that he "implicitly" authorized Davis to give copies of the financial statement and tax return to Plaintiff, Debtor has produced evidence that Debtor did not do so himself or expressly authorize Davis to do so, *that Debtor did not even know until after the closing of the first loan that Davis had done so*, and that Debtor did not have any discussions with Plaintiff regarding the two direct loans until the closings. These facts all support the conclusion that

Debtor himself lacked the requisite intent to deceive Plaintiff. Moreover, although Debtor admits that he did not verify the accuracy of the Davis valuations, the financial statement's valuations of the stocks that are the focus of Plaintiff's arguments all had some basis in fact as they were valued at cost (which valuation method was plainly disclosed to Plaintiff in the financial statement) and may have been accurate despite Plaintiff's conjecture to the contrary. *See Continental Bank v. McKinley (In re McKinley)*, 190 B.R. 45, 51-52 (Bankr. E.D. Pa. 1995). In the instance of McMaster Motor, the valuation was based on a contemporaneous private offering at $10,000 per share, which Plaintiff has offered no evidence to contest. Debtor has thus identified the lack of evidence of an intent to deceive or gross recklessness on his part, and shifted the burden to Plaintiff to come forward with evidence from which the court could find a genuine issue of material fact on this element of Plaintiff's proof.

Plaintiff's discussion on the element of intent to deceive in its opposition to Debtor's summary judgment motion [Memorandum in Opposition to Summary Judgment, Doc. #25, pp.18-19] addresses at length the publication part of subsection (a)(2)(B)(iv), but identifies no evidence, apart from its argument that the statement was materially false,[2] showing an intent to deceive or gross recklessness by Debtor. Accordingly, the court concludes that Plaintiff has offered insufficient evidence from which a factfinder could reasonably determine that Debtor made the statements contained in his financial statement with intent to deceive Plaintiff or with gross recklessness as to the accuracy of the information therein.

Although not explicit, Plaintiff's argument focusing on Davis as an agent of Debtor [*Id.*] could be liberally construed as asserting that some fraudulent intent of Davis in valuing the stocks

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[2] Having determined that there is insufficient evidence of material falsity of the financial statement to create a genuine issue of material fact, the court acknowledges that it is difficult to conceive of context in which a separate finding of intent to deceive would be made; the intent to deceive as a separate element of the claim is of obviously greater evidentiary import when there is evidence of material falsity. However, if the court is wrong about material falsity, Plaintiff must still demonstrate that there is a genuine issue of fact regarding Debtor's to intent to deceive Plaintiff. Apart from the arguments about the falsity of the financial statement already rejected by the court, and Debtor's admission that he did not independently verify the accuracy of the Davis stock values, Plaintiff offers no other evidence showing a genuine issue of fact as to Debtor's intent to deceive. The evidence in the record is thus insufficient in the court's view to create a genuine issue of material fact on that element, regardless of material falsity.

and using the financial statement should be vicariously imputed to Debtor. Under § 523(a)(2)(A), the Sixth Circuit held in *BancBoston Mortgage Corp. v. Ledford (In re Ledford)*, 970 F.2d 1556, 1562-62 (6th Cir. 1992), that "a partner's fraudulent acts are imputed to an innocent debtor-partner for purposes of determining dischargeability [if] ... (1) the debtor was partner; (2) the debtor's partner committed fraud 'while acting on behalf of the partnership [] in the ordinary course of business;' and (3) as a partner, the debtor 'shared in the monetary benefits of the fraud.'" If Plaintiff is making this argument, it lacks evidentiary support on each element identified. There is no evidence of a partnership between Davis and Debtor. *See* Ohio Rev. Code §§ 1775.05, 1775.06. There is no evidence of fraud by Davis in this record beyond Debtor's testimony that his signature was forged on the guarantee. But there is no evidence that it was Davis who forged the signature or that Davis knew of the forgery. And there is no showing in the record that Debtor shared in any monetary benefits of any fraud perpetrated by Davis as to Plaintiff. To the contrary, there is no evidence that any of the money borrowed from Plaintiff was distributed to Debtor as opposed to CCC. The fact that Debtor was a director and a shareholder of CCC is too tenuous from which to infer a benefit to him in any fraud arguably committed by Davis. [3]

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[3] Plaintiff repeatedly makes conclusory references to Davis as Debtor's agent. The court presumes that this reference arises from Debtor's testimony that Davis was "implicitly" authorized to give Debtor's financial statement to Plaintiff. Giving Plaintiff the benefit of the doubt that it is also implicitly asserting that some fraudulent intent of Davis as agent could be imputed for dischargeability purposes to Debtor as principal, prevailing would require that *Ledford* be extended from its roots in a § 523(a)(2)(A) case to a § 523(a)(2)(B) case, and further that it be extended beyond the partnership context of mutual agency to more general agency relationships, *compare Lail v. Weaver (In re Weaver)*, 174 B.R. 85, 89 (Bankr. E.D. Tenn. 1994)(*Ledford* does not require that debtor be a partner, but that debtor be treated as in the same manner as a partner for purposes of liability under state law) *with S.P. Inv. Ltd. Partnership v. O'Connor (In re O'Connor)*, 145 B.R. 883, 892 (Bankr. W.D. Mich. 1992)(refusing to apply *Ledford* in the absence of proof of a state law partnership relationship). This court need not decide these legal questions here. Even assuming Debtor's testimony is sufficient to create a genuine issue of fact as to the existence and scope of an agency relationship between Davis and Debtor, this theory would require evidence of Davis' intent to deceive Plaintiff in falsifying stock values on Debtor's financial statement or otherwise, evidence that is absent from this summary judgment record. The general knowledge of the court garnered from the newspaper and other court actions that Davis has been indicted for federal crimes in connection with acts leading to a liquidation proceeding of certain CCC subsidiaries under the Securities Investor Protection Act, also pending in this court, would not substitute for evidence in

(continued...)

Debtor's Liability for Loan to CCC

Plaintiff includes its $250,000 loan to CCC in its nondischargeability claim and demand for damages, asserting that Debtor guaranteed the loan. Debtor's motion for summary judgment disputes that he has any liability for that debt.

Once it is established that there is a debt for money, property, services, or an extension, renewal, or refinancing of credit that was obtained by use of a written statement of the type described in the statute, the creditor must prove that a debtor is liable for the debt as a matter of applicable law in order for it to be excepted from a debtor's discharge. 11 U.S.C. § 523(a)(2)(B)(iii) ("...on which the creditor *to whom the debtor is liable for such money*, property, services or credit reasonably relied;" emphasis added). Insofar as the alleged guaranty of the loan to CCC is concerned, the court concludes that Plaintiff has offered insufficient evidence to avoid summary judgment that Debtor incurred no liability at all for that debt.

Debtor testified that his signature on the guaranty document is a forgery, testimony that Plaintiff characterizes as self-serving but which is indisputably competent. In response, Plaintiff shows only that in April 2003 Carolyn McMaster, Debtor's wife, signed a check for $510.41 drawn on a joint account and payable to Plaintiff to be applied to the CCC loan. Plaintiff argues that this evidence controverts Debtor's testimony denying the validity of the signature, thereby negating the need for expert testimony, and demonstrates his liability for the CCC debt to Plaintiff. The court disagrees that one $510.41 check signed by Debtor's wife to be applied to the $250,000 loan to CCC is sufficient evidence from which to conclude that Debtor signed the guaranty and therefore to create a genuine issue of material fact as to whether Debtor signed the guaranty. Nor is the check itself sufficient to create Debtor's liability for the loan under any legal theory independent of the validity of the guaranty. In the absence of his execution of the guaranty, Plaintiff shows and argues no other basis under applicable law upon which Debtor is liable for the loan to CCC, such as through a partnership or agency or a piercing the corporate veil theory. Accordingly, even if there was sufficient evidence for the case to go to trial on the issue of the nondischargeability of alleged indebtedness, there is insufficient evidence for the case go to trial on the issue of whether the

[3] (...continued)
this record of an intent by Davis to deceive Plaintiff so as to obtain the loans in issue.

$250,000 loan is included in the indebtedness for which Debtor is liable. Debtor would be entitled to partial summary judgment on this issue even if summary judgment were not otherwise appropriate. [4]

CONCLUSION

The court concludes that Plaintiff has offered insufficient evidence from which a reasonable jury could find that the debts in question are nondischargeable under 11 U.S.C. § 523(a)(2)(B) or, indeed, that Plaintiff is entitled to a money judgment establishing Debtor's liability for Plaintiff's $250,000 loan to CCC. First, although there is some evidence calling into doubt the accuracy of the financial statement, but not the tax return, the evidence before the court would not support a finding at trial that the document is, in fact, materially false. Second, while it appears that Plaintiff relied on the documents in making the $200,000 loan to Debtor and that such reliance may have been reasonable, there is no evidence of actual reliance on the documents (or other written statements) in making the $250,000 loan to CCC or the $50,000 loan to Debtor. Third, there is insufficient evidence in the record for a finder of fact to determine that Debtor made the valuation statements to Plaintiff either with intent to deceive or with grossly reckless disregard for their truth. Finally, Plaintiff has offered insufficient evidence to controvert Debtor's testimony that he did not sign the personal guaranty of the $250,000 loan to CCC.

The court will enter a separate order granting Debtor's Motion for Summary Judgment [Doc. #21] and a separate final judgment in favor of Debtor.

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[4] As to the other two loans evidenced by promissory notes signed by Debtor, and Plaintiff's request for a money judgment for compensatory damages, punitive damages and attorney's fees in addition to a judgment for nondischargeability, Plaintiff likewise offers no evidence as to the amounts due, or as to its entitlement to attorney's fees and punitive damages. Debtor's summary judgment motion does not, however, advance any absence of evidence to support these aspects of Plaintiff's prayer for relief. Moreover, Plaintiff is not entitled to any money judgment unless the underlying debt is excepted from discharge. The court notes, however, that Plaintiff's complaint did not assert the claim for attorney's fees as a separate count as required by Rule 7008(b) of the Federal Rules of Bankruptcy Procedure. *E.g.*, *Leonard v. Onyx Acceptance Corp.*, Nos. 02-8125, Civ. 03-1117 ADM, 2003 WL 1873283, at *2 (D. Minn. Apr. 11, 2003); *Citibank USA, N.A. v. Spring (In re Spring)*, Nos. 03-35552 (LMW), 04-3007 (LMW), 2005 WL 588776, at *6 (Bankr. D. Conn. Mr. 7, 2005); *Garcia v. Odom (In re Odom)*, 113 B.R. 623, 625 (Bankr. C.D. Cal. 1990); *see In re S.S.*, 271 B.R. 240, 244 (Bankr. D.N.J. 2002).