

MAR 28 2007

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	WW-05-1478-SPaMo
7	ANTHONY J. SARP,)	Bk. No.	03-24716
8	Debtor.)	Adv. No.	05-01143
9	_____)		
10	ANTHONY J. SARP and THE)		
11	MARITAL COMMUNITY OF ANTHONY)		
12	J. SARP & BARBARA SARP,)		
13	Appellants,)		
14	v.)	MEMORANDUM¹	
15	DAVID S. MORK, Chapter 7)		
16	Trustee,)		
17	Appellee.)		
18	_____)		

Argued and Submitted on November 16, 2006
at Seattle, Washington

Filed - March 28, 2007

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

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

Before: SMITH, PAPPAS and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 After the appointment of a chapter 11 trustee and without
2 any legal authority, World Wide Angling LLC ("WWA"), solicited,
3 booked, and collected over \$540,000 in deposits and payments for
4 fishing vacations to be provided by debtor Katmai Lodge, Ltd.
5 ("Katmai") in upcoming seasons. WWA acted under the direction of
6 Katmai's former president, Anthony Sarp ("Sarp). Upon WWA's
7 failure to turnover such funds to the trustee, the trustee filed
8 a complaint against Sarp, his wife Barbara Sarp (collectively,
9 the "Sarps"), Murray Armstrong, and WWA (collectively,
10 "defendants"). The complaint sought 1) an accounting, 2)
11 turnover of property, 3) damages for violation of the automatic
12 stay, breach of fiduciary duties, breach of § 521² duties, and
13 fraud, and 4) injunctive relief.

14 The trustee moved for summary judgment, which the court
15 granted in part. Based on the its findings, the court entered a
16 \$118,229.99 judgment in favor of the trustee, for which
17 defendants were jointly and severally liable. The Sarps filed a
18 timely notice of appeal on November 17, 2005. We AFFIRM.

19 I. FACTS

20 Katmai Lodge, Ltd. ("Katmai") is a fishing lodge located on
21 126 acres of land on the Alagnak River in Alaska. On December 5,
22 2003, Katmai filed for chapter 11 relief. Thereafter, on
23 December 17, 2004, the bankruptcy court entered an order
24 substantively consolidating the separately filed bankruptcy cases

25 ² Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 of Sarp and Barbara Sarp with Katmai's bankruptcy.³ The court's
2 order provided that David S. Mork, who had previously been
3 appointed as the chapter 11 trustee of the Sarps' bankruptcy
4 estates, would also serve as the chapter 11 trustee of the Katmai
5 estate (the "trustee").

6 In late December 2004 or early January 2005, the trustee
7 notified Sarp of his intent to immediately terminate the
8 operations of Katmai and to discharge all of its employees,
9 including Sarp. He also advised Sarp of his intention to auction
10 off the company sometime in March 2005.

11 Believing that a complete shutdown of Katmai's operations in
12 January would cause the business to be valueless by auction
13 time,⁴ Sarp took employment in January 2005 with WWA, the
14 principal booking agent for Katmai. He worked as a "consultant"
15 and continued booking fishing trips for Katmai for the 2005 and
16 2006 seasons. From January 2005 through March 2005, Sarp ran the
17 day-to-day operations of WWA and oversaw the solicitation and
18 booking of vacations as well as the collection of deposits and
19 payments for those vacations (the "customer payments"). By June
20 2, 2005, WWA had collected \$543,351.73 in customer payments.⁵

21
22 ³ The Sarps owned Katmai and were its only shareholders.
23 Prior to the trustee's termination of its operations, they were
also officers of Katmai.

24 ⁴ A majority of Katmai's trips are booked during the winter,
25 with the main bookings coming during the first quarter of the
year.

26 ⁵ The collection of the \$543,351.73 occurred between
27 September 1, 2004 and June 2, 2005. \$316,039.50 of this amount
28 was collected after December 17, 2004. However, when WWA closed
its checking account on June 2, 2005, the account ending balance
was a -\$741.53.

1 Following WWA's resistance to his demands for turnover of
2 the customer payments to the estate,⁶ the trustee filed a
3 complaint against the defendants seeking an accounting, turnover
4 of the customer payments, damages for violation of the automatic
5 stay, breach of fiduciary duties, breach of § 521 duties, fraud,
6 and injunctive relief.⁷ On the same day that the complaint was
7 filed, WWA transferred to the trustee's counsel \$110,300.40 in
8 customer payments.

9 On September 15, 2005, the trustee moved for summary
10 judgment. The trustee maintained that the proceeds generated
11 from the vacation sales were property of the estate under
12 § 541(a)(6) and that, pursuant to §§ 521(3) and (4), Sarp had an
13 affirmative duty to cooperate in the surrender of the customer
14 payments to the estate. Instead of upholding these duties,
15 however, Sarp breached them by causing the disbursal of the
16 customer payments to dozens of third parties, including more than
17 \$40,000 to himself.

18 The Sarps disputed the characterization of the customer
19 payments as property of the estate, arguing that WWA had always
20 operated as an independent company employing its own staff,
21 hiring its own salespeople, and conducting its own business as a
22

23 ⁶ The trustee's first demand for the customer payments
24 occurred by letter dated December 22, 2004. The letter requested
25 (1) the turnover of all customer payments, and (2) an accounting.

26 ⁷ Initially, the trustee filed the complaint on the estate's
27 behalf. Subsequent to initiating the adversary proceeding, the
28 trustee sold Katmai to L.E. Duncan. Pursuant to the sale order,
Duncan agreed to honor the vacations WWA had sold for the 2005
and 2006 seasons, and in return, the trustee agreed to continue
prosecuting the complaint against defendants to recover for
Duncan the outstanding customer payments.

1 booking agent. Further, the customers from which WWA solicited
2 vacations were derived from its own customer lists and the
3 customers had contracted only with WWA, not Katmai. Therefore,
4 the argument continued, any liability for unfulfilled vacations
5 rested exclusively with WWA and, as a consequence, WWA was
6 entitled to all of the payments.

7 According to the Sarps, the vacations had been openly sold
8 in the ordinary course of the long-standing business relationship
9 between Katmai and WWA and all relevant parties, including the
10 trustee and the bankruptcy court, had full knowledge of WWA's
11 continued solicitation of vacations. As such, they believed that
12 no court approval of this activity was required.

13 The Sarps also argued that without the efforts of WWA and
14 Sarp, the estate would have had nothing to sell and no funds with
15 which to pay administrative claims. Stated otherwise, WWA and
16 Sarp brought value to the estate and prevented the estate from
17 being administratively insolvent.

18 In addressing the Sarps' arguments, the trustee denied ever
19 having knowledge of Sarp's continued booking of Katmai vacations.
20 He pointed out that, unlike in prior seasons, there was no
21 written agreement, or approval from the court, which allowed the
22 defendants to resell vacations for the 2005 and 2006 seasons and
23 to disburse customer payments. Because the customer payments
24 represented payments for food and lodging, and not for the
25 ministerial act of booking the vacation by WWA, the revenues
26 constituted property of the estate.

27 The trustee further argued that WWA's and Sarp's continued
28 efforts had harmed the estate by 1) creating a post-petition

1 administrative liability to each customer who purchased a
2 vacation for the 2005 and 2006 seasons, and 2) misappropriating
3 over \$430,000 in estate funds, including \$40,000 paid directly to
4 Sarp for alleged consulting fees. Based on this harm, he urged
5 the court to find that there was nothing "ordinary" about
6 defendants booking vacations and collecting and disbursing
7 hundreds of thousands of dollars in estate property.

8 On October 14, 2005, the summary judgment motion was heard.
9 In its oral ruling, the court agreed with the trustee and found
10 that neither WWA nor Sarp were authorized by the court or the
11 trustee to continue booking vacations for Katmai and to collect
12 customer payments. The court viewed Sarp and WWA as one and the
13 same and believed that Sarp was merely using WWA as a vehicle by
14 which he could continue booking trips for Katmai in circumvention
15 of the decision made by the trustee to shut down the business.

16 The court granted partial summary judgment in favor of the
17 trustee.⁸ Specifically, it found that defendants should have
18 turned over \$116,000⁹ in customer payments pursuant to § 542. It
19 also held that defendants had wrongfully assumed control over the
20 customer payments, and thus had violated § 362 - the automatic
21 stay.

23 ⁸ The court denied summary judgment as to the accounting and
24 fraud causes of action and denied the motion in its entirety as
25 to Barbara Sarp individually. Damages against her were limited
to property in which she held a community interest with Sarp.

26 ⁹ The court arrived at this figure by subtracting from the
27 total sum collected by WWA since September 1, 2004 (\$540,000) the
28 amount WWA had collected up to the trustee's appointment
(\$314,000) and the amount WWA turned over to the trustee after
his request (\$110,000).

1 In discussing Sarp's duties, the court stated that "Sarp had
2 a fiduciary duty to cooperate with the trustee" and comply with
3 the requirements of the Code. The court found that Sarp had not
4 upheld his duties, but instead, once ousted as Katmai's
5 president, he developed an alternative way to continue selling
6 vacations and collect funds from the estate, disguised as
7 commissions, for his personal use. As a result, the court
8 determined that Sarp had breached his fiduciary duties owed to
9 the estate as an officer and shareholder of Katmai and the duties
10 imposed upon him under § 521(3) and (4).

11 Pursuant to the court's oral ruling, an order granting in
12 part and denying in part the summary judgment motion was entered
13 on November 9, 2005. The order caused defendants to be jointly
14 and severally liable for \$118,229.99.

15 The Sarps appeal.¹⁰

16 **II. JURISDICTION**

17 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
18 and §§ 157(b)(1), (b)(2)(A), and (2)(B). We have jurisdiction
19 under 28 U.S.C. §§ 158(b)(1) and (c)(1).

20 **III. ISSUES¹¹**

21 1) Whether the customer payments represent property of the
22 Katmai estate.

23 ¹⁰ Neither WWA nor Armstrong appealed the November 9, 2005
24 order.

25 ¹¹ The Sarps' notice of appeal designates only a single
26 issue to be heard on appeal: "Did the Court below err in granting
27 Summary Judgment [sic] in favor of the Trustee against Anthony
28 J. Sarp and the marital community of Anthony and Barbara Sarp for
alleged violations of 11 USC [sic] § 521(3) and (4) and awarding
the Trustee damages on the claim?" As their opening brief fails
to specify what issue[s] is on appeal, we have limited our
analysis to the issues surrounding § 521(3) and (4).

1 2) Whether there are genuine issues of material fact as to
2 Sarp's breach of his duties under §§ 521(3) and (4).

3 **IV. STANDARD OF REVIEW**

4 We review a grant of summary judgment de novo. Patterson v.
5 Int'l Bhd. of Teamsters, Local 959, 121 F.3d 1345, 1349 (9th Cir.
6 1997). In viewing the evidence in the light most favorable to
7 the nonmoving party, we must determine whether there are any
8 genuine issues of material fact and whether the applicable
9 substantive law was correctly applied by the bankruptcy court.
10 City of Vernon v. S. Cal. Edison Co., 955 F.2d 1361, 1365 (9th
11 Cir. 1992). A fact is material when, under the governing
12 substantive law, it could affect the outcome of the case.
13 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A
14 dispute about a material fact is genuine "if the evidence is such
15 that a reasonable jury could return a verdict for the nonmoving
16 party." Id.

17 The party requesting summary judgment has the initial burden
18 of establishing the absence of a genuine issue of material fact.
19 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Kennedy v
20 Allied Mut. Ins. Co., 952 F.2d 262, 265 (9th Cir. 1991). If the
21 moving party satisfies his initial burden, the opposing party may
22 not rely on denials in the pleadings but must produce specific
23 evidence, through affidavits or admissible discovery material, to
24 show that the dispute exists. Fed. R. Civ. P. 56(e). In other
25 words, the "opponent must do more than simply show that there is
26 some metaphysical doubt as to the material facts." Matsushita
27 Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586
28 (1986).

1 **V. DISCUSSION**

2 The Sarps argue that the bankruptcy court erred by
3 1) finding that the customer payments were property of Katmai's
4 estate and 2) holding them liable for Sarp's breach of his duties
5 under §§ 521(3) and (4) when genuine issues of material fact
6 existed surrounding his cooperation and ability to surrender the
7 customer payments. We disagree.

8 A. Property of the Estate

9 An estate is created when a bankruptcy petition is filed.
10 See 11 U.S.C. §§ 301-303 & 541(a); Fitzsimmons v. Walsh (In re
11 Fitzsimmons), 725 F.2d 1208, 1210 (9th Cir. 1984). The scope of
12 the estate is broad and encompasses "all legal or equitable
13 interests of the debtor in property as of the commencement of the
14 case" with certain limited exceptions. 11 U.S.C. § 541(a)(1).
15 Included in the estate are "proceeds, product, offspring, rents,
16 and or profits of or from property of the estate, except such as
17 are earnings from services performed by an individual debtor
18 after the commencement of the case." 11 U.S.C. 541(a)(6).

19 No party disputes the facts surrounding WWA and Sarp's
20 soliciting and booking of vacations for the 2005 and 2006
21 seasons. Thus, it was proper for the bankruptcy court to decide,
22 as a matter of law, whether the customer payments derived from
23 such sales were estate property. In making its determination,
24 however, the Sarps contend that the bankruptcy court incorrectly
25 characterized the customer payments as estate property because 1)
26 WWA was a separate entity from the estate under Washington law;
27 and 2) only WWA had contracted with the customers and therefore
28

1 Katmai had no contractual relationship with them or entitlement
2 to the customer payments.

3 We are not persuaded by the Sarps' argument that the
4 customer payments are not property of the estate. The customer
5 payments constitute prepaid amounts for fishing trips to be
6 provided by Katmai through its land and lodge facility.
7 Consequently, when WWA collected the customer payments, it was
8 obtaining property of the estate. See 11 U.S.C. § 541(a)(6).

9 The Sarps admit that no formal contracts for the 2005 and
10 2006 seasons were assumed by Katmai in its chapter 11 case.¹²
11 Nevertheless, they argue that Steven Hartung (Katmai's former
12 chief financial officer)¹³, Sarp, and Armstrong had entered into
13 an agreement that allowed WWA to continue selling vacations for
14 the 2005 and 2006 seasons, provided that all customer payments
15 were deposited into a restricted account earmarked exclusively
16 for Katmai. However, no writing was created to evidence this
17 agreement nor was a restricted account established by WWA.
18 Therefore, even if it was reasonable for WWA to rely on an
19 unwritten, undocumented, post-petition agreement, the record does
20 not support a finding that such an arrangement was ever
21 implemented.

22
23 ¹² The last evidenced booking agreement WWA entered into
24 with Katmai occurred on December 11, 2002. This agreement only
25 provided WWA with the ability to sell vacations for the 2003
26 fishing season.

27 ¹³ Prior to the trustee's appointment, Katmai and First
28 Heritage Bank agreed that Steven Hartung was to act as the
chapter 11 trustee. However, the United State's Trustee's office
was unable to commit to the appointment of Hartung. This led to
Katmai obtaining court approval for Hartung to act as president
and chief financial officer.

1 While it is true that the vacations in question were
2 solicited under WWA's name, the Sarps have failed to provide any
3 evidence that WWA had a legal right to the customer payments
4 resulting from such solicitations. On the contrary, the record
5 supports the bankruptcy court's conclusion that the customer
6 payments were property of Katmai's bankruptcy estate.

7 B. Liability Pursuant to §§ 521(3) and (4)

8 Section 521 imposes self-executing obligations upon a
9 debtor. Among other things, § 521 requires a debtor to
10 1) cooperate with the trustee so as to enable the trustee to
11 perform his or her duties, and 2) surrender all property of the
12 estate and recorded information. 11 U.S.C. § 521(3)-(4).¹⁴ This
13 section is supplemented by Bankruptcy Rule 4002, which provides
14 that it is the debtor's duty to "cooperate with the trustee in .
15 . . the administration of the estate." Fed. R. Bankr. P.
16 4002(3).

17 1. Section 521(3) - The Duty To Cooperate

18 "The nature of a debtor's cooperation is coextensive with
19 the tasks to be performed by the trustee in administering the

20 ¹⁴ Section 521 provides, in relevant part:

21 The debtor shall-

22

23 (3) if a trustee is serving in the case, cooperate with
24 the trustee as necessary to enable the trustee to
25 perform the trustee's duties under this title;

26 (4) if a trustee is serving in the case, surrender to
27 the trustee all property of the estate and any recorded
28 information, including books, documents, records, and
papers, relating to property of the estate, whether or
not immunity is granted under section 344 of this
title.

1 estate." In re Nesse, 137 B.R. 797, 800 (Bankr. C.D. Cal. 1992).
2 "Cooperate" must be construed broadly and requires a debtor to
3 respond whenever the trustee calls upon him for assistance in the
4 performance of the trustee's duties. Id. at 801. A debtor will
5 be found to have fulfilled his § 521(3) duty if he cooperates to
6 the best of his ability. Id. "Absent a trustee's express
7 request for additional or ongoing information, § 521 does not
8 impose upon a debtor the ongoing obligation to provide
9 information to the trustee with regard to assets that the
10 [d]ebtor clearly disclosed in her bankruptcy schedules." In re
11 Adair, 253 B.R. 85, 90 (9th Cir. BAP 2000).

12 a. The trustee's knowledge and approval

13 According to the Sarps, summary judgment should not have
14 been granted pursuant to § 521(3) because there is a genuine
15 issue of material fact as to the trustee's knowledge and approval
16 of WWA's continued operations. We disagree and find that the
17 Sarps' evidence, at best, only establishes some "metaphysical
18 doubt" as to the trustee's knowledge. Matsushita, 475 U.S. at
19 586.

20 Here, the trustee has fulfilled his initial burden of
21 establishing the absence of a genuine issue of material fact as
22 to Sarp's lack of cooperation. The undisputed facts support a
23 finding that in January 2005, the trustee clearly communicated to
24 Sarp his intent to shut down Katmai's business operations and to
25 discharge Sarp as its president. Notwithstanding the trustee's
26 expressly stated intent, and without written or oral approval,
27 Sarp admittedly continued to book Katmai vacations through WWA
28 until March of 2005. As discussed above, the customer payments

1 received from these bookings were property of the estate.
2 Consequently, Sarp's acts not only impeded the trustee's efforts
3 to liquidate the estate, but possibly exposed the estate to
4 hundreds of thousands of dollars in administrative expenses. See
5 In re Kadjevich, 220 F.3d 1016, 1020 (9th Cir. 2000) ("post-
6 petition business expenses are granted administrative-expense
7 priority").

8 In order to defeat the trustee's summary judgment motion,
9 the Sarps had to produce evidence sufficient to show that a
10 genuine dispute concerning Sarp's cooperation existed. The Sarps
11 contend that Sarp's and Armstrong's declarations raise material
12 issues of fact as to the trustee's knowledge and approval of
13 WWA's continued booking operations. The declarations state
14 generally that the trustee visited WWA's office in late December
15 or early January and observed WWA's staff. They further
16 establish that the trustee's accountant was given access to
17 Katmai's computers, accounting discs, and client information.
18 From this visit, the accountant's access to accounting and client
19 information, and the trustee's silence as to WWA's continued
20 operations, the Sarps argue that there is evidence that the
21 trustee was well aware of WWA's continued selling of Katmai
22 vacations. Even viewing this evidence in a light most favorable
23 to the Sarps, we find it insufficient.

24 Missing from the declarations are facts that would tend to
25 indicate that the trustee knew exactly for whom WWA's staff was
26 booking vacations and that he, either expressly or implicitly,
27 consented to the continued booking operations. The general,
28 conclusory statements presented by the Sarps are inadequate to

1 overcome the specific, unrefuted evidence presented by the
2 trustee, i.e., the trustee's notification to Sarp of his intent
3 to close the business, the trustee's discharge of Katmai's
4 employees (including Sarp), and the trustee's December 2004
5 demand to WWA for the turnover of all customer payments.
6 Further, it is not clear from the declarations what the trustee
7 should have been able to ascertain from Katmai's accounting or
8 client information that would have alerted him to Sarp's
9 activities with WWA. Simply put, the declarations amount to a
10 "mere scintilla of evidence" of 1) the trustee's alleged
11 knowledge and approval of WWA's continued solicitation of
12 bookings and 2) Sarp's cooperation with the trustee. A scintilla
13 of evidence is not enough. See City of Vernon, 955 F.2d at 1369.

14 b. The prospective purchasers' requests

15 The Sarps also assert that the requests made by the
16 perspective purchasers of Katmai to have WWA continue booking
17 vacations and to collect customer payments creates a genuine
18 issue of material fact as to Sarp's cooperation. Nevertheless,
19 whether Sarp was fulfilling the perspective purchasers' requests
20 is not a material fact in determining his cooperation. Sarp's
21 duty under § 521(3) is owed to the trustee, not the prospective
22 purchasers. Thus, any request did not excuse Sarp from
23 cooperating with the trustee's stated plans to cease the business
24 operations.

25 Because the Sarps have not presented sufficient evidence to
26 establish that a genuine issue of material fact existed as to
27 Sarp's cooperation, and there is ample evidence in the record to
28 establish that Sarp acted in direct defiance of the trustee's

1 intentions to close Katmai's operations by continuing to book
2 vacations and to collect customer payments without any authority
3 to do so, Sarp is liable for not cooperating with the trustee in
4 his administration of the estate under § 521(3).

5 2. Section 521(4) - The Duty to Surrender Property

6 Pursuant to § 521(4), a debtor is obligated to "surrender to
7 the trustee all property of the estate. . . ." 11 U.S.C.

8 § 521(4). "The word 'surrender' generally connotes a [sic] act
9 done by the mutual agreement of the parties. That is, the debtor
10 must hold the estate property and turn it over to the trustee
11 upon demand." In re D&L Nicolaysen, 228 B.R. 252, 263 (Bankr.
12 E.D. Cal. 1998).

13 In holding Sarp liable for breach of his § 521(4) duty, the
14 court stated that it did not

15 see any separation between [WWA] and Sarp. Mr. Sarp is
16 [WWA] on this record, and all he did was what he was
17 not authorized to do by [the court] or the trustee. As
18 soon as he was ousted, [WWA] was merely the vehicle by
19 which he could keep doing that which he wanted to do,
20 was book trips for the company that he could no longer
21 work for, Katmai Lodge.

22 Tr. of Hr'g at 3, Oct. 14, 2005. Based on the nature and extent
23 of Sarp's control over WWA, the court determined that Sarp had
24 the ability and duty to surrender the outstanding customer
25 payments that had been collected by WWA from the date of the
26 trustee's appointment through March 2005. Nonetheless, the Sarps
27 argue that the bankruptcy court's determination is in error
28 because there is a genuine factual dispute as to Sarp's control
over WWA.

The record amply establishes that Sarp had the ability to
preserve the customer payments and to help with the surrendering

1 of the amounts collected. Sarp and Armstrong both testified at
2 their Rule 2004 examinations that from January 2005, Sarp had
3 complete managerial control over WWA, including the right to hire
4 and fire employees and to run its day-to-day operations.
5 Armstrong admitted that once Sarp took over the day-to-day
6 operations of WWA in January of 2005, he left all decision-making
7 up to Sarp and began functioning as an absentee owner.
8 Additionally, it is undisputed that WWA's office was located in
9 Sarp's personal residence and that the customer payments were
10 mailed to that address. It has also been established that Sarp
11 told Armstrong when to write checks payable to him for his
12 alleged consulting fees and expenses out of WWA's checking
13 account. Through these checks, Sarp received over \$40,000 in a
14 little over two months when he was ultimately only entitled to
15 \$25,000 plus expenses.¹⁵

16 To survive summary judgment, the Sarps must produce specific
17 evidence to show that a dispute exists as to Sarp's control
18 before a genuine issue of material fact will be found. The
19 evidence the Sarps have presented is, once again, based upon
20 statements made by Sarp and Armstrong in their declarations filed
21 in opposition to the summary judgment. Specifically, the Sarps
22 maintain that these declarations indicate that WWA was
23 Armstrong's company and that Armstrong and Sarp met six days a
24 week to discuss business issues prior to Armstrong making the

25 ¹⁵ Sarp had been employed as a consultant for \$2,500 per
26 week. The first check Sarp received for his services was dated
27 January 20, 2005, and his last check was dated March 28, 2005.
28 Assuming the January 20th check represented payment for his first
week of consulting and the March 28th his last, Sarp would have
only worked a total of ten weeks. Thus, he should have only been
able to collect in consulting fees \$25,000.

1 final decision. While these statements may be accurate, and by
2 themselves would show that there is a factual issue concerning
3 Sarp's control over the customer payments, the statements are
4 misleading in that they fall short of portraying an accurate
5 picture of Sarp's relationship with WWA.

6 Though Armstrong at one time controlled WWA and exercised
7 exclusive decision-making power, Sarp and Armstrong both
8 testified to a very different decision-making environment once
9 Sarp was hired as WWA's consultant. As discussed above, once
10 Sarp took over WWA's operations in January 2005, Sarp, and not
11 Armstrong, exercised total control over WWA's employees, WWA's
12 daily operations, and the collection of customer payments, not to
13 mention Sarp's generous compensation. On these facts, we cannot
14 find any material issue of fact concerning Sarp's pervasive
15 control over WWA. Thus, the trustee was entitled to a decision
16 in his favor as to Sarp's liability under § 521(4).

17 Through Sarp's control of WWA, he clearly had the ability to
18 prevent the disbursement of customer payments and, at the very
19 least, preserve the customer payments for the estate. Sarp was
20 aware of the trustee's request to turnover the customer payments.
21 Nevertheless, instead of preserving the \$118,229.99 in customer
22 payments collected by WWA from the date of trustee's appointment
23 to March 2005, he had Armstrong write checks payable to himself
24 for over \$40,000 in consulting fees and expenses. These checks
25 were all written out of WWA's checking account which was
26 comprised solely of the funds obtained from the customer
27 payments. As a result, Sarp's failure to not preserve the estate
28 and work with the trustee in getting the customer payments

1 surrendered constitutes a breach of his duty under § 521(4).

2 Important policy considerations favor creating incentives
3 for debtors to be forthcoming about all of their assets. In re
4 Mahan, 104 B.R. 300, 302 (Bankr. E.D. Cal. 1989). A debtor's
5 voluntary compliance with the obligation to surrender all
6 property of the estate is essential to the Code's delicate
7 balancing of the competing interests of debtors and creditors.
8 See id. If debtors were not required to be completely candid
9 about estate assets and did not have to cooperate with the
10 trustee, "the system could rapidly degenerate into one which
11 debtors" are the favored party. Id. Consequently, we find that
12 the judgment entered against the Sarps for the \$118,229.99 in
13 outstanding customer payments based upon Sarp's breach of his
14 § 521(3) and (4) duties is appropriate.

15 **VI. CONCLUSION**

16 For the foregoing reasons, we AFFIRM the order entered by
17 the bankruptcy court.
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